



March 22, 2021

Via Electronic Mail

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: National Bank and Federal Savings Association Premises (Docket No. OCC-2020-0045; RIN 1557-AF07)

To whom it may concern:

The Bank Policy Institute, the American Bankers Association and the Independent Community Bankers of America (the "Associations")¹ appreciate the opportunity to comment on the Office of the Comptroller of the Currency's notice of proposed rulemaking regarding national bank and Federal savings association premises.²

If adopted, the Proposal would abandon a long-standing, well-established approach to evaluating "bank occupied premises" based on consideration of all the facts and

¹ See Annex A for a description of each of the Associations.

² National Bank and Federal Savings Association Premises, 86 Fed. Reg. 7979 (February 3, 2021) (the "Proposal"). Although on its face the Proposal would impose new limitations on the premises authority of OCC-supervised national banks and Federal savings associations (collectively, the "banks"), the Proposal could also have a significant effect on the operations of banking organizations for which the OCC is not the primary Federal regulator. For example, Section 24 of the Federal Deposit Insurance Act (the "FDIA") restricts the activities and equity investments of insured state banks to those that are permissible for a national bank, subject to certain exceptions. 12 U.S.C. § 1813a. *See also*, 12 C.F.R. Part 362; and FDIC, Decisions on Bank Applications, <https://www.fdic.gov/regulations/laws/bankdecisions/investactivity/> (last updated July 25, 2012). To the extent that the FDIC would view itself as being bound by the OCC's regulations with respect to national bank premises, it could impose the Proposal's new limitations on insured state banks.

circumstances of a bank's particular facility, building or land. Instead, the Proposal would prescribe a one-size-fits-all set of rules to evaluate bank premises and would eliminate the principles-based approach that has been in place for decades.³

As explained in more detail below, in the absence of any demonstration that the current approach has been defective and in light of the challenges of the pandemic and the uncertainties presented by expected changes to the post-pandemic work and business environments, we strongly recommend that the OCC withdraw the Proposal. If in the future the OCC determines that changes to its premises regulations should be implemented, the OCC should propose changes after there has been an opportunity to evaluate the impact of a post-pandemic working environment on banks' premises needs.

Notwithstanding our strong recommendation that the Proposal be withdrawn and that consideration of any changes to the OCC's premises regulations be postponed, we have included below a number of recommended changes to the Proposal's approach.

I. Executive Summary

We believe the Proposal should be withdrawn because it would eliminate the necessary flexibility for navigating the wide variety of facts and circumstances that can pertain to premises investments and changes to real estate needs and use. Changes are particularly likely to occur in the near future as a result of the pandemic. The Proposal would upset industry expectations and practice based on long-standing and well-understood judicial and administrative precedent without any identified risks related to premises investments. The Proposal's stated rationale fails to justify the need to abandon long-standing and well-known interpretations of the National Bank Act. The OCC's current approach is better suited than the Proposal's approach in light of the complexity, uniqueness and changing nature of banks' businesses and their premises needs. The Proposal's approach would diminish or deprive banks of their ability to manage efficiently their lawfully held premises in the same manner as other property owners, as has been expressly and consistently permitted under the principles-based approach to bank premises in judicial and OCC precedent.

If the OCC nevertheless determines to finalize the Proposal, at a minimum, a number of modifications to the Proposal should be made, including the establishment of a 25 percent minimum percentage of usage safe harbor and the maintenance of the ability of banks to seek OCC approval for premises the use of which falls outside the safe harbor. Other modifications to the Proposal should include not automatically characterizing legitimately held premises as "former banking premises" when a bank's use of which falls below any minimum

³ The OCC's current bank premises regulations provide a non-exhaustive list of the types of real estate that the OCC has found permissible for bank ownership and use, but does not define specific occupancy requirements in order for banks' ownership or use of their premises. 12 C.F.R. § 7.1000(a)(2). Effective April 1, 2021, 12 C.F.R. § 7.1000 will be redesignated as 12 C.F.R. § 7.1024. *See* Activities and Operations of National Banks and Federal Savings Associations, 85 Fed. Reg. 83686 (December 22, 2020). For purposes of this letter, the proposed rule is referred to by its new section number.

percentage of usage threshold, not adopting a strict, mechanical approach to calculating the percentage of usage, not applying any minimum percentage of usage requirement to “each building or severable piece of land,” substantially broadening the transition provision, and continuing to provide a non-exhaustive list of the type of real estate that may qualify as “bank occupied premises” as in the current rule.

II. The OCC should withdraw the Proposal.

A. In light of the uncertainties surrounding the pandemic and banks’ post-pandemic premises needs, now is not the appropriate time for the OCC to finalize the Proposal or to consider any significant changes to its existing approach to bank premises.

