to 50% of the maximum base civil penalty ($46,666).

IX. Enforcement Actions

1. Notice of Violation

(a) * * * * *

(e) * * * * *(1) DOE may assess civil penalties of up to $93,332 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). See 10 CFR 851.5(a).

PART 1017—IDENTIFICATION AND PROTECTION OF UNCENSORED CONTROLLED NUCLEAR INFORMATION

26. The authority citation for part 1017 continues to read as follows:


27. Section 1017.29 is amended by revising paragraph (c) to read as follows:

§ 1017.29 Civil penalty.

(c) Amount of penalty. The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $258,811 for each violation.

PART 1050—FOREIGN GIFTS AND DECORATIONS

28. The authority citation for part 1050 continues to read as follows:


29. Section 1050.303 is amended by revising the last sentence in paragraph (d) to read as follows:

§ 1050.303 Enforcement.

(d) * * * * * The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $19,621.

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: 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.
FOR FURTHER INFORMATION CONTACT: Casey Scott Laxton, Counsel, or Margo Dey, Counsel, Securities and Corporate Practices Division, (202) 649–5510; Carl Kaminski, Special Counsel, Legislative and Regulatory Activities Division, (202) 649–5490; or, for persons who are deaf or hard of hearing, TTY, (202) 649–5490; or, for persons who are deaf or hard of hearing, TTY, (202) 649–5490; or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, 400 7th Street SW., Washington, DC 20219.
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. 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, the business of banking. The proposed prohibitions were generally consistent with recommendations made by the U.S. Senate Permanent Subcommittee on Investigations in 2014, 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 81 FR 63428 (Sept. 15, 2016).

1 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).
reasonably determines are part of the business of banking.4

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 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 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...

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6 The OCC considers the definition of industrial or commercial metal to include a warehouse receipt for such metal.
7 See Nat’l Cable & Telecommms. 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 1, 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 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).
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.
12 See 81 FR 63430, n.21.
zinc. 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 understands that national banks 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 understands that national banks 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 understands that national banks 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 understands that national banks 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 understands that national banks 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 understands that national banks 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.

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. 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 a moment in time. However, the OCC noted that the OCC 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 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. Banks may use commodity reverse repurchase agreements to finance customer inventory. 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 OCC notes 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 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 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 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.

**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 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 do not believe allowing 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 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

\(^19\)19 FR 63433.

\(^20\)19 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).

\(^22\)81 FR 63432.

\(^23\)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).


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

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

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 refined gold bars bearing the United States stamp of fineness, weight, and value, or bars from any mill 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.”).


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. 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.

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 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

42 Currently, national banks’ dealing and investing 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 improves 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 permissible for a national bank to make substantial purchases of precious metals).
44 Interpretive Letter 1077 (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. 1973)).
45 See 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.
46 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.
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. Interpretive Letter 1073 provides that national banks may hedge metal derivative transactions on a portfolio basis with counterderivative 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. For these reasons, OCC believes that transitory title transfers do not constitute physical possession of commodities and therefore does not consider transitory title transfers to be being or investing in commercial or industrial use for the purpose of dealing or investing in that metal before the effective date of the rule. 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.

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. Under the divestiture provision, national 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.

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 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 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.

The final rule will not have a significant economic impact on a substantial number of 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.
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 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 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.
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: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the Federal Register. That AD applies to certain The Boeing Company Model 787–8 airplanes. As published, the amendment number specified in the preamble and regulatory text is incorrect. This document corrects that error. In all other respects, the original document remains the same.

DATES: This final rule is effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 20, 2017 (81 FR 99055, December 16, 2016).


SUPPLEMENTARY INFORMATION:

Airworthiness Directive 2016–25–02 (81 FR 99055, December 16, 2016), requires installing markers to limit the hydraulic system fluid used to a specific brand, doing hydraulic fluid tests of the hydraulic systems, replacing hydraulic system fluid if necessary, and doing all applicable related investigative and corrective actions for certain The Boeing Company Model 787–8 airplanes.

Need for the Correction

As published, the amendment number specified in the preamble and regulatory text is incorrect. The incorrectly specified number was Amendment 39–18725; the correct number is Amendment 39–18728.

Related Service Information Under 1 CFR Part 51

We have reviewed Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016. This service information describes procedures for installing markers to limit the hydraulic system fluid used to a specific brand, doing hydraulic fluid tests of the hydraulic systems, replacing the hydraulic system fluid if necessary, and related investigative and corrective actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Correction of Publication

This document corrects an error and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, we are publishing the entire rule in the Federal Register.

The effective date of this AD remains January 20, 2017.

Since this action only corrects an amendment number, it has no adverse economic impact and imposes no additional burden on any person. Therefore, we have determined that notice and public procedures are unnecessary.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

§ 39.13 [Corrected]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Corrected]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–25–02 The Boeing Company:


(a) Effective Date

This AD is effective January 20, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Control Systems.

(e) Unsafe Condition

This AD was prompted by reports of the accumulation of very fine particle deposits in the power control unit (PCU) electro-hydraulic servo valves (EHSVs) used in the flight control system; this accumulation caused degraded performance due to reduced EHSV internal hydraulic supply pressures, resulting in the display of PCU fault status messages from the engine indication and crew alerting system (EICAS). We are issuing this AD to prevent failure of flight control hydraulic PCUs, which could lead to reduced controllability of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Marker Installation

Within 36 months after the effective date of this AD, install markers to allow servicing