

# Proposed Rules

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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 No. OCC–2020–0045]

RIN 1557–AF07

### National Bank and Federal Savings Association Premises

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

**ACTION:** Notice of proposed rulemaking with request for public comment.

**SUMMARY:** The OCC is inviting comment on a proposed rule that would modify the requirements for national bank and Federal savings association premises.

**DATES:** Comments must be received by March 22, 2021.

**ADDRESSES:** You may submit comments to the OCC by any of the methods set forth below. Commenters are encouraged to submit comments through the Federal eRulemaking Portal, if possible. Please use the title “National Bank and Federal Savings Association Premises” 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](http://www.regulations.gov). Enter “Docket ID OCC–2020–0045” 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.

- *Mail:* Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC–2020–0045” in your comment.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC–2020–0045” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments, 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 the following methods:

- *Viewing Comments Electronically:* Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC–2020–0045” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” 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*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

**FOR FURTHER INFORMATION CONTACT:** Matthew Tynan, Counsel; Sarah Turney, Counsel; Henry Barkhausen, Counsel; Chief Counsel’s Office (202) 649–5490; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

The Office of the Comptroller of the Currency (OCC) is issuing a notice of proposed rulemaking to amend its regulations on national bank or Federal savings association ownership of real property. The OCC also proposes to consolidate 12 CFR 7.3001 on sharing national bank or Federal savings association space and employees with

the rule covering ownership of property. The OCC proposes to continue to cover the national bank and Federal savings association charters under the same regulation, but, because different statutory regimes cover each charter, the OCC seeks comment on whether to apply different requirements to national banks and Federal savings associations.

#### II. Background

The OCC periodically reviews its regulations to eliminate outdated or otherwise unnecessary regulatory provisions and, where possible, to clarify or revise requirements imposed on national banks and Federal savings associations. As part of the periodic review that resulted in recent amendments to 12 CFR part 7, which take effect on April 1, 2021, the OCC determined that it would propose revisions to the rules governing national bank and Federal savings association premises currently codified at 12 CFR 7.1000, which the recent amendments to 12 CFR part 7 redesignated as to 12 CFR 7.1024.<sup>1</sup> The OCC determined that the regulation may need significant revision and that such revisions may involve significant policy considerations. To consider the matter more fully and ensure the greatest benefit from public comment, the OCC chose to propose revisions to redesignated 12 CFR 7.1024 separately from the revisions to 12 CFR part 7 finalized in 2020.<sup>2</sup> Because of the redesignation of 12 CFR 7.1000 as 12 CFR 7.1024, this proposed rule refers to 12 CFR 7.1024.<sup>3</sup>

National bank ownership of real estate is governed by 12 U.S.C. 29, an original component of the National Bank Act. Twelve U.S.C. 29 generally prohibits national banks from purchasing, holding, or conveying real estate except for a list of four exclusive exceptions. The first such purpose covers the authority of a national bank to hold real property “[s]uch as shall be necessary for its accommodation in the transaction of its business.”<sup>4</sup> As stated by the

<sup>1</sup> 85 FR 40794 (July 7, 2020). 12 CFR 7.1024 was previously codified at 12 CFR 7.1000.

<sup>2</sup> 85 FR 83686 (December 22, 2020).

<sup>3</sup> Because the redesignation of 12 CFR 7.1000 as 12 CFR 7.1024 takes effect on April 1, 2021, the regulatory text of this proposed rule must reflect this as an addition rather than an amendment. The final rule will reflect the change as an amendment.

<sup>4</sup> The other three purposes all relate to the national bank authority to own property taken for

Supreme Court, this statute was designed to promote the safety and soundness of national banks by discouraging real estate speculation, and was also designed to protect the national economy and consumers by preventing banks from holding masses of property for their own account.<sup>5</sup> Consistent with the statutory framework, a national bank investing in property should be doing so “in good faith, solely with a view of obtaining an eligible location” and not for the purpose of speculating or investing in real estate as a landlord.<sup>6</sup>

Federal savings association ownership of premises is governed by the Home Owners Loan Act (HOLA). Although the HOLA does not specifically address a Federal savings association’s investment in banking premises and there is no prohibition in the HOLA similar to 12 U.S.C. 29, historically, the Federal Home Loan Bank Board (FHLBB), the Office of Thrift Supervision (OTS), and the OCC have interpreted the HOLA to permit Federal savings associations to hold real estate only for their offices and related facilities with permission to rent or sell excess space in their offices and facilities and the OCC has issued regulations governing a Federal savings association’s investment in banking premises pursuant to general supervisory and rulemaking authority under the HOLA.<sup>7</sup> After Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>8</sup> transferred to the OCC all functions of the former OTS and the Director of the OTS relating to Federal savings associations, the OCC began reviewing its rules governing national banks and Federal savings associations to determine which rules were appropriate to integrate into a single set of rules for both national banks and savings associations.<sup>9</sup> After this review, the OCC did not find substantive differences between the then-banking premises rules and related OTS guidance governing national banks

debts previously contracted and other such means of securing debts. The proposed rule would not affect the ability of national banks to rely on these other purposes in 12 U.S.C. 29. The proposed rule would only interpret and implement the meaning of the first purpose (“Such as shall be necessary for its accommodation in the transaction of its business”).

<sup>5</sup> *Union National Bank v. Matthews*, 98 U.S. 621, 626 (1878) (“to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in the banks’ hands, to be held, as it were, in mortmain”).