It is difficult to identify a time when banks’ future premises needs have been more uncertain. The uncertainty surrounding the longer-term impact of the pandemic on workspace requirements, including occupancy limitations implemented for safety reasons and continued work-from-home arrangements, makes it nearly impossible to evaluate meaningfully the potential impact of the Proposal. News outlets have widely reported that the work-from-home experiences during the pandemic have led to employees’ relocating away from their physical office locations with the view that they will be able to continue working remotely or will find employment that will permit them to work remotely some or all of the time.⁴ In addition, some businesses are viewing the changes to work environments as an opportunity to relocate employees to less expensive locations away from the centers of larger areas, and others are focused on returning all their staff to their offices.⁵ Businesses are also having to consider what modifications may be necessary to implement appropriate social distancing upon their employees’ return to the office, which may require additional space per worker.⁶ The increased usage of online banking driven by the pandemic, if it persists, also has the potential to affect banks’ use of real estate in yet-to-be-determined ways.⁷

⁴ See, e.g., Dror Poleg, *The Future of Offices When Workers Have a Choice*, NY Times, January 4, 2021, <https://www.nytimes.com/2021/01/04/upshot/work-office-from-home.html>; Dana Mattioli & Konrad Putzier, *When It’s Time to Go Back to the Office, Will It Still Be There?*, Wall St. J., May 16, 2020, <https://www.wsj.com/articles/when-its-time-to-go-back-to-the-of>.

⁵ Mattioli & Putzier, *supra* note 4; Siobhan Riding, *Fund Managers Grapple with Limits of Remote Working*, Fin. Times, October 25, 2020, <https://www.ft.com/content/c158637e-d769-493c-a2d7-286016f42f48>.

⁶ See Jones Lang LaSalle, *How Will Employee Workspace Needs Change post-Coronavirus?*, June 10, 2020, <https://www.us.jll.com/en/views/how-will-employee-workspace-needs-change-post-coronavirus>.

⁷ See, e.g., NextAdvisor, *How the Pandemic Pushed a Generation of Americans to Discover the Perks (and Risks) of Online Banking*, January 8, 2021, <https://time.com/nextadvisor/banking/how-the-pandemic-is-changing-banking/>; Ernst & Young Global Limited, *Four Ways COVID-19 is Reshaping Consumer Banking Behavior*, August 31, 2020, https://www.ey.com/en_us/banking-capital-markets/four-ways-covid-19-is-reshaping-consumer-banking-behavior.

In any case, as they consider changes to space needs and use, banks need flexibility to adapt to an uncertain future. Implementing the Proposal now would interfere with banks' ability to adapt to changing premises needs and arrangements in a post-pandemic working environment, detracting from their ability to hire competitively. The OCC should not finalize the Proposal without considering the full impact of these pandemic-related changes.

Additionally, although the pandemic is a current and illustrative example of why the OCC should accommodate adaptation to changing circumstances with a principles-based, rather than rules-based, approach, there will undoubtedly be other events in the future where the flexibility of a principles-based approach to premises would enable prudent responses by banks.

B. Implementation of the Proposal would upset industry expectations and practice based on longstanding and well-understood judicial and administrative precedent interpreting a provision of the National Bank Act that has not been amended and that has been interpreted by courts as allowing banks to maximize the utility of their lawfully acquired real estate for just as long.

The Proposal would impose substantial limitations on banks' authority to purchase, hold and convey real estate necessary for the accommodation of their businesses notwithstanding that there have been no changes to the statutory framework that would require the OCC to do so or any identified instances that suggest that the premises activities of banks present risks that must be addressed by changes in the regulation. Moreover, we are not aware, and the OCC has not suggested, that banks have been engaged in impermissible real estate speculation or development.

A national bank's authority to own real estate is governed by 12 U.S.C. § 29 (First), which is an original component of the National Bank Act and has been in place for more than 150 years.⁸ The statute provides that a national bank may "purchase, hold, and convey real estate . . . such as shall be necessary for its accommodation in the transaction of its business."⁹ Although the Home Owners Loan Act (the "HOLA") does not specifically address Federal savings associations' ownership and use of banking premises, historically, the former regulators of Federal savings associations 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 same regulations

⁸ 12 U.S.C. § 29 (First) has remained largely unchanged since it was enacted in 1863; at the time it read "[t]hat it shall be lawful for any such association to purchase, hold, and convey real estate as follows: First. Such as shall be necessary for its immediate accommodation in the transaction of its business," as compared to its modern language adopted in 1927: "[a] national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its accommodation in the transaction of its business."

