



How Banks Use Their Own Premises: The OCC Proposes a Solution in Search Of a Problem (and Does so at the Worst Possible Time)

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At a time when banks are trying to determine what a post-pandemic workforce will look like, the OCC, the regulator for federally chartered banks, has proposed to create new, rigid rules on how banks can use their own premises and how employees are to occupy those physical locations.

Banks have historically been subject to strict limits on their ability to hold real estate (including homes, office buildings, strip malls) as a way to ensure they don't engage in speculative real estate activities. There are a few key and sensible exceptions, one of which allows a bank to take title to real estate that secures a loan where the borrower defaults. Without the exception, banks couldn't practically lend against real estate collateral. Another key exception allows banks to hold or lease the real estate they use to operate their banking business, like a branch or a headquarters building. Without the exception (known as the "bank premises" exception), banks would have trouble serving customers from a physical location or having a place for their employees to work. It'd be like telling GM they can't own their automotive plant or Ace that they can't own their hardware store.

For decades, courts and the OCC have followed a principles-based and flexible approach to evaluating the bank premises exception based on a consideration of all the facts and circumstances for each site and its proposed intended use by the bank. Under this approach, a bank may hold property as premises only if the bank possesses a good-faith banking purpose supporting its use of the property and the bank is not engaged in improper real estate speculation or development. This flexible approach has worked well in the past in light of the complexity, uniqueness and changing nature of banks' businesses and their premises needs as well as changes in the commercial real estate market over time.

The OCC's new proposal, however, would abandon this long-standing, well-established approach and put pressure on the banking industry to stick to new, rigid guidelines about how they use their office buildings, facilities and land at a time when banks, like all businesses, need flexibility in determining what a post-pandemic work environment will look like. Importantly, the OCC in its proposal has failed to identify a justification for this rulemaking and has not identified any instance of banks engaging in any impermissible or improper use of their premises. Notably, the proposal would require that more than 50 percent of "each building or severable piece of land" owned or leased by a bank be used by the bank, a new bright-line standard that is an arbitrary threshold with no justification and would make it much harder for banks to adapt to post-pandemic reality.¹ This new, strict

¹ It warrants mention that the proposal does not appear to fill any gap in the OCC's regulatory tools from a safety and soundness perspective. 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.

approach during already uncertain conditions has led to BPI, the American Bankers Association and the Independent Community Bankers of America to call on the OCC to withdraw the proposal and avoid imposing bright-line rules on how banks use their premises in a recent comment [letter](#).

Furthermore, several trends are converging as a result of the COVID pandemic that could upend how banks use their premises and make this OCC proposal even more difficult to implement. During the pandemic, banks are following strict guidelines, including social distancing, working from home and limiting use of common workspaces to avoid spreading the virus, which have a significant impact on banks' real estate usage. Even with vaccines accelerating the return to a normal economy, public health experts have repeatedly told businesses they should continue to stick to protective measures like wearing masks and social distancing. Many customers may also prefer to bank online rather than visiting a branch. Employees may also desire the added flexibility of working from home in the long term, even after it's safe to work side-by-side in cubicles again. Many businesses have also used the pandemic as an opportunity to move workers away from expensive city centers. And during the pandemic, the number of employees in bank buildings may fluctuate based on sick employees isolating at home or staggering shifts to avoid close contact with colleagues. Banks will need to rethink how and where their employees work in order to adapt to the future – and they need maximum flexibility from regulators to enable those changes.

The timing and substance of the OCC proposal makes dealing with these uncertainties even more difficult. The proposal would require a bank to treat its existing premises as “former banking premises,” and thereby force the bank to divest it, if the bank's usage of the premises falls below 50 percent. Thus, banks are incentivized to artificially use at least 50 percent of every premises they own, even if they don't need it in these changing times. In other words, the proposal acts to disincentivize banks from using their premises in the most efficient manner. The proposal could also lead to complex subdivision and costly disposal of some or all of a bank's property. These requirements would put banks at a competitive disadvantage in dealing with potential buyers or sublessors of so-called “former banking premises,” because buyers would know the banks are being forced by the OCC to off-load the property. This is another reason why the pandemic makes this a particularly poor time for such a proposal – because of the changing nature of banks premises needs during and post pandemic, banks might be forced to divest property in an unusually weak market for commercial real estate.

Moreover, the proposal's very narrow transition provision would also provoke more uncertainty and preclude banks from adapting to the pandemic or other changing circumstances. Banks would need regulatory approval for “modifications, expansions or improvements” to their existing premises, other than “routine maintenance.” But what does routine maintenance mean? This provision could cause problems for banks trying to refit their office space for post-pandemic life. For example, what if a bank wants to upgrade its HVAC system to one with better air filtering to prevent the virus spreading inside the building? That upgrade could potentially require the OCC's approval, a roadblock that would slow banks down as they make changes that support public health goals.

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 (e.g., with respect to planning for future space needs, carrying out office relocations, and operating premises in an efficient and cost-effective manner).

For all these reasons, the banking industry's view is that the OCC should withdraw this misguided proposal.

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