<sup>6</sup> *Brown v. Schleier*, 118 F. 981, 984 (8th Cir. 1902), *aff’d* 194 U.S. 18 (1904).

<sup>7</sup> 80 FR 28346, 28377 (May 18, 2015).

<sup>8</sup> Public Law 111–203, 124 Stat. 1376 (2010).

<sup>9</sup> See footnote 7.

and Federal savings associations and determined that, as a supervisory matter, it was appropriate to apply the rule governing national banks to both national banks and Federal savings associations.<sup>10</sup>

The OCC implemented 12 CFR 7.1024 to cover national bank and Federal savings association ownership of real estate for their own use. However, 12 CFR 7.1024 does not provide a full set of standards implementing the requirements of 12 U.S.C. 29 and the HOLA regarding national bank and Federal savings association premises. Rather, 12 CFR 7.1024 is an interpretive rule that codifies specific OCC interpretations of 12 U.S.C. 29. Thus, although the rule contains a list of types of real estate that the OCC has found permissible for national bank and Federal savings association ownership, that list is not exhaustive. Moreover, significant standards relating to the permissibility of real estate ownership, such as the minimum percentage of bank occupancy required for a building to qualify as premises, are not addressed anywhere in OCC regulation.

Instead, the OCC has long deferred to court cases and published OCC precedent to cover the field of requirements for national bank and Federal savings association ownership of premises. The OCC historically chose not to define specific limitations for standards, such as percentages of occupancy,<sup>11</sup> instead relying on principles drawn from precedent to preserve a flexible approach to new national bank proposals while ensuring those principles continue to reflect the purposes behind 12 U.S.C. 29.<sup>12</sup> The

<sup>10</sup> *Id.*

<sup>11</sup> OCC Interpretive Letter No. 1053 (Jan. 31, 2006) (“Neither the OCC nor the courts have established a single occupancy percentage test . . .”).

<sup>12</sup> Outstanding precedent includes OCC Interpretive Letter No. 1072 (Sept. 15, 2006) (permitting a bank to lease out a portion of its existing premises to retail businesses in arrangements under which approximately 50 percent of the premises would be used by the bank for its banking business); OCC Interpretive Letter No. 1053 (Jan. 31, 2006) (describing OCC analysis of permissibility of premises in OCC Interpretive Letter No. 1045 and 1044); OCC Interpretive Letter No. 1045 (Dec. 5, 2005) (permitting a national bank to establish a hotel on its premises, of which the bank intended to use more than 50 percent of the occupancy for out-of-area bank employees, members of the bank’s board of directors, and selected vendors, shareholders, customers, and other visitors on bank-related business); OCC Interpretive Letter No. 1044 (Dec. 5, 2005) (permitting a national bank to establish a mixed-use office, hotel, and residences facility on its premises, in which the bank would use less than 50 percent of the premises for banking purposes); OCC Interpretive Letter No. 1043 (July 8, 1993) (permitting a national bank to lease to third parties a bank condominium when it is not being used for bank purposes); OCC Interpretive Letter No. 1042

OTS similarly did not set percentages of occupancy within its premises regulation for Federal savings associations.<sup>13</sup>

Although this precedent-based approach provides flexibility, it comes with several limitations. First, since precedent is necessarily responsive to presented facts, reliance on precedent means there is no clear rule to give notice to banks or the public of what forms of real estate ownership are permissible for a bank. Published OCC precedent by its nature typically describes fact patterns found to be permissible. Therefore, reliance on precedent alone makes it difficult for the industry and the public to understand what set of facts would be impermissible. Given the time and effort often required to plan an investment in premises, delays and uncertainty caused by unclear legal standards can be problematic.

Second, national bank premises precedent was largely formed at a time when the banking industry was different than the one in existence today. Many of the most important cases decided on premises occurred at a time when most banks operated entirely out of a single headquarters. The principles drawn from those cases remain relevant in the present day, but the reality of a modern large bank is very different than a bank that existed prior to interstate branching. Bank premises rules in the present day must apply to both

(Jan. 21, 1993) (permitting a bank to retain a condominium used only for bank purposes); OCC Interpretive Letter No. 1034 (April 1, 2005) (permitting a national bank to construct new facilities on existing premises real estate, use less than 50 percent of the premises for bank purposes, and lease unused space as excess bank premises); Conditional Approval No. 298 (Dec. 15, 1998) (permitting a bank to use less than 50 percent of office premises for its banking business); Interpretive Letter No. 758 (April 5, 1996) (permitting a national bank to lease out a portion of its real estate held as premises for employee recreation purposes to a third party to remove a hill and mine granite deposits). As discussed below, this proposed rule would supersede existing precedent to the extent it is inconsistent with the proposed rule. However, the proposed rule would not necessarily supersede precedent that is consistent with the requirements of the proposed rule or precedent that addresses issues not covered by the proposed rule. The OCC requests comment on whether and how outstanding precedent should be affected by the proposed rule.