⁹ 12 U.S.C. § 29 (First).

have governed the premises authority of national banks and Federal savings associations since 2015.¹⁰

There have been no changes to the National Bank Act or the HOLA that would require the OCC to impose the Proposal's novel limitations on banks' premises authority in a manner that is inconsistent with over 100 years of judicial precedent and almost 40 years of published OCC precedent. Both the courts and the OCC have followed a principles-based approach, which is flexible but within the fundamental limitations on the authority of national banks to establish and utilize bank premises—*i.e.*, a bank may hold property as bank premises only if: (1) the bank possesses a good-faith banking purpose supporting its use of the property and (2) the bank's ownership of the property is not part of an effort to circumvent the National Bank Act's restrictions on property ownership.¹¹ Courts and the OCC have never imposed a minimum percentage of usage threshold or a prescriptive percentage calculation methodology on banks' premises authority. In *Brown v. Schleier*, a leading case on the authority of national banks to establish and utilize bank premises from over 100 years ago, the Circuit Court stated:¹²

If the land which [a national bank] purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.

The Proposal, by imposing a hard-and-fast 50 percent minimum occupancy requirement irrespective of the facts and circumstances, would severely curtail current and planned use of many bank premises, which would be inconsistent with case law and decades of precedents. For example, banks historically have been permitted to reduce their overall premises costs through leasing the excess space in a building to third parties, relying on cases such as *Brown* and on decades of OCC precedent. In addition, the Proposal could prohibit a

¹⁰ Integration of National Bank and Federal Savings Association Regulations, 80 Fed. Reg. 28346, 28377 (May 18, 2015).

¹¹ See, e.g., *Brown v. Schleier*, 118 F. 981 (8th Cir. 1902), aff'd, 194 U.S. 18 (1904); and Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcommittee on Government Management, Finance, and Accountability of the Committee on Government Reform, United States House of Representatives (September 7, 2006) ("Williams Testimony"), at 6.

¹² *Brown v. Schleier*, 118 F. at 984. By prescribing specific requirements, such as the 50 percent minimum usage threshold and the requirement that the percentage of usage calculation be applied to "each building or severable piece of land," would deviate from the historical approach and constrain the ability of banks to acquire, hold or lease property as premises even if its use of such property is consistent with the principles drawn from the precedent.

bank that needs to be in a particular location for its retail network or other business needs from acquiring existing space if the size of the space is larger than the bank needs, even if the available space is priced more competitively than an alternative location, if such an alternative location exists.

Finally, the Proposal does not appear to fill any gap in the regulatory tools available to the OCC to prevent impermissible real estate speculation or development. The OCC currently has the ability to object to a bank's premises plans under its existing premises regulations and in its supervisory capacity. Banks must either obtain the approval of the OCC before investing in premises, or, if the bank meets certain requirements, provide an after-the-fact notice to the OCC with respect to its investment in premises, giving the OCC the opportunity to object to any such investment.¹³

C. The OCC's stated rationale for the Proposal does not justify eliminating or limiting well-established bank powers.

The stated goal of the Proposal is to "codify and clarify a transparent and consistent set of principles for [bank] premises" that would "meet the needs of modern [banks] while ensuring consistent application of and adherence to the limitations of 12 U.S.C. 29 and the [Home Owners Loan Act]."¹⁴ Unlike, however, other recent revisions to the OCC's Part 7 regulations that were finalized in 2020,¹⁵ which codified and clarified existing OCC precedent,¹⁶ the Proposal would propose new rules and eliminate or substantially limit well-established bank powers without providing meaningful rationale. Moreover, with due respect, the Proposal is more about arbitrary rules rather than principles.

Specifically, the Preamble provides three main reasons for the Proposal: reliance on precedent alone does not provide a clear rule to banks and the public on what constitutes permissible and impermissible real estate ownership by banks; existing precedent was largely formed at a time when the banking industry was different than the one in existence today (*i.e.*,

¹³ 12 U.S.C. § 371d; 12 C.F.R. § 5.37(d). The OCC reviews after-the-fact notices for consistency with safe and sound banking practices and OCC policy. Comptroller's Handbook: Bank Premises and Equipment, 31 (December 28, 2018) ("Handbook"). Banks may also submit their requests for an investment in bank premises in connection with a bank's application for a business combination, branch or branch relocation, change in main home or office location, or other corporation applications filed with the OCC. Handbook, at 8.

¹⁴ Proposal, at 7981.

¹⁵ Activities and Operations of National Banks and Federal Savings Associations, *supra* note 3.

