



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS.

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March 25, 2021

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, D.C. 20219

Re: Notice of Proposed Rulemaking on National Bank and Federal Savings Association Premises (Docket ID OCC-2020-0045)

To Whom it May Concern:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (CCMC) appreciates the opportunity to comment on the Notice of Proposed Rulemaking on National Bank and Federal Savings Association Premises (the "Proposed Rule") issued by the Office of the Comptroller of the Currency (OCC).

12 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." 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. The OCC has historically looked to court precedent and issued Interpretive Letters when applying 12 U.S.C § 29 to a set of facts and circumstances.

The Proposed Rule would provide general standards the OCC would 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. The Proposed Rule would define "bank occupied premises" 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.¹ 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

¹ See Proposed Rule, 86 Fed. Reg. 7981 (February 3, 2021)

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.²

The OCC explains the genesis of the Proposed Rule is part of its periodic review of 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.”³ This statement is accompanied by discussion about a lack of legal clarity in applying OCC Interpretive Letters and precedent; changes in banking industry, including the use of commercial real estate, that have not kept up with premises precedent; and even questions about permanent changes in the use of bank premises that may result from disruption in workforce location due to COVID-19.

The Chamber always appreciates Agencies taking action to ensure that regulations are updated to reflect a modernizing economy, including our banking system. In this case, however, such updates do not appear necessary for the OCC to fulfil its supervisory responsibilities or for banks to have the requisite regulatory clarity for the use of bank premises. Furthermore, as the Proposed Rule notes, significant change in the banking industry may be underway. It is difficult to square the OCC’s rationale for the Proposed Rule with the rigid, “bright line” requirements set forth in the Proposed Rule.

The U.S. Chamber of Commerce is concerned about the Proposed Rule and requests the OCC not finalize it for the following reasons:

- I. Updates are Not Necessary or Justified at This Time**
- II. Proposed Rule Would Severely Complicate Real Estate Transactions and Holdings**
- III. Future Use of Bank Premises is Highly Uncertain Due to COVID-19**

- I. Updates are Not Necessary or Justified at This Time**

It is unclear what issues the OCC is seeking to address via the Proposed Rule. The discussion in the Proposed Rule suggests challenges with applying historical precedent in the applicability of 12 U.S.C. § 29 to the modern operation of banks, but fails to adequately explain what those challenges are and why a new framework is justified.

The OCC cites a “lack of legal clarity” but neglects to cite specific examples where the existing framework, including Interpretive Letters, is insufficient. The Proposed Rule merits further discussion on where the existing framework inhibits the OCC from fulfilling its obligations under 12 U.S.C. § 29 and/or how a prescriptive, inflexible rule adopted in the midst of a pandemic advances the safety and soundness of banks and savings associations.

² Ibid

³ See Proposed Rule, 86 Fed. Reg. 7979 (February 3, 2021)

The Chamber appreciates the OCC's efforts to provide regulatory clarity through a "bright line" approach but believes it could cause more harm than good in these circumstances. A bright line could, in theory, provide more regulatory certainty and avoid any need to apply OCC Interpretive Letters and court precedent to novel circumstances. However, it also creates new challenges given the unique nature of real estate and the variety of premises needs across banking organizations.

The Proposed Rule requests comment on the appropriate threshold for the bright line requirement using a relatively large range – 25% to 75% -- suggesting that imposing such a threshold requires substantially more analysis. In fact, the Proposed Rule neglects to explain how it determined 50 percent as an appropriate threshold, or why this is even an appropriate threshold for centering discussion. Existing OCC Interpretive Letters have permitted a range of minimum bank percentage occupancy, and at times have allowed banks to occupy 22 percent, or as little as 11 percent of the total space in a complex, permitting the bank to lease up to 78 percent, or as much as 89 percent, while still remaining within the purposes of 12 U.S.C. § 29.⁴

The OCC should not adopt a bright line requirement and should continue to operate under the flexible framework currently in use. As necessary, the OCC could consider updating Interpretive Letters to address the questions raised by banks to achieve its objective of "clarifying" requirements. There are undoubtedly changes happening in the banking industry and every bank has different circumstances that influence its use of real estate – updated Interpretive Letters, instead of a rigid bright line, have proven to be a suitable approach.

II. Proposed Rule Would Severely Complicate Real Estate Holdings Transactions and Holdings

The Proposed Rule appears to overlook the complexity of complying with a rigid formula for determining if 50 percent of a bank's premises are being used for permissible purposes. This calculation would likely be a difficult compliance exercise. It could also be fundamentally difficult to adhere to depending on the specific circumstances of a bank and the market in which it operates.

The Proposed Rule would require banks to determine if 50 percent of each building or severable piece of land is used by bank persons. This will require banks to determine if they "use" 50 percent of their real estate. This "use" would, helpfully, include facilities operated by third parties that provides amenities and services to bank persons. However, there are numerous questions about mixed-use areas such as bank lobbies, for example. Furthermore, changes to the "use" of premises overtime would require reassessment.