<sup>13</sup> Former 12 CFR 560.37. In 2011, the OCC republished OTS regulations set out in Chapter V of Title 12, including 12 CFR 560.37, with OCC part numbers changing the “5” to a “1”. 12 CFR 560.37 became 12 CFR 160.37. 76 FR 48950 (August 9, 2011). 12 CFR 160.37 was subsequently removed when Federal savings associations were integrated into the national bank rule. Prior OTS guidance provided that a building would be a Federal savings association’s premises if the association used 25 percent or more of the building. *OTS Handbook*, Section 252, Fixed Assets, April 1999, p.31 (rescinded).

community banks, some operating out of a single building or few buildings, and large banks with tens of thousands of employees and operations in all fifty states.

Finally, commercial real estate itself has changed greatly in the past several decades in ways that are difficult to square with premises precedent. The majority of OCC and OTS premises precedent concerns either branches or standalone office space, as those were the typical premises arrangements for banking operations in the 20th century. Recent years have seen the growth of mixed-use developments combining office space with retail space, residential space, and other uses not typically found in a traditional office building. Some industries have moved towards a comprehensive campus arrangement providing employees with amenities and working arrangements previously not present in an office environment. Finally, with the development of robust teleconferencing and the arrival of the COVID-19 pandemic, many companies are moving towards offsite, shared, or virtual work spaces. It is increasingly difficult for national banks and Federal savings associations to rely on precedent focusing on traditional office arrangements to determine whether and to what extent they may own mixed-use developments, install amenities to compete with those offered by other industries (including technology companies), or make use of alternative work arrangements.

For these reasons, the OCC proposes these revisions to 12 CFR 7.1024 to codify and clarify a transparent and consistent set of principles for national bank and Federal savings association premises. The OCC intends these regulations to meet the needs of modern national banks and Federal savings associations while ensuring consistent application of and adherence to the limitations of 12 U.S.C. 29 and the HOLA.

*Question One: Although current OCC regulations and the proposal cover both the national bank and Federal savings association charters in one section, there are differences in the statutory regimes covering each charter. Would it be preferable to apply different requirements to Federal savings association premises? Specifically, should the proposed rule apply only to national banks? If so, what requirements should apply to Federal savings associations? Should the OCC continue to apply the current requirements to Federal savings associations even if it adopts the proposed rule with respect to national banks? Should the OCC adopt*

*a requirement for Federal savings associations that is similar to or identical to the requirement in effect before the integration of national bank and Federal savings association requirements?<sup>14</sup> Also, should the proposed rule apply to federal branches and agencies of foreign banks regulated by the OCC? If so, should modified requirements be applied to such branches and agencies?*

### III. The Proposed Rule

The OCC is proposing to revise § 7.1024 to provide general standards the OCC will use in determining whether the acquisition and holding of real estate is necessary for the transaction of a national bank's or Federal savings association's business. Revisions include implementing an occupancy test and excess capacity standards that would allow national banks and Federal savings associations to ascertain better whether an acquisition or holding of real estate is permissible under 12 U.S.C. 29 or the HOLA. The OCC has determined that national banks and the public would benefit from clear standards related to the requirements and expectations for real estate to be considered necessary for the transaction of a national bank's or Federal savings association's business as required by 12 U.S.C. 29 or the HOLA. Current § 7.1024 and various legal interpretations provided examples of permissible holdings, but the OCC has determined that, for the reasons articulated above, these examples do not provide general principles national banks could apply to new acquisitions. Without clear principles, there is the potential for inconsistent application of 12 U.S.C. 29, the HOLA, and 12 CFR 7.1024. The proposed revisions are intended to provide for more consistent application of 12 U.S.C. 29, the HOLA, and 12 CFR 7.1024.

#### *Definitions (§ 7.1024(a))*

Proposed § 7.1024(a) provides certain definitions used in the proposed rule. Bank occupied office premises is defined in proposed § 7.1024(a)(1) as bank occupied premises containing

<sup>14</sup> 61 FR 66561, 66579 (Dec. 18, 1996) ("A federal savings association may invest in real estate (improved or unimproved) to be used for office and related facilities of the association, or for such office and related facilities and for rental or sale, if such investment is made and maintained under a prudent program of property acquisition to meet the federal savings association's present needs or its reasonable future needs for office and related facilities. A federal savings association may not make an investment that would cause the outstanding book value of all such investments (including investments under § 559.4(e)(2) of this chapter) to exceed its total capital.").

offices where professional or clerical duties are performed.

Bank occupied premises is defined in proposed § 7.1024(a)(2) as real estate acquired and held in good faith in which more than 50 percent of each building or severable piece of land is used by bank persons, including facilities that may be operated by third parties to provide amenities and services to bank persons or otherwise facilitate bank business operations. This definition encompasses a variety of factual situations, including a bank's acquisition of a single premises building or a bank's development of a premises campus. As reflected in the above definition, in any factual situation the OCC would apply the 50 percent occupancy standard to each building or severable piece of land. In order for a building or severable piece of land to be considered bank occupied premises, more than 50 percent of the space must be used by, or for, bank persons to facilitate bank business operations. Space that facilitates bank business operations would include facilities operated by third parties to provide amenities and services to bank persons that facilitate bank business operations; examples of such facilities include an office gym, cafeteria, daycare, or printing center. In calculating the occupancy percentage, the national bank or Federal savings association would look at each building or severable piece of land using the amount of space that is used by or for bank persons as the numerator and the overall space of the building or severable piece of land as the denominator. As an example, a national bank or Federal savings association that acquires and holds a building in good faith and in which the national bank or Federal savings association uses 4,000 square feet of the 6,000 square foot building for a bank branch, bank offices, gym for bank persons' use, and cafeteria for bank persons' use, the occupancy percentage would be approximately 67 percent and the national bank or Federal savings association could rent the remaining 2,000 square feet of the building, for example as ground floor retail space, in order to avoid economic loss or waste in the real estate consistent with § 7.1024(c).