¹⁶ The OCC indicated that many of its revisions to Part 7 provided banks more flexibility with respect to various operations. *See, e.g.*, Activities and Operations of National Banks and Federal Savings Associations, *supra* note 3, at 83698-99 ("The OCC agrees with the commenter that there should be flexibility related to the legal analysis underlying the tax availability determination."; "The OCC agrees with these commenters that national banks and Federal savings associations should be afforded the flexibility to choose contractual remedies as appropriate.")

prior to interstate banking), and the rules must apply to both community banks and large banks; and commercial real estate has “changed greatly” in the past several decades and it is difficult to square “modern” premises arrangements (*e.g.*, mixed-use developments, corporate campuses, offsite, shared or virtual workspaces, etc.) with premises precedent.

However, the OCC’s stated rationales for the Proposal fail to justify the need to abandon the OCC’s current approach to premises. First, the Proposal is not needed to increase transparency to the public because the OCC’s existing rules and interpretations and their application are already transparent to the public. They are readily available (including on the OCC’s website), clearly written and well reasoned.¹⁷ Published OCC interpretations and guidance typically describe specific fact patterns, and are written so as to allow readers to understand the factors that the OCC has considered in determining whether a proposal was permissible.

Second, the Proposal states that the Proposal is necessary because the national bank premises precedent was largely formed at a time when the banking industry was different than the one in existence today, and that the principles from the 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”¹⁸ and that “[b]ank premises rules in the present day must apply to both 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.”¹⁹ Because the OCC’s existing rules regarding premises already apply to both community banks and large banks, no change is necessary.

Indeed, the very reasons cited by the OCC support the retention of the principles-based approach as opposed to a shift to a rules-based approach. Banking has, of course, changed and will continue to evolve and change, including as a result of the pandemic. A rules-based approach even if it were appropriate now would no longer be within a short period of time.

Likewise, the very fact that, as the Proposal points out, community banks and large banks have very different business needs for premises supports the need to retain the current OCC’s principles-based approach to bank premises requiring consideration of all the facts and circumstances, including a bank’s size, location and needs.

Finally, the specific examples of changes to commercial real estate in the Proposal—mixed-use developments and corporate campuses—are not as novel or as recent as

¹⁷ Handbook; Williams Testimony, at 7-8.

¹⁸ Proposal, at 7980. However, a significant portion of the published premises interpretations, including seven out of the nine letters cited in footnote 12 of the Proposal as “outstanding,” were issued after the interstate branching became widely possible after enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

¹⁹ Proposal, at 7980-81.

the Proposal makes them out to be, and as a result, do not justify the need for the Proposal. Both mixed-use developments and corporate campuses have existed for many years and have been dealt with by the OCC. In one case, the OCC permitted a bank to construct a mixed-use building that contained office space, ground-level retail, restaurant space, hotel space and condominiums in order to help finance the building's construction and to rejuvenate the local area.²⁰ In addition, corporate campuses have been used by technology and innovation companies since the 1950s, and the OCC has found that mixed-use developments were appropriate bank premises on several occasions, dating back to as early as 1998.²¹

D. The OCC's current flexible approach is better suited than the Proposal's one-size-fits-all approach to address the complexity, uniqueness and changing nature of banks' businesses and their premises needs.

The varied nature and size of real estate parcels and potentially limited availability of appropriate parcels for a bank's operations make it nearly impossible to establish a workable, bright-line, one-size-fits-all rule regarding bank premises.

It has long been recognized that each parcel of real estate is unique.²² The needs of a bank for a particular location or purpose are equally unique. A one-size-fits-all rule would not be an effective approach for the many different premises scenarios that may be considered by banks. For example, the size requirements of bank premises vary tremendously and could range from as little as 10 square feet for ATM locations to millions of square feet for bank headquarters and technology facilities.

The flexibility of the OCC's current approach has permitted the OCC to promptly respond to banks' changing needs for premises. In the ordinary course, banks compete with non-bank firms for talent and employees, including technology expertise talent, as banks

²⁰ OCC Interpretive Letter No. 1044 (December 5, 2005).

²¹ Benjamin Grant, *The Corporate Campus: A Local History, A glimpse at how Silicon Valley became Silicon Valley*, Urbanist Article (September 21, 2016), available at <https://www.spur.org/publications/urbanist-article/2016-09-21/corporate-campus-local-history>; *see, e.g.*, OCC Conditional Approval No. 298 (December 15, 1998) (a national bank was permitted to develop a proposed complex consisting of three office buildings, two parking garages and space for employee food service and related vendors, where the bank anticipated that it would initially occupy 75 percent of the proposed complex and, at all times, would occupy at least 25 percent of each of the three office buildings in the complex); and OCC Interpretive Letter No. 1034 (April 1, 2005) (a national bank was permitted to construct a complex consisting of two buildings, ground-level covered parking and an underground parking facility shared by the two buildings and was permitted to change its usage of space within the complex as its facilities needs in the metropolitan area changed).

