

December 21, 2021

OCC Issues Interpretive Letter Regarding the Authority of Banks to Engage in Cryptocurrency Activities

OCC Confirms That National Banks Must Demonstrate Adequate Controls Before They Can Engage in Certain Cryptocurrency Activities

SUMMARY

On November 18, 2021, the OCC issued Interpretive Letter 1179 regarding (i) the authority of a bank to engage in cryptocurrency activities permitted under interpretive letters issued in 2020 and early 2021, and (ii) the authority of the OCC to charter a national trust bank. The letter notes that national banks and federal savings associations must demonstrate to the OCC that they have adequate controls in place prior to engaging in cryptocurrency activities. Banks that have yet to engage in cryptocurrency activities should refrain from doing so until they receive a notice of supervisory non-objection from the OCC; those banks that have already commenced cryptocurrency activities are not required to discontinue those activities, but should notify their supervisory office. The letter notes that all OCC-regulated banks should expect their cryptocurrency activities to be reviewed as part of the ongoing supervisory process.

A. PRIOR OCC INTERPRETIVE LETTERS

Over the course of 2020 and early 2021, the Chief Counsel of the Office of the Comptroller of the Currency (the “OCC”) issued three interpretive letters addressing the permissibility of national banks and federal savings associations to engage in certain cryptocurrency, distributed ledger and stablecoin activities (collectively, “cryptocurrency activities”).¹ These letters provided long-awaited clarity regarding the authority of national banks — and, indirectly, insured state-chartered banks — in several types of cryptocurrency activities.

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In Interpretive Letter 1170, issued in July 2020, the OCC determined that banks could provide cryptocurrency custody services, including holding unique cryptographic keys, on the basis that these activities represented a modern form of traditional bank custodial and safekeeping services.² The OCC concluded that banks may provide such custodial services because they are a permissible form of a traditional banking activity that banks can perform via electronic means.³

Interpretive Letter 1172, issued in September 2020, concluded that banks may hold deposits serving as reserves for stablecoins that are backed on a 1:1 basis by a single fiat currency and held in hosted wallets under banks' existing authority to receive deposits.⁴

Interpretive Letter 1174, issued in January 2021, confirmed that banks may use distributed ledgers and stablecoins to facilitate and engage in payment activities, and further noted that using independent node verification networks to facilitate payments transactions is permissible because it represents a modern form of traditional payment services.⁵ This letter also concluded that—just as banks may buy and sell electronically stored value (ESV) to convert into dollars and complete customer payment transactions—banks may also buy, sell and issue stablecoins to facilitate payments.⁶

In all three interpretive letters, the OCC qualified its guidance by noting that banks should engage in cryptocurrency activities only if they could do so in a way that was consistent with “safe and sound banking practices.”⁷ Interpretive Letter 1179 reiterates and expands upon this requirement, noting that a cryptocurrency activity is “not legally permissible if the bank lacks the capacity to conduct the activity in a safe and sound manner,”⁸ and specifies how banks must demonstrate to the OCC that they are meeting this standard.⁹

B. INTERPRETIVE LETTER 1179

1. Supervisory Process for Cryptocurrency Activities

Interpretive Letter 1179 explains the process by which a bank may demonstrate its capacity to engage in cryptocurrency activities in a safe and sound manner. Before engaging in any cryptocurrency activities, a bank is required to notify its supervisory office, in writing, of the proposed activities and must receive written notification of the supervisory non-objection.¹⁰ A bank already engaging in cryptocurrency activities prior to the publication of the letter is not required to obtain supervisory non-objection, but it must still provide notice to its OCC supervisory office. Furthermore, all banks will be expected to demonstrate the sufficiency of their control systems as part of the ongoing OCC supervisory process.¹¹

A bank may obtain supervisory non-objection by demonstrating that it has implemented risk management and measurement processes appropriate for the risks associated with cryptocurrency activities.¹² In particular, Interpretive Letter 1179 notes that a bank should (i) have adequate systems in place to identify, measure, monitor and control risks related to its cryptocurrency activities on an ongoing basis, including

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operational, liquidity, strategic and compliance risks,¹³ (ii) demonstrate, in writing, an understanding of any compliance obligations related to the specific activities the bank intends to conduct¹⁴ and (iii) prior to seeking supervisory non-objection, consider all applicable laws, verify that the proposed structure of the activity is consistent with such laws and ensure that the compliance management system will be sufficient and appropriate to maintain compliance.¹⁵

Interpretive Letter 1179 notes that, in considering whether to grant supervisory non-objection, the supervisory office will consider the adequacy of a bank's risk measurement and management systems and controls in light of the bank's obligation to engage in cryptocurrency activities on a safe and sound basis.¹⁶ In reviewing a bank's proposal to engage in cryptocurrency activities, the supervisory office will also assess whether the bank has demonstrated that it understands and will comply with laws that apply to the proposed activities.¹⁷ Interpretive Letter 1179 notes the OCC's belief that requiring banks to demonstrate their ability to conduct cryptocurrency activities in a safe and sound manner, in compliance with applicable law, prior to engaging in such activities will enhance prudential supervision of such banks.¹⁸