*Question Two: The OCC requests comment on whether 50 percent is the appropriate percentage for bank occupied premises. Should the percentage be higher, such as 75 percent, or lower, such as 25 percent? The OCC requests comments on all possible percentage limitations and particularly the range of percentages between 25 and 75. Why should the*

percentage be higher or lower than 50 percent?

*Question Three: The OCC requests comment on whether ground floor retail space rented to a third party should be treated differently under the occupancy percentage calculation. For example, should ground floor retail space that is intended primarily for bank persons use be included in the numerator of the calculation even if third parties incidentally use the space? Should "primarily" be defined as more than 50 percent of use by bank persons? Or, should ground floor retail space that is not intended primarily for bank persons be excluded entirely from the occupancy percentage calculation as an incident of sound facilities management so that it would be included in neither the numerator nor the denominator? Or should retail space that is intended, but not primarily intended, for bank persons be excluded from the numerator but included in the denominator? Should other adjustments be made to the calculation? Should unused or less-used spaces (such as stairwells, lobbies, and maintenance areas) be excluded from the numerator, denominator, or both?*

*Question Four: How should land obtained by a national bank or Federal savings association as lessee be treated? The proposed rule would treat all land obtained by the bank through lease for use as premises as subject to the rule and its calculation requirements. Should certain types of leases (e.g., operating leases or capital leases) be treated differently or excluded from the calculation?*

Bank persons is defined in proposed § 7.1024(a)(3) as a national bank's or Federal savings association's employees, contractors, consultants, vendors, and any other individuals who are engaged in the national bank's or Federal savings association's business.

Impermissible premises is defined in proposed § 7.1024(a)(4) as real estate that is not bank occupied premises or that otherwise does not conform with the requirements of this section. Impermissible premises is any property not expressly permitted under this section, including real estate in which the national bank or Federal savings association uses 50 percent or less of the building or severable piece of land for bank persons or the facilitation of bank business operations. Impermissible premises would also include real estate in which a national bank or Federal savings association occupies 50 percent or more but does not comply with the excess space and capacity provisions of proposed § 7.1024(c). Real estate held under the transition provision in

proposed § 7.1024(g) would not be considered impermissible premises.

Shared space is defined in proposed § 7.1024(a)(5) as bank occupied office premises that a national bank or Federal savings association shares with a third party to enhance the national bank's or Federal savings association's business operations. The OCC is proposing to remove the shared space provisions from 12 CFR 7.3001 and instead include them in proposed § 7.1024(e) to eliminate confusion regarding the interaction of the shared space provisions with the permissibility provisions of 12 CFR 7.1024. These proposed provisions are substantively unchanged from the current rule.

#### *Investments in Real Estate Necessary for the Transaction of Business (§ 7.1024(b))*

Proposed § 7.1024(b) provides that a national bank or Federal savings association may acquire, hold, or convey real estate for use as bank occupied premises.<sup>15</sup> Under the proposed rule, bank occupied premises would be considered real estate necessary for the transaction of a national bank's or Federal savings association's business, and thus a national bank or Federal savings association would be permitted to acquire, hold, and convey real estate that is included within the definition of bank occupied premises.

#### *Excess Space or Capacity (§ 7.1024(c))*

Proposed § 7.1024(c) sets forth the principles of the excess capacity doctrine<sup>16</sup> recognizing national banks' and Federal savings associations' need to optimize the value of bank property by authorizing national banks and

<sup>15</sup> 12 U.S.C. 29 provides that national banks may only "purchase, hold, and convey real estate" for four specific purposes. The OCC interprets the words "purchase, hold, and convey" to encompass all forms of real estate acquisition, ownership, and transfer. The proposed rule would use the words "acquire, hold, or convey" to make clear that all forms of real estate acquisition and ownership would be covered by the proposed rule. Depending on the circumstances, the words "acquire, hold, or convey" may include real estate obtained by a national bank or Federal savings association via lease.

<sup>16</sup> The excess capacity doctrine holds that a bank properly acquiring an asset to conduct its banking business is permitted, under its incidental powers, to make full economic use of the property if using the property solely for banking purposes would leave the property underutilized. See OCC Conditional Approval No. 361 (Mar. 3, 2000). In 2002, the OCC distilled this doctrine in a regulation that allowed national banks to sell excess electronic capacity, including data processing services. 12 CFR 7.5004. This regulation relied on the previous history of allowing the sale of excess real property. 67 FR 34992, 34995 (May 17, 2002). The current proposal for the treatment of excess capacity in the real estate context is consistent with the distillation set forth in the electronic capacity rule.