²² *See, e.g.*, *Friendship Manor, Inc. v. Greiman*, 581 A.2d 893, 897 (N.J. 1990) ("There is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey."); *Woliansky v. Miller*, 661 P.2d 1145, 1147 (Ariz. Ct. App. 1983) ("Specific performance is ordinarily available to enforce contracts for the sale of real property because land is viewed as unique and an award of damages is usually considered an inadequate remedy.").

increasingly focus on digital banking, technology and innovation. Office locations and amenities are a significant factor in many potential employees' decisions on a particular employer. If banks were prohibited from offering desirable workplaces to prospective employees by the Proposal, banks would be at a competitive disadvantage to non-banks for attracting and hiring talent.

E. The lack of flexibility in the Proposal could result in significant financial harm to banks.

The Proposal could result in substantial financial costs for banks given the divestiture requirements that apply to "former banking premises." Once a bank's use of a building or severable piece of land falls below the 50 percent usage threshold, under the Proposal, the property or building would no longer be "bank occupied premises" and, therefore, would become "former banking premises," which is a type of other real estate owned ("OREO"). A bank must dispose of former banking premises within five years with an additional five years upon the OCC's approval and is subject to restrictions on the ways in which it may dispose of such premises as well as on its expenditures related to such former banking premises.²³ As a result, if the bank's need for staff at a particular office location over time decreased, whether because of changing market needs (such as increased use of online banking) or increased efficiency, a bank could be forced to sell the entire property if it is unable to dispose of a portion of the facility or land to meet the 50 percent usage threshold, despite still having a good-faith use for the former premises as bank premises. The Proposal, therefore, could disincentivize a bank from using its premises in the most efficient manner and require complex subdivision and costly disposal of some or all of a bank's property. In many cases a partial divestiture of premises would not be feasible, which further increases the expected financial and operational burdens of the Proposal on banks. Contractual arrangements with landlords frequently prohibit or substantially limit a tenant's ability to sublet, and generally do not release a tenant from its responsibility under the contract. In addition, local laws and requirements may make it nearly impossible to sell off portions of a facility or site (including laws applicable to the subdivision of property or creation of condominium units, requiring many years to complete).

Finally, a bank would be at a competitive disadvantage in dealing with potential buyers or sublessors of former banking premises. For example, a potential buyer or sublessor of former banking premises that recognized that a bank must divest property within a certain period of time could use that information to extract a lower price to the detriment of the divesting bank. Similarly, a tenant may be wary of leasing or subleasing from a bank on

²³ See 12 U.S.C. § 29; and 12 C.F.R. Part 34, Subpart E. A national bank must dispose of its former banking premises at the earliest time that prudent judgment dictates, but not later than the end of five years commencing from the date that (i) a bank completes relocation from former banking premises to new banking premises or ceases to use the former banking premises without relocating, or (ii) a national bank decides not to use real estate acquired for future banking expansion, in each case unless an extension is granted by the OCC. The OCC may grant multiple extensions, although the extensions, in the aggregate, may not exceed an additional five years. 12 C.F.R. § 34.82.

reasonable market terms upon learning that the bank's ability to hold the property is more limited, such as in the case of the bank falling below the minimum 50 percent usage requirement under the Proposal.

III. If the OCC nevertheless determines to move forward with the Proposal, a number of changes should be made before a rule is finalized.

A. If a minimum percentage of usage test must be established, it should be set at 25 percent and should be treated as a "safe harbor" applied only to new investments in real estate.

The Proposal 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, or consistent with [12 C.F.R. § 7.1024(c)(2)(ii) (as proposed)], 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."²⁴

The OCC requested comment as to whether 50 percent is the appropriate percentage for bank occupied premises, and whether the percentage should be higher, such as 75 percent, or lower, such as 25 percent.²⁵ Our members strongly oppose the 50 percent requirement that would be created by the Proposal. The Proposal does not provide a rationale for setting the threshold at 50 percent, and there is not, to our knowledge, a clear pattern of setting the threshold at 50 percent in OCC precedent or case law. In fact, OCC precedent and case law do not contain a bright-line percentage requirement, and have instead been based on analyses of the facts and circumstances of the specific situation. However, if a minimum percentage must be included in a final rule, we believe it should be set at 25 percent, rather than the proposed 50 percent, and it should be a "safe harbor" on which the banks could rely.