A rigid bright line fundamentally overlooks the fact that banks have different business models and operate in different markets. Banks that have large headquarters in Manhattan, NY have fewer options than banks that headquarter with less population-dense areas of the Midwest, for example. A bank that has a business rationale for having its headquarters in Manhattan, or even a specific block in the City, will have fewer options for acquiring real estate. Similarly, banks with

⁴ See OCC Interpretive Letter No. 1034, available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2005/int1034.pdf>

a large branch network will face different challenges, especially when attempting to acquire real estate in less developed markets. Finally, every market is subject to different zoning restrictions that could limit the type and location of real estate a bank may be able to acquire.

The existing framework of court precedent and OCC Interpretive Letters is flexible and well-suited to meet the changes of the modern banking industry. Moreover, compliance with the Proposed Rule could substantially increase real estate costs for banks. If the regulation reduces the supply of eligible properties the laws of supply and demand dictate that banks will likely be subject to higher real estate costs that are unrelated to “speculative investment.” This could be especially acute when attempting to acquire property in desirable geographies that have few locations able to accommodate their needs.

III. Future Use of Bank Premises is Highly Uncertain Due to COVID-19

The future use of bank premises is highly uncertain due to the ongoing COVID-19 crisis and banks remain focused on meeting the difficult challenges faced by the communities they serve. The OCC has rightfully acknowledged the historic difficulties that confront banks and has provided helpful regulatory and supervisory measures to accommodate their needs. The OCC should continue to focus on the COVID-19 crisis instead of promulgating a regulation that, in part, ostensibly attempts to predict the future uses of bank premises.

The OCC should continue to focus its resources on addressing challenges associated with the COVID-19 pandemic. Banks and federal savings associations are still facing unique and unexpected challenges as a result of the pandemic and require support from the OCC and other regulators on a host of timely issues unrelated to the Proposed Rule. The OCC should provide continued flexibility to banks and federal savings associations to meet the needs of their customers, communities, and employees instead of imposing a new perspective regulation requiring, among other things, an assessment of existing commercial real estate holdings and plans for growth.

The Proposed Rule rightly points out that “with the development of robust teleconferencing and the arrival of the COVID–19 pandemic, many companies are moving towards offsite, shared, or virtual workspaces.”⁵ However, it fails to explain how much uncertainty currently exists regarding “the future of work” and the unique circumstances of companies based on their business model, location, workforce, and other criteria.

Before COVID-19, remote work was becoming more common, but the pandemic may have accelerated certain trends. According to data from the Bureau of Labor Statistics, the number of employees who telecommuted increased by 115% between 2005 and 2015.⁶ And, according to Gallup, 43% of Americans worked from home occasionally in 2017, up from 39% in 2012.⁷ There is also growing evidence to the contrary which must be considered.

⁵ See Proposed Rule, 86 Fed. Reg. 7981 (February 3, 2021)

⁶ Abrams, Z. (2019, October 1). The Future of Remote Work. Retrieved from <https://www.apa.org/monitor/2019/10/cover-remote-work>

⁷ Mann, A., & Adkins, A. (2017, March 15). America's Coming Workplace: Home Alone. Retrieved from <https://news.gallup.com/businessjournal/206033/america-coming-workplace-home-alone.aspx>

Remote work comes with new challenges that employers have yet to fully understand. Specifically, employers, in light of emergency measures to rearrange the location of their workforces during COVID-19, are recognizing challenges with the resiliency and creativity of their workforce that may inhibit productivity. Remote work may make employees more efficient in some instances, depending on the employee and circumstances. Is this an employee that requires significant oversight from management to fulfill his or her responsibilities? If the employee is permitted to work remotely, what new management techniques will employers need to develop to maximize the efficiency of their workforce?⁸ Also, there is growing evidence that video-conferencing technology does not foster a creative environment that engenders new ideas that spur growth. Finally, employers may need to reassess the location of their real estate, which could lead to significant changes.

What is certain is that few employers have made any permanent decisions about remote work. The few employers that have made long-term decisions have unique workforces (e.g. technology sector) that include a high percentage of professional and individuals that do not require in-person customer interaction. Most employers have indicated any changes about the future of their working environment will depend on the distribution of the vaccine and guidance from public health officials such as the Center for Disease Control and local governments.

We respectfully request that the OCC withdraw the Proposed Rule. At a minimum, we would appreciate the OCC not finalizing at this time and carefully considering stakeholder input before considering next steps such as issuing a new proposal.

Please do not hesitate to contact us for further discussion about our concerns. We would value the opportunity to better understand the OCC's intentions with the Proposed Rule and how we can achieve those objectives without unnecessarily complicating permissible uses of bank premises.

Respectfully,

A handwritten signature in black ink that reads "William R Hulse". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Bill Hulse
Executive Director, Capital Markets Policy
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

⁸ Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen? (2020, September 7). Retrieved from https://read.oecd-ilibrary.org/view/?ref=135_135250-u15liwp4jd&title=Productivity-gains-from-teleworking-in-the-post-COVID-19-era