Federal savings associations to sell or lease excess space or capacity in that property.<sup>17</sup> Although national banks and Federal savings associations may sell or lease excess capacity or space in property, the property must have been legitimately acquired for banking purposes, meaning the national bank or Federal savings association must acquire or hold such property because of its suitability for use in banking operations or by bank persons and not as a means to invest the bank's funds in real property or to speculate in real estate.<sup>18</sup>

Proposed § 7.1024(c)(1) provides that a national bank or Federal savings association may, in order to optimize the use of bank occupied premises or avoid economic loss or waste, permit third parties to use excess space or capacity in real estate legitimately acquired or developed by the national bank or Federal savings association for its banking business. The proposal also provides that such excess space or capacity must have a nexus with the transaction of bank business or bank operations such that it is acquired or held to provide the national bank or Federal savings association with a business location rather than as an investment in real estate. A national bank or Federal savings association must be able to demonstrate a nexus between its ownership of the property and the transaction of its business or bank operations. One way to demonstrate such a nexus would be for the national bank or Federal savings association to show in its business plan how the property supports its business. Demonstrating that there is a nexus between the ownership of property and the transaction of its business allows the national bank or Federal savings association to demonstrate that such property was acquired or developed in good faith and not for a speculative purpose, consistent with statutory requirements. Although a national bank or Federal savings association may sell or lease excess space or capacity legitimately acquired or developed, a national bank or Federal savings association acquiring or developing

<sup>17</sup> See 12 U.S.C. 24 (Seventh) and 29; *Perth Amboy National Bank v. Brodsky*, 207 F. Supp. 785, 788 (S.D.N.Y. 1962) ("It is clear beyond cavil that the statute [12 U.S.C. 29] permits a national bank to lease or construct a building, in good faith, for banking purposes, even though it intends to occupy only a part thereof and to rent out a large part of the building to others.").

<sup>18</sup> *Brown v. Schleier*, 118 F. 981, 984 (8th Cir. 1902). ("... provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate.").

space in order to serve as a landlord to tenants using space unrelated to the transaction of its business or bank operations (for example, a grocery store or a branded hotel) would likely not meet this requirement as the national bank or Federal savings association would not merely be avoiding economic waste in acquiring or developing real estate for such purposes but likely actively investing in real estate for a speculative non-banking purpose. In the case of leasing space to tenants such as a grocery store or a branded hotel, the national bank or Federal savings association would likely derive significant revenue related to such activity and would need to demonstrate that the real estate was not acquired primarily for its lease income but rather because of its suitability for bank purposes or use by bank persons. A national bank or Federal savings association can only lease legitimate excess space or capacity, and if real estate is acquired or developed in a volume or manner that is not consistent with the bank's operations or business, for example as set forth in its business plan, such real estate was likely not legitimately acquired or developed, and thus would be impermissible.

Excess space is space in bank occupied premises that is not being used by bank persons or for bank operations. Excess capacity in bank occupied premises can be either temporal or space-based. An example of temporal excess capacity is a bank auditorium that is used after bank business hours by members of the local community. An example of space-based excess capacity is a call center in which the bank needs space for 100 employees during eight months of the year but only needs space for 80 employees during the remaining four months of the year. In both examples, the space can be used by non-bank persons as long as the space was legitimately acquired or developed by the bank for its operations or business as required by § 7.1024(c)(1).

Proposed § 7.1024(c)(2) discusses situations in which legitimate excess space or capacity may be used by third parties. Section § 7.1024(c)(2)(i) through (iv) have analogous provisions in the excess capacity provisions for electronic activities located in 12 CFR 7.5004. Section 7.1024(c)(2)(i) provides that excess space or capacity can be used by third parties to the extent that the real estate acquired is consistent with the real estate available in the market. For example, if a national bank or Federal savings association is located in an area in which strip malls are the predominant type of commercial real estate, then a national bank or Federal

savings association may be able to acquire a strip mall if the national bank or Federal savings association would occupy greater than 50 percent of the space and lease out the remaining space. However, as the national bank or Federal savings association must have good faith and a non-speculative purpose in order for real estate to be legitimately acquired, a national bank or Federal savings association would need to analyze carefully whether this requirement would be met if many smaller strip malls than the one it acquired were available or if there were many free standing buildings more appropriately sized for bank purposes available in the market.

Section 7.1024(c)(2)(ii) provides that a national bank or Federal savings association may acquire and retain additional space or capacity, beyond its present needs, if it is reasonably necessary for planned future expansion or to meet the bank's future expected banking needs as long as the bank uses the additional space or capacity in the real estate acquired for future bank expansion within five years. A national bank or Federal savings association may acquire real estate intended to be used for future banking purposes and may permit third parties to use this excess space or capacity, but the national bank or Federal savings association must use this real estate for banking purposes within five years of acquisition. The OCC understands that it is prudent for a national bank or Federal savings association to plan for future expansion and use, so a national bank or Federal savings association may legitimately acquire and develop real estate intended for future use as long as that real estate is used by the national bank or Federal savings association within five years of its acquisition or development. If the property does not become bank occupied premises within five years, it will become Other Real Estate Owned (OREO) and, subject to 12 U.S.C. 29 for national banks and 12 CFR 34.82 for national banks and Federal savings associations, must be disposed of within five years of becoming OREO, unless the bank requests an extension of up to an additional five years.

Proposed § 7.1024(c)(2)(iii) provides that a national bank or Federal savings association may lease excess capacity resulting from a fluctuation caused by the bank's need to use the full capacity of a space during peak periods but not in other off-peak periods. This situation is similar to the example discussed above related to a call center which the bank uses all 100 available seats during eight months of the year but only used 80 during the other four months. The

bank may allow third parties to use the excess 20 seats in its call center provided the capacity was legitimately acquired for bank operations and does not impede the safe and sound operation of the bank.