The Proposal's bright-line percentage of usage test of 50 percent is more restrictive than most published OCC precedent, and does not appear to permit any exceptions on a case-by-case basis. Under the current approach, the minimum percentage of bank occupancy generally has varied between 15 percent and 50 percent (but has been as low as 5 percent) in judicial and OCC interpretations, with excess space in the premises available for use by third parties.²⁶ For example, in one letter, the OCC permitted the demolition of the bank's existing branch building and the construction of a new bank complex, where the bank's

²⁴ 12 C.F.R. § 7.1024(a)(2) (as proposed).

²⁵ Proposal, at 7981-82 (Question Two).

²⁶ Williams Testimony, at 6-7.

occupancy could be as low as 11 percent.²⁷ Similarly, the OCC permitted a bank to develop a new, mixed-use office building adjacent to the bank's existing headquarters.²⁸ The bank was permitted to construct the new mixed-use building, including offices, residential space and a hotel where the bank initially anticipated occupying 25 percent of the available office space and approximately 10 percent of the available room-nights in the hotel (the residential space was planned to be sold as condominiums).

Under the Proposal, even after a bank satisfies the minimum percentage of usage requirement, the bank still needs to demonstrate that the excess space or capacity is "legitimately acquired or developed" and has a "nexus" with the transaction of the bank's business, and that the bank's use of the excess space or capacity is to "optimize the use of bank occupied premises or avoid economic loss or waste."²⁹ We believe that this requirement creates substantial uncertainty and would make both planning and negotiation with third parties difficult and often impossible. Under a safe harbor approach, a bank that has satisfied the minimum percentage of usage test would be deemed in compliance with the statutory and regulatory requirements regarding permissible bank premises and, accordingly, would be permitted to use excess space or capacity as it deems appropriate without the need to further demonstrate that such usage satisfies any additional requirements relating to excess space or capacity. We believe a 25 percent minimum percentage of usage safe harbor should satisfy any concerns about transparency of the OCC's rules without eliminating all the current flexibility for the OCC and banks.

In connection with the safe harbor approach, a final rule should also provide an approval process through which a bank may request approval from the OCC to acquire, hold or lease premises that do not satisfy the 25 percent minimum percentage of usage safe harbor. In determining whether to approve a bank's request under such a process, the OCC would consider a variety of factors, such as the bank's demonstrated need for space in that location, the availability of suitable alternatives, the relative value of the portion of the space used, constraints imposed by local laws and zoning and other factors identified in current OCC precedent.

In connection with the safe harbor and approval process for premises that fall outside the safe harbor, the OCC should not provide in its premises regulations specific

²⁷ OCC Interpretive Letter No. 1034 (April 1, 2005). The OCC appears to reach this result because of the changing circumstances of the area, including the condemnation of nearby property for light rail construction, a consequent lack of other adequate facilities for the bank's branch, and that new construction would be the most cost-effective approach for the bank.

²⁸ OCC Interpretive Letter No. 1044 (December 5, 2005). The bank demonstrated need for additional office space and that the mixed-use nature of the building was necessary to make it economically viable in the downtown area where the bank's headquarters were located, which would also aid in the rejuvenation of the downtown area.

²⁹ 12 C.F.R. § 7.1024(c) (as proposed).

examples of impermissible uses that would not be permitted.³⁰ Banks should be able to maximize the return on their permissible investments, with the bounds of existing good-faith requirements for premises, and restricting the types of tenants could make it more difficult for banks to do so.

B. Legitimately held premises should not be automatically characterized as “former banking premises” when a bank’s use of the premises falls below any minimum percentage of usage threshold in a final rule.

Under the Proposal, once a bank’s percentage of usage of a bank occupied premises falls below the minimum percentage, such premises would no longer be “bank occupied premises,” and become “former banking premises.”³¹ As discussed in Section II.E above, former banking premises are OREO subject to limited holding periods and divestiture requirements under the OCC’s regulations, and the Proposal’s approach with respect to former banking premises could result in significant financial harm to banks.

If, in the ordinary course of planning its space needs, a bank decides to gradually reduce its occupancy of certain bank occupied premises pursuant to a plan designed in good faith (*i.e.*, based on factors other than prolonging the use of premises authority for speculation), including as a result of more efficient use of the premises, we believe the bank should be afforded the opportunity to demonstrate why the bank should be permitted to continue to hold such premises under premises authority even when its occupancy of the premises is less than any established minimum percentage of usage requirement until it has vacated the premises. For example, in some cases, the process for a planned exit from bank premises for a bank may take several years to implement, as it moves employees and needed equipment in groups (rather than *en masse*) to avoid unsafe and unsound disruptions to its operations. If the OCC nevertheless decides not to adopt this suggestion, there should, at a minimum, be a process by which a bank may request that it be permitted to continue to hold certain real estate as bank premises. While a bank’s request for such an exception is pending with the OCC, the requirement for it to dispose of the property in question “at the earliest time that prudent judgment dictates” under the OCC’s OREO regulations³² should be suspended, and the bank should not be required to market the property actively or to take other steps to divest it.