2. Standards for Chartering National Trust Banks

Interpretive Letter 1179 also addresses the OCC's standards when chartering national trust banks. In January 2021, in Interpretive Letter 1176, the OCC discussed its authority under the National Bank Act to charter, or approve the conversion of a state-chartered bank or trust company into, a national bank that limits its operations to those of a trust company and activities related thereto.¹⁹ Interpretive Letter 1179 affirms that the determination of whether an institution may be chartered under the National Bank Act is a question of federal law. The letter notes that the OCC may look to state law to determine whether an applicant's activities are appropriately limited, but it "retains discretion to determine if an applicant's activities that are considered trust or fiduciary activities under state law would be considered trust or fiduciary activities for purposes of applicable federal law."²⁰ Interpretive Letter 1179 reiterates that (i) national banks that have already been granted fiduciary powers remain subject to the OCC's fiduciary activity regulations²¹ with respect to those activities and (ii) national banks that are currently conducting activities in a non-fiduciary capacity that are not subject to those regulations are not, and will not become, subject to those regulations because of Interpretive Letter 1176.²²

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Interpretive Letter 1179 is the latest in a series of recent pronouncements from U.S. regulators regarding cryptocurrency regulation, including the federal banking regulators' joint statement on their crypto-asset "policy sprint"²³ and the President's Working Group on Financial Markets' Report on Stablecoins.²⁴ The letter signals the OCC's continued concern with ensuring that national banks engage in cryptocurrency activities in a safe and sound manner in particular, and demonstrates the increasing focus of the U.S. banking and markets regulators more generally on cryptoassets.

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ENDNOTES

- ¹ See Interpretive Letter 1170 (July 22, 2020), <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf> (“Interpretive Letter 1170”); Interpretive Letter 1172 (Sept. 21, 2020), <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1172.pdf> (“Interpretive Letter 1172”); Interpretive Letter 1174 (Jan. 4, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf> (“Interpretive Letter 1174”).
- ² Interpretive Letter 1170, *supra* note 1.
- ³ Interpretive Letter 1179 (November 18, 2021), <https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1179.pdf> (“Interpretive Letter 1179”). The OCC relied upon the “transparency doctrine,” pursuant to which the OCC focuses on the authority of a national bank to offer the underlying product or service rather than the means by which the product is delivered, noting that cryptocurrency custody services are a permissible form of traditional banking activity being performed via electronic means.
- ⁴ *Id.*; see also 12 U.S.C. § 24(Seventh); 12 U.S.C. § 1464(b); Interpretive Letter 1172, *supra* note 1. This interpretive letter would appear to confirm the authority of national banks to conduct most or all of the functions that would be reserved to banks under the *Report on Stablecoins* issued on November 1, 2021, by The President’s Working Group on Financial Markets, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, available at https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf (the “PWG Report”).
- ⁵ Interpretive Letter 1179, *supra* note 3; see also Interpretive Letter 1174, *supra* note 1.
- ⁶ Interpretive Letter 1179, *supra* note 3; see also Interpretive Letter 1174, *supra* note 1; 12 C.F.R. § 7.5002(a)(3).
- ⁷ Interpretive Letter 1179, *supra* note 3 at 1.
- ⁸ *Id.* at 3.
- ⁹ Interpretive Letter 1179 emphasizes that this letter “is in addition to and does not replace the specific conditions, processes, and controls discussed in Interpretive Letters 1170, 1172, and 1174.” *Id.* at 4.
- ¹⁰ *Id.* at 1, 4.
- ¹¹ *Id.* at 2, fn 3.
- ¹² *Id.* at 4.
- ¹³ *Id.*
- ¹⁴ *Id.* These obligations may include applicable requirements under the federal securities laws, the Bank Secrecy Act, anti-money laundering, the Commodity Exchange Act, and consumer protection laws. Interpretive Letter 1179 notes specifically that a bank should understand that there may be different legal and compliance obligations for stablecoin activities, depending on how the particular stablecoin is structured. For example, certain stablecoins may be securities. A bank’s issuance of a stablecoin that is a security must comply with all applicable securities laws and regulations. See the PWG Report, *supra* note 4, at 15; SEC, Framework for “Investment Contract” Analysis of Digital Assets (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>; SEC FinHub Staff Statement on OCC Interpretation (Sept. 21, 2020), <https://www.sec.gov/news/public-statement/sec-finhub-statement-occ-interpretation>. *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Id.* Interpretive Letter 1179 further notes that the supervisory office will also evaluate any other supervisory considerations it deems relevant.

ENDNOTES (CONTINUED)

- 17 *Id.*
- 18 *Id.* at 5.
- 19 *Id.* The OCC clarified that Interpretive Letter 1176 did not change the current obligations of national banks with existing fiduciary powers and that the scope of Interpretive Letter 1176 is limited to how the OCC may view 12 U.S.C. § 27(a) in the context of a charter application.
- 20 *Id.*
- 21 See 12 C.F.R. Part 9.
- 22 Interpretive Letter 1179, *supra* note 3, at 4.
- 23 See Sullivan & Cromwell LLP, “Federal Banking Agencies Release Joint Statement on Crypto-Asset ‘Policy Sprint’ Initiative” (November 24, 2021), <https://www.sullcrom.com/sc-publication-federal-banking-agencies-release-joint-statement-crypto-asset-policy-sprint-initiative>.
- 24 See Sullivan & Cromwell LLP, “President’s Working Group on Financial Markets Issues Report on Stablecoins” (November 5, 2021), <https://www.sullcrom.com/sc-publication-presidents-working-group-on-financial-markets-issues-report-on-stablecoins>.

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