Proposed § 7.1024(c)(2)(iv) provides that a national bank or Federal savings association may lease excess capacity or space that is no longer needed due to a decline in the level of banking operations. In this situation, a bank acquired real estate for use in its banking operations and, based on a decline in bank activity or operation, no longer needs all of the space. The nexus between national bank or Federal savings association ownership of a building and its banking operations becomes clearer the closer the bank's occupancy approaches one hundred percent. As with excess capacity in data processing, the OCC presumes a certain percentage of use of the property to be permissible. The bank may allow third parties to use the space provided the bank still otherwise occupies more than 50 percent of the real estate as required by § 7.1024(a)(2).

*Question Five: Should the OCC permit a national bank or Federal savings association to lease out more than 50 percent of its premises on a temporary basis, provided that the national bank brings its percentage of occupancy back to at least 50 percent by a certain time period?*

*Question Six: Should the OCC impose additional time-based limitations on a bank's ability to lease out excess space or capacity? For example, should a bank be permitted to lease out 50 percent of its space for a limited period (for example, five years) but be subject to a higher usage requirement (for example, 75 percent) on an ongoing basis?*

*Question Seven: Should certain uses be permissible but subject to a time-based limit?*

Proposed § 7.1024(c)(2)(v) provides that a national bank or Federal savings association may permit third parties to use bank occupied premises after bank business hours.<sup>19</sup> For example, a bank may permit community members to use a bank auditorium or conference center after bank business hours. After hours

<sup>19</sup> National banks and Federal savings associations are often key anchors in a local community and can be called on to play an important role in life-cycle events, for example supplying the use of a conference room or the institution's board room for a funeral viewing or community celebration during business hours. Occasional use of facilities for such purpose is entirely consistent with the institution's role in the local community and is not inconsistent with section 29 or 1464 and this proposed rule.

use by third parties will not affect the bank occupied premises calculation.

The OCC recognizes that often national banks and Federal savings associations are asked or required by outside parties, such as a local government, to make commitments to allow third party or public use in order to acquire or hold real estate. When such commitments are requested or required, the national bank or Federal savings association should inform the appropriate OCC supervisory office of such requests and share such commitments and other relevant information with the appropriate OCC supervisory office.

#### *Impermissible Premises (§ 7.1024(d))*

Proposed § 7.1024(d) provides that a national bank or Federal savings association may not acquire or hold impermissible premises. Proposed § 7.1024(a)(4) defines impermissible premises as real estate that is not bank occupied premises or that otherwise does not conform with the requirements of this section. If the real estate acquisition or holding would not conform with the requirements of § 7.1024, then it would be impermissible.

*Question Eight: Should the OCC include specific examples in § 7.1024(d) of impermissible premises? If so, what examples should be included? Should large retail operations, such as grocery stores, be specifically impermissible? Should commercial lodging (rental apartments, branded hotels) be specifically impermissible?*

*Question Nine: Courts have explained that, under 12 U.S.C. 29, national banks investing in property should be doing so “in good faith, solely with a view of obtaining an eligible location” and not for the purpose of speculating or investing in real estate as a landlord.<sup>20</sup> Should the final rule retain the good faith requirement to ensure that national banks and Federal savings associations are only permitted to acquire additional real estate with the intention of using it as premises? Should the final rule make further clarification that national banks and Federal savings associations would not be permitted to obtain real estate with the intention of using part of the real estate for a non-premises purpose on an indefinite basis?*

#### *Sharing National Bank or Federal Savings Association Space and Employees in Jointly Held Bank Occupied Premises (§ 7.1024(e))*

Proposed § 7.1024(e) substantially imports current 12 CFR 7.3001 concerning the sharing of national bank or Federal savings association space and employees in jointly held bank occupied office premises covering situations where a bank and another business jointly hold and share the same space as opposed to a bank leasing a separate space within a building to a third party. Proposed § 7.1024(e) provides guidance on how to share offices and employees in a manner that protects customers and is consistent with safe and sound banking practices. The proposed rule would not alter or affect existing precedent applicable to 12 CFR 7.3001. Proposed § 7.1024(e)(4), like current 12 CFR 7.3001(d), provides that in conducting sharing arrangements, national banks and Federal savings associations would be required to ensure that each arrangement complies with all applicable laws or regulations. Proposed § 7.1024(e)(4), like current 12 CFR 7.3001(d), lists three requirements, which are illustrative and not exhaustive.

#### *Permissible Means of Holding Real Estate and Fixed Assets (§ 7.1024(f))*

Proposed § 7.1024(f) provides technical information related to permissible means of holding real estate and fixed assets. These provisions are substantially similar to the provisions in current 12 CFR 7.1024(a)(3), (b), and (c).

#### *Transition (§ 7.1024(g))*

Proposed § 7.1024(g) provides that as of XX, 20XX, a national bank or Federal savings association that holds an investment in real estate, fixed assets, banking premises, or other real property that complies with the legal requirements in effect prior to XX, 20XX, but would violate any provision of proposed § 7.1024, would be permitted to continue to hold the investment in accordance with the prior legal requirements. However, a national bank or Federal savings association holding such an investment cannot modify, expand, or improve the investment, except for routine maintenance, without the prior approval of the appropriate OCC supervisory office. Proposed § 7.1024(g) grandfather national banks or Federal savings associations that currently have permissible real estate investments that would no longer be permissible under the proposed revisions. The proposed

rule would supersede outstanding OCC precedent (and former OTS precedent) in this area to the extent it is inconsistent with the proposed rule. While national banks and Federal savings associations would be able to continue to rely on this precedent, including interpretive letters, with respect to current real estate investments, national banks and Federal savings associations would not be able to rely on this precedent with respect to future real estate investments. The proposed rule would not affect outstanding precedent regarding 12 CFR 7.1000 or 12 CFR 7.3001.