³⁰ The OCC requested comment on whether it should include specific examples in § 7.1024(d) of impermissible premises. Proposal, at 7984 (Question Eight).

³¹ 12 C.F.R. §§ 34.81; 34.86.

³² 12 C.F.R. § 34.8(a)(1).

C. The OCC should not adopt a strict, mechanical approach to calculating the percentage of usage.

Neither the proposed rule, nor OCC precedent, specifically addresses a complete methodology for calculating the percentage of use.³³ We believe that, if the OCC finalizes the Proposal, the OCC should not attempt to establish a specific and uniform methodology for calculating the percentage of use. Instead, banks should be expected to implement a reasonable methodology taking into account the characteristics of particular properties.

A specific metric or formula intended to be suitable for all potential premises would be flawed on its face given the uniqueness of real estate. For example, square footage of a building may not always be the appropriate metric for purposes of the percentage of use calculations because the value and utility of a square foot can vary significantly even within the same building (*e.g.*, the value of a square foot of the ground floor in a building can be multiple times the value of a square foot on an upper floor in the same building). Additionally, there are different measures of square footage (*e.g.*, “gross,” “usable” and “rentable”), which treat areas such as elevator shafts, mechanical area, space occupied by walls and common areas differently.

D. Any minimum percentage of usage requirement in a final rule should not be applied to “each building or severable piece of land.”

For the reasons described below, a bank should not be required to calculate usage for each separate lot or by “each building or severable piece of land,” as the Proposal would require.³⁴

First, “premises” has not historically been defined by reference to a particular parcel or on a per building basis. In fact, the OCC has historically permitted percentage of use to be calculated for an entire complex consisting of multiple buildings and other facilities instead of requiring the calculation be done for each building or facility that is a component of the complex.³⁵ An approach that considers all the facts and circumstances of a particular facility is consistent with OCC precedent and would be the most reasonable approach in light of the multiple iterations that any particular facility may present.

³³ The OCC requested comment on certain specific methods for calculating the percentage of usage. Proposal, at 7982 (Question Two).

³⁴ 12 C.F.R. § 7.1024(a)(2) (as proposed). If the “each building or severable piece of land” language in proposed 12 C.F.R. § 7.1024(a)(2) is a component of the definition of “bank occupied premises” in a finalized rule, it should be clarified that the denominator of the minimum percentage of use requirement is only the portion of a building or severable piece of land owned or leased by the bank and not necessarily the full building or severable piece of land. The proposed definition of “bank occupied premises” refers to “more than 50 percent of each building or severable piece of land” (emphasis added), without any recognition that the bank may not own or lease the entirety of each building or severable piece of land.

³⁵ See *supra* note 21.

Second, a methodology based on calculations at the single building or separate parcel basis would yield inconsistent results based on factors completely unrelated to how property is or can be used. There are many reasons why multiple buildings are constructed on a single parcel of land and why contiguous land may be carved into multiple parcels such as historical subdivisions, zoning, taxation, estate planning and other local law and requirements. Local law, deed restrictions and local government bodies could also impose limits on the overall sizes and heights of buildings, sizes and maximum occupancies of parking lots and require dedicated “green space” or space available to the public as a condition for approval of a facility.

For example, in a campus environment, key facilities such as a cafeteria or daycare facility and other amenities that are essential to the viability and attractiveness of a bank’s premises may be located in separate buildings of which bank persons do not use a majority of the square footage. The need to break up ownership or control over separate buildings for such a reason would be impractical and highly detrimental to the commercial viability of the campus. Additionally, ownership or control of contiguous parcels of land or multiple buildings may be necessary to ensure security for a bank and its employees and customers and could provide a bank with the flexibility to expand its facilities and to enhance its business continuity planning efforts.

Finally, this aspect of the Proposal would also lead to different treatment of permissible bank premises outside larger cities, without any clear policy rationale. For example, a bank would be permitted to occupy 50,000 square feet of a multi-story, 100,000-square-foot building in a city center that the bank owns. It is unclear, however, from the Proposal, whether a bank would be permitted to own one parcel of land in the suburbs that has four separate buildings of 25,000 square feet each (*i.e.*, a total of 100,000 square feet) and then occupy only two of the buildings (*i.e.*, for a total of 50,000 square feet). It is also unclear whether the conclusion would be different if the four separate buildings in the prior example were located on two or more adjacent parcels of land instead of one parcel of land.

