

Alert

OCC Outlines System for Banks to Engage in Certain Cryptocurrency Activities Subject to Supervisory Non-Objection

December 1, 2021

On Nov. 23, 2021, the Office of the Comptroller of the Currency (“OCC”) announced¹ the publication of Interpretive Letter 1179, dated Nov. 18, 2021 (“Letter”),² confirming that national banks and federal savings associations must demonstrate to their supervisory office that they have proper risk management measures and controls in place before they can engage in certain cryptocurrency, distributed ledger and stablecoin activities. Specifically, the Letter clarifies that a bank should notify and obtain a written non-objection from its supervisory office prior to engaging in any of the activities addressed in previous OCC Interpretive Letters 1170, 1172, and 1174.³ The Letter also clarifies that OCC Interpretive Letter 1176, regarding the OCC’s chartering authority of national trust banks, did not change an existing bank’s obligations under the OCC’s fiduciary activities regulations and that the OCC still has discretion in determining whether an activity is conducted in a fiduciary capacity for purposes of federal law.⁴

Permitted Cryptocurrency, Distributed Ledger and Stablecoin Activities (After Supervisory Non-Objection)

The OCC discussed various cryptocurrency, distributed ledger and stablecoin activities in prior interpretive letters, and whether it is permissible for banks to engage in such activities. The Letter confirmed that a bank may engage in these activities if the bank can demonstrate, to the satisfaction of its supervisory office, that the bank has controls in place to conduct the activity in a safe and sound manner.⁵ The permitted activities include:

- Providing cryptocurrency custody services, including the keeping of unique cryptographic keys⁶;

¹ Office of the Comptroller of the Currency, OCC Clarifies Bank Authority to Engage in Certain Cryptocurrency Activities and Authority of OCC to Charter National Trust Banks (Nov. 23, 2021), available [here](#).

² OCC Interpretive Letter 1179 (Nov. 18, 2021), available [here](#).

³ *Id.* at 1; see also OCC Interpretive Letter 1170 (July 22, 2020) (pertaining to the authority of a national bank to provide cryptocurrency custody services for customers), available [here](#); OCC Interpretive Letter 1172 (Sept. 21, 2020) (addressing the authority of a national bank to hold deposits that serve as reserves for certain “stablecoins”), available [here](#); OCC Interpretive Letter 1174 (Jan. 4, 2021) (addressing the legal permissibility of certain payment-related activities that involve the use of new technologies, including the use of independent node verification networks and stablecoins, to engage in and facilitate payment activities), available [here](#).

⁴ See Letter at 1; see also OCC Interpretive Letter 1176 (Jan. 11, 2021), available [here](#).

⁵ *Id.* at 1.

⁶ Letter at 2; see also OCC Interpretive Letter 1170.

- Holding dollar deposits to serve as reserves for stablecoins that are backed on a 1:1 basis by a single fiat currency and held in hosted wallets⁷;
- Acting as nodes on an independent node verification network (i.e., distributed ledger) to verify customer payments, as a new means of performing banks' permissible payments functions⁸; and
- Engaging in certain stablecoin activities to facilitate payment transactions on a distributed ledger (these activities include using stablecoins to facilitate customers' payment transactions on a distributed ledger, including by issuing a stablecoin and by exchanging that stablecoin for fiat currency).⁹

Supervisory Process for Cryptocurrency Activities

Before engaging in the activities outlined above, a bank should notify its OCC supervisory office in writing of the proposed activities and should receive written notification of the supervisory non-objection. The bank should not engage in any of the proposed activities before receiving supervisory non-objection. The Letter clarified that banks already engaged in these activities as of the date of publication of the Letter need not obtain supervisory non-objection, but the OCC expects that such banks have already provided notice to the OCC and are aware that those activities will be monitored as part of the OCC's ongoing supervisory process.¹⁰