*Question Ten: The OCC requests comment on the appropriate parameters of a national bank or Federal savings association’s ability to hold real estate subject to the transition rule in § 7.1024(g). Specifically, should a renewal, modification, or termination of a lease constitute a “modification” subject to the transition rule? Should other activities besides “routine maintenance” be permitted under the transition rule?*

#### **IV. Administrative Law Matters**

*Paperwork Reduction Act.* In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC has reviewed the notice of proposed rulemaking and determined that it would not introduce any new or revise any existing collection of information pursuant to the PRA. Therefore, no submission will be made to OMB for review.

*Regulatory Flexibility Act.* The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, 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 commercial banks and savings institutions with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities. The OCC expects that all of these small entities would be impacted by the proposed rule. Because the proposed rule applies to all OCC-supervised depository institutions, the proposed

<sup>20</sup> *Brown v. Schleier*, 118 F. 981, 984 (8th Cir. 1902), *aff’d* 194 U.S. 18 (1904).

rule would affect all small OCC-supervised entities, and thus a substantial number of them.

*Unfunded Mandates Reform Act.* Consistent with the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, the OCC considers 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 adjusted for inflation (currently \$157 million) in any one year. The OCC estimates the expenditures that may be associated with compliance costs for this proposed rule, if implemented, would be as much as \$412,000. The estimate for expenditures is for modifying a bank's policies and procedures on premises. However, it should be noted that the proposed rule does not require banks to modify their policies and procedures. Therefore, the OCC concludes that implementation of the proposed rule would not result in an expenditure of \$157 million or more annually by state, local, and tribal governments, or by the private sector.

*Riegle Community Development and Regulatory Improvement Act.* Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. Although the proposed rule does not impose additional reporting, disclosures, or other new requirements on insured depository institutions, the OCC invites comments that will inform its consideration of the administrative burdens and the benefits of its proposal, as well as the effective date of the final rule.

### List of Subjects in 12 CFR Part 7

Computer technology, Credit, Derivatives, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Security bonds.

### Authority and Issuance

For the reasons stated in the preamble, the OCC proposes to amend 12 CFR part 7 as follows.

### PART 7—ACTIVITIES AND OPERATIONS

- 1. The authority citation for part 7 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1463, 1464, 1465, 1818, 1828(m) and 5412(b)(2)(B).

- 2. Amend Part 7 by adding § 7.1024 to read as follows:

#### § 7.1024 National bank or Federal savings association ownership of property.

##### (a) Definitions.

(1) *Bank occupied office premises* means bank occupied premises containing offices where professional or clerical duties are performed.

(2) *Bank occupied premises* means real estate acquired and held in good faith and in which more than 50 percent of each building or severable piece of land is, or consistent with paragraph (c)(2)(ii) of this section—, will be used by bank persons for the transaction of a national bank's or Federal savings association's business, including facilities that may be operated by third parties to provide amenities and services to bank persons or otherwise facilitate national bank or Federal savings association business operations.

(3) *Bank persons* mean a national bank or Federal savings association's employees, contractors, consultants, vendors, and any other individuals who are engaged in the national bank or Federal savings association's business.

(4) *Impermissible premises* means real estate that is not bank occupied premises or that otherwise does not conform with the requirements of this section.

(5) *Shared space* means bank occupied office premises that a national bank or Federal savings association shares with a third party to enhance the national bank's business operations.

(b) *Investment in real estate necessary for the transaction of business.* A national bank or Federal savings association may acquire, hold, or convey real estate for use as bank occupied premises.

(c) *Excess space and capacity.*

(1) A national bank or Federal savings association may, in order to optimize the use of bank occupied premises or avoid economic loss or waste, permit third parties to use excess space or capacity in real estate legitimately acquired or developed by the national bank or Federal savings association for its banking business. Such excess space or capacity must have a nexus with the transaction of the bank's business or bank operations for the national bank or Federal savings association such that it is acquired or held to provide the bank with a business location rather than as an investment in real estate.

(2) With respect to bank occupied premises, legitimate excess space or capacity that may be used by third parties can arise in a variety of situations, including the following:

(i) Due to the characteristics of the real estate available in the market, the space or capacity to meet a national bank or Federal savings association's requirements exceeds its present needs;

(ii) The acquisition and retention of additional space or capacity, beyond present needs, reasonably may be necessary for planned future expansion or to meet a national bank's or Federal savings association's expected future banking needs as long as the national bank or Federal savings association uses the additional capacity in the real estate acquired for future national bank or Federal savings association expansion or banking needs within five years;

(iii) Requirements for capacity fluctuate because a national bank or Federal savings association may need to use the full capacity of a space during peak periods resulting in periods when its capacity is underutilized;

(iv) After the initial acquisition of real estate thought to be fully needed for banking operations, a national bank or Federal savings association experiences a decline in the level of banking operations or an increase in efficiency resulting in underutilized space or capacity; and

(v) A national bank or Federal savings association has capacity to allow third parties after-hours use of bank occupied premises.