E. The transition provision should be substantially broadened in a final rule.

The proposed transition provision is impractically narrow, given the significant reduction in banks’ authority to hold premises and the consequently large amount of real estate that might be subject to it. We submit that any rule adopted should recognize that if a bank legitimately had acquired premises prior to the effective date of any new limitations imposed by the OCC, it should be entitled to continue to hold and own the relevant property subject only to the requirements that would have applied under then-effective OCC interpretations.³⁶

³⁶ The OCC adopted a transition provision similar to the one in the Proposal with regards to Federal savings associations when it integrated the regulations applicable to national banks and Federal savings associations to ensure consistent standards for national banks and Federal savings associations equally and to ensure safety and soundness concerns were satisfied. See 12 C.F.R. § 7.100(e); Integration of National Bank and Federal Savings Association Regulations, *supra* note 10, at 28378. The same rationales do not apply in the case of the Proposal. First, the Proposal would apply to national banks and Federal savings associations

Banks have made significant capital and investment decisions based on the premises regulations and interpretations in effect at the time, and would be unfairly penalized by a transition provision that could effectively, due to its severe restrictions, “freeze” the grandfathered premises in time and, therefore, substantially diminish the value of such lawfully acquired premises. As stated in *Brown*, “the [National Bank Act] ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purpose to deal with it otherwise than a prudent landowner would ordinarily deal with such property.”³⁷ The proposed transition provision would deprive banks of the ability to exercise the measure of judgment and discretion of a prudent landowner in dealing with grandfathered premises.

As owners of property, banks should be able to make improvements to their properties to keep pace with market standards and to maintain their value, and to renew, modify and terminate existing leases as they see fit. Contrary to its stated purpose of creating uniformity and ease of determination, under the Proposal, banks would be required to seek prior OCC approval of modifications, expansions or improvements of grandfathered premises except for “routine maintenance.”³⁸ Such an approach would result in a constant need for banks to seek permission from the OCC for evaluations and approvals of improvements and modifications to individual properties, significantly increasing the regulatory burden on the OCC in comparison to the current regime. Such evaluations and approvals would also delay and hinder any changes that the OCC ultimately approves. For example, under the Proposal, actions that seek to improve a grandfathered building and that do not change the use of the building in any meaningful way, such as the installation of solar panels or steps to improve the energy efficiency of a building, would require the prior approval of the OCC and delay the ability of the bank to benefit from such improvements. The Proposal would even appear to require a bank to seek OCC approval to repair damage to its grandfathered premises caused by natural disasters, as the repair would not be “routine maintenance,” at a time when any delay caused by seeking such approval could hinder the bank’s business continuity and recovery efforts.

F. A final rule should continue to provide a non-exhaustive list of the type of real estate that may qualify as “bank occupied premises,” as in the current rule.

A final rule, if any is adopted, should provide a non-exhaustive list of the type of real estate that may qualify as bank occupied premises, as in the current rule, and should incorporate examples included in the current regulation as well as the new examples in the

equally. Second, the Proposal identifies no safety and soundness concerns with respect to existing premises, and in any event, the OCC already has sufficient power to ensure that such concerns are satisfied, without imposing additional requirements in a transition provision that would penalize banks.

³⁷ *Brown v. Schleier*, 118 F. at 984.

³⁸ The OCC requested comment on the transition provision in Question Ten of the Proposal. Proposal, at 7984. At the very least, any rule adopted should not require a approval for changes that would not constitute routine maintenance.

Proposal. The OCC regulation currently sets forth a non-exhaustive list of the types of permissible real estate for banks, including (1) premises that are owned or occupied by the bank or its branches or consolidated subsidiaries; (2) real estate acquired and intended, in good faith, for use in future expansion; (3) parking facilities that are used by customers or employees of the bank or its branches or consolidated subsidiaries; and (4) subject to certain conditions specified in the rule, certain residential or lodging property for the use of bank officers, employees or customers.³⁹ The Proposal includes other examples of “facilities operated by third parties to provide amenities and services to bank persons that facilitate bank business operations” (which are included in the definition of “bank occupied premises”), including an office gym, cafeteria, daycare or printing center.

* * *

³⁹ 12 C.F.R. § 7.1000(a)(2)

The Associations appreciate the opportunity to provide their comments, and would welcome the opportunity to discuss them further with you. If you have any questions, please contact Gregg Rozansky at (917) 863-5945 or Gregg.Rozansky@bpi.com, Shaun Kern at (202) 663-5253 or skern@aba.com or Christopher Cole at (202) 425-6533 or chris.cole@icba.org.

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Annex A: The Associations

The Bank Policy Institute

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The American Bankers Association

The American Bankers Association is the voice of the nation's \$21.9 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$17 trillion in deposits, and extend more than \$11 trillion in loans. Learn more at www.aba.com.

The Independent Community Bankers of America

The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.