

July 23, 2020

Custody of Crypto Assets by National Banks

OCC Interpretive Letter Confirms National Bank Authority to Provide Cryptocurrency Custody Services

SUMMARY

On July 22, 2020, the Office of the Comptroller of the Currency (the “OCC”) released publicly an interpretive letter¹ confirming the authority of a national bank to provide cryptocurrency custody services for customers, including by holding the unique cryptographic keys associated with cryptocurrency. Noting that several states had already passed legislation and promulgated regulations allowing banks chartered in those states to offer custody services for digital assets, the OCC concluded that a national bank could offer cryptocurrency custody services to its customers as part of its existing custody business. Acknowledging that safekeeping of customer assets has long been a core service provided by banks, and that the OCC’s regulations explicitly authorize national banks to perform through electronic means any activities that they are otherwise authorized to perform, the letter concludes that providing custody services for cryptocurrency falls within the authority of national banks. The letter also states that national banks may provide banking services to any lawful business, “including cryptocurrency businesses, so long as national banks effectively manage the risks and comply with applicable law”,² including the OCC’s regulations governing fiduciary obligations, where relevant.

THE INTERPRETIVE LETTER

In an interpretive letter released to the public on July 22, 2020, the OCC concluded that a national bank may provide custody services for “cryptocurrencies,” including by providing storage for the cryptographic keys associated with these assets. Recognizing the long history of safekeeping and custody services provided by banks, the letter concludes that “providing cryptocurrency custody services, including holding the unique cryptographic keys that permit the control and transfer of the customer’s cryptocurrency, is a

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modern form of these traditional bank activities.”³ The letter cites prior interpretive letters issued by the OCC authorizing national banks to provide similar services with respect to other electronic assets, including escrow encryption keys used in connection with digital certificates, and secure web-based document storage, retrieval and collaboration of documents and files containing personal information or valuable confidential trade or business information.⁴ The letter acknowledges that, in many cases, providing custody for cryptocurrencies will, in fact, mean providing custody for the related cryptographic keys, and that these prior letters already establish that national banks have the authority to provide custody for this type of digital assets.⁵ In a statement that may have broader applicability, the letter emphasizes that “[t]he OCC’s regulations . . . explicitly authorize national banks to perform, provide or deliver through electronic means and facilities any activities that they are otherwise authorized to perform.”⁶

The OCC cautions that all such activities must be conducted “consistent with sound risk management practices” and must be aligned “with the bank’s overall business plans and strategies as set forth in OCC guidance.”⁷ Furthermore, to the extent the custodial services are provided in a fiduciary capacity, the national bank remains subject to the OCC’s fiduciary regulations,⁸ as well as other applicable law and the instrument that created the fiduciary relationship.⁹

The OCC identifies several categories of customer who may wish to obtain custodial services from national banks for these types of assets. The letter notes that, in general, the fact that a cryptographic key is the sole means to access cryptocurrency, and that such keys can be lost or stolen, may lead many holders of cryptocurrencies to seek a safekeeping location for those keys with the security and redundancy that banks can provide. The letter also notes that investment advisers may wish to utilize bank custodians for cryptocurrencies.¹⁰

Until now, both national banks and state banks have generally declined to provide custody services for cryptocurrencies and other virtual assets, due to the absence of clarity on permissibility and on regulators’ views of these activities generally. The absence of bank custodians in this area has presented a limiting and, to some degree, preclusive impediment to the development of some otherwise permissible financial innovations. By confirming that national banks may provide custodial services for these assets, the OCC’s guidance will help to expand the range of people and institutions that can invest in and hold digital assets and the manner in which they may be held.

For example, funds registered under the Investment Company Act of 1940, which are generally required to maintain custody of their assets at banks,¹¹ have been unable to hold cryptocurrencies. The SEC’s Division of Investment Management has identified “a number of significant investor protection issues that need to be examined” before registered funds investing in cryptocurrencies may be offered to retail investors.¹² While the OCC’s guidance may resolve some concerns about custody, other topics identified by the Division

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remain to be addressed, including concerns about valuation, liquidity, the feasibility of arbitrage for ETFs so that their market price adheres closely to their net asset value, and the risk of manipulation.

The letter may also make it practicable for broker-dealers to hold cryptocurrencies in customer accounts consistent with the requirements of the SEC's Customer Protection Rule.¹³ That, in turn, may enable registered investment advisers with retail customers, whose assets are commonly held in brokerage accounts, to advise on cryptocurrencies.

The letter includes a useful analysis of the types of cryptocurrencies currently in use and the manner in which they are held and transferred. For the most part, it addresses only those virtual assets that are generally viewed as "digital currencies" or "virtual currencies," *i.e.*, virtual assets that are designed to work as a medium of exchange and are created and stored electronically.¹⁴ However, in a footnote, the letter indicates that "[t]he term 'cryptocurrency' as used in this letter also encompasses digital assets that are not broadly used as currencies,"¹⁵ apparently including digital assets that are securities (whether in the traditional sense, held in digital form; or purely digital assets that are securities under the "*Howey test*")¹⁶ subject to the overall requirement that they effectively manage the risks and comply with applicable law.¹⁷ Furthermore, the broad statement that national banks are authorized to perform, provide or deliver through electronic means and facilities any activities that they are otherwise authorized to perform is consistent with the OCC's stated intention to further financial innovation.¹⁸

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ENDNOTES

- 1 Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers, OCC Interpretive Letter #1170 (Jul. 2020).
- 2 *Id.* at 1.
- 3 *Id.* at 6.
- 4 *Id.* at 6-7.
- 5 *Id.* at 8.
- 6 *Id.*
- 7 *Id.* at 9.
- 8 12 C.F.R. Part 9.
- 9 OCC Interpretive Letter #1170 at 9.
- 10 *Id.* at 4-5.
- 11 See Section 17(f)(1) of the Investment Company Act, 15 USC § 80a-17(f)(1), and the rules thereunder.
- 12 SEC Staff Letter: Engaging on Fund Innovation and Cryptocurrency-related Holdings (Jan. 18, 2018), available at www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm.
- 13 Rule 15c3-3 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.15c3-3.
- 14 OCC Interpretive Letter #1170 at 1.
- 15 *Id.* at 1 n.3.
- 16 *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946).
- 17 OCC Interpretive Letter #1170 at 1.
- 18 See, e.g., Chief Innovation Officer Discusses OCC Support of Responsible Innovation (June 25, 2019), available at <https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-70.html>.

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