(d) *Impermissible premises.* A national bank or Federal savings association may not acquire, hold, or convey impermissible premises, except as otherwise permitted by 12 U.S.C. 29 or 1464, respectively, or other applicable law.

(e) *Sharing national bank space and employees in jointly held bank occupied office premises.*

(1) *Shared space.* A national bank or Federal savings association may share space in bank occupied office premises

jointly held with one or more other businesses.

(2) *Shared employees.* When sharing space with other businesses as described in paragraph (e)(1) of this section, a national bank or Federal savings association may provide, under one or more written agreements between the national bank or Federal savings association, the other business, and their employees, that:

(i) A national bank or Federal savings association employee may act as agent for the other business; or

(ii) An employee of the other business may act as agent for the national bank or Federal savings association.

(3) *Supervisory conditions.* When a national bank or Federal savings association engages in arrangements of the types listed in paragraphs (e)(1) and (2) of this section, the national bank or Federal savings association must ensure:

(i) The other business is conspicuously, accurately, and separately identified;

(ii) Shared employees clearly and fully disclose the nature of their agency relationship to customers of the national bank or Federal savings association and of the other businesses so that customers will know the identity of the national bank, Federal savings association, or other business that is providing the product or service;

(iii) The arrangement does not constitute a joint venture or partnership with the other business under applicable state law;

(iv) All aspects of the relationship between the national bank or Federal savings association and the other business are conducted at arm's length, unless a special arrangement is warranted because the other business is a subsidiary of the national bank or Federal savings association;

(v) Security issues arising from the activities of the other business on the premises are addressed;

(vi) The activities of the other business do not adversely affect the safety and soundness of the national bank or Federal savings association;

(vii) The shared employees or the entity for which they perform services are duly licensed or meet qualification requirements of applicable statutes and regulations pertaining to agents or employees of such other business; and

(viii) The assets and records of the parties are segregated.

(4) *Other legal requirements.* When entering into arrangements of the types described in paragraphs (e)(1) and (2) of this section, and in conducting operations pursuant to those arrangements, a national bank or Federal savings association must ensure

that each arrangement complies with all applicable laws and regulations. If the arrangement involves an affiliate or a shareholder, director, officer, or employee of the national bank or Federal savings association:

(i) The national bank or Federal savings association must ensure compliance with all applicable statutory and regulatory provisions governing national bank or Federal savings association transactions with these persons or entities;

(ii) The parties must comply with all applicable fiduciary duties; and

(iii) The parties, if they are in competition with each other, must consider limitations, if any, imposed by applicable antitrust laws.

(f) *Permissible means of holding real estate and fixed assets.*

(1) *Permissible means of holding.* A national bank or Federal savings association may acquire and hold real estate under paragraph (b) of this section by any reasonable and prudent means, including ownership in fee, a leasehold estate, or in an interest in a cooperative. A national bank or Federal savings association may hold this real estate directly or through one or more subsidiaries. A national bank or Federal savings association may organize a bank occupied premises subsidiary as a corporation, partnership, limited liability company, or any other similar entity.

(2) *Fixed assets.* A national bank or Federal savings association may own fixed assets necessary for the transaction of its business, such as fixtures, furniture, and data processing equipment.

(3) *Investment in banking premises.*

(i) *Premises investment and approval.* A national bank or Federal savings association must comply with the investment and approval requirements for investment in banking premises in 12 CFR 5.37(d).

(ii) *Option to purchase.* An unexercised option to purchase banking premises or stock in a corporation holding banking premises is not an investment in banking premises. However, a national bank or Federal savings association seeking to exercise such an option must comply with the requirements in 12 CFR 5.37(d).

(g) *Transition.* If, on XX, 20XX, a national bank or Federal savings association holds an investment in real estate, fixed assets, banking premises, or other real property that complies with the legal requirements in effect prior to XX, 20XX, but would violate any provision of this section, the national bank or Federal savings association may continue to hold such investment in

accordance with the prior legal requirements. However, a national bank or Federal savings association that holds such an investment may not modify, expand, or improve this investment, except for routine maintenance, without the prior approval of the appropriate OCC supervisory office.

#### § 7.3001 [Removed]

■ 3. Remove § 7.3001.

**Brian P. Brooks,**

*Acting Comptroller of the Currency.*

**Editorial Note:** This document was received at the Office of the Federal Register on December 31, 2020.

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG–119890–18]

RIN 1545–BP92

#### Section 42, Low-Income Housing Credit Average Income Test Regulations; Hearing

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Proposed rule; notice of hearing.

**SUMMARY:** This document provides a notice of public hearing on proposed regulations setting forth guidance on the average income test for purposes of the low-income housing credit.

**DATES:** The public hearing is being held on Wednesday, March 24, 2021 at 12 p.m. The IRS must receive speakers' outlines of the topics to be discussed at the public hearing by Friday, March 5, 2021. If no outlines are received by March 5, 2021, the public hearing will be cancelled.

**ADDRESSES:** The public hearing is being held by teleconference. Individuals who want to testify (by telephone) at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number [REG–119890–18] and the word TESTIFY. For example, the subject line may say: Request to TESTIFY at Hearing for REG–119890–18. The email must include the name(s) of the speaker(s) and title(s). Send outline submissions electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG–119890–18). The email must be received by March 5, 2021.