To obtain supervisory non-objection, the bank should demonstrate in writing to the supervisory office that it has established a proper risk management system for the proposed activities by showing there are systems in place to identify, monitor, and control the risks of the activities. The bank should also demonstrate that those risk management measures can be conducted on a continuous and ongoing basis.¹¹ The Letter noted a bank addressing operational risks (e.g., hacking, fraud and theft) and compliance risks (e.g., compliance with anti-money laundering laws) as an example of a bank demonstrating to its supervisory office that it can identify and control risks.¹² The Letter also referred to Interpretive Letters 1170, 1172, and 1174 for banks to identify additional measures to implement in regard to the proposed activities.¹³

The Letter indicated that banks should also demonstrate an understanding of any compliance obligations (e.g., the Bank Secrecy Act and federal securities laws) related to the specific activities in which the bank wants to engage. The Letter cited as an example a bank demonstrating that it understands there are different compliance obligations for stablecoin activities based on how exactly the stablecoin is structured. The Letter also stated that in addition to banks demonstrating that they understand compliance obligations, banks should also demonstrate that their proposed activities are

⁷ Letter at 2; *see also* OCC Interpretive Letter 1172.

⁸ Letter at 3; *see also* OCC Interpretive Letter 1174.

⁹ *Id.*

¹⁰ Letter at 2, n.3.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.*

consistent with relevant laws and compliance obligations, and that there is a compliance system in place that will ensure continued compliance with such obligations.¹⁴

The OCC, when deciding whether to grant supervisory non-objection, will evaluate the adequacy of the proposed risk management system in terms of ensuring the bank is engaging in the proposed activities on a safe and sound basis, and that the bank has demonstrated it understands and will comply with the laws that apply to the proposed activities.¹⁵ After a bank has received supervisory non-objection to its proposed activities, the OCC will continue to review those activities as part of its ordinary supervisory processes.¹⁶

Standards for Chartering National Trust Banks

In January 2021, the OCC issued Interpretive Letter 1176, which addressed the OCC’s authority under 12 U.S.C. § 27(a)¹⁷ to charter or approve an applicant’s conversion to a national bank that limits its activities to those of a trust company.¹⁸ The Letter clarified that Interpretive Letter 1176 is limited to how charter applications may be viewed by the OCC in light of 12 U.S.C. § 27(a).¹⁹ Specifically, the Letter clarified that while the OCC may look to state law to determine if an applicant’s activities are limited to those of a trust company, state law is not determinative and ultimately federal law still controls in deciding whether the activities of an applicant are considered trust or fiduciary activities.²⁰

The Letter also reaffirmed that the requirements of 12 C.F.R. Part 9 (relating to fiduciary activities of national banks) continue to apply to the activities of national banks that have been granted fiduciary powers.²¹ Moreover, national banks conducting non-fiduciary activities that are not subject to 12 C.F.R. Part 9 are not — and will not become — subject to 12 C.F.R. Part 9 because of Interpretive Letter 1176.²²

Conclusion

The Letter is demonstrative of the OCC’s desire to allow banks to engage in certain cryptocurrency activities while also making sure those activities fall under the OCC’s regulatory sphere and approval.²³ Banks wishing to newly engage in the cryptocurrency activities outlined above must submit a notification in writing of their proposal to engage in the activities to their supervisory office. The writing should demonstrate that the bank: (i) understands the risks of the activities; (ii) has an effective risk

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 12 U.S.C. § 27(a) provides the authority for the OCC to permit national banks to engage in activities in which the bank will be acting in a fiduciary capacity.

¹⁸ See Interpretive Letter 1176, at 2.

¹⁹ See Letter, at 5.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.*

²³ On the same date of publication as the Letter, the OCC jointly announced with the Federal Deposit Insurance Corporation and Board of Governors of the Federal Reserve System that the agencies have all conducted further research on cryptocurrencies and that these agencies plan to provide further clarity on the legality of, and best practices for, cryptocurrency activities. See Joint Statement Crypto-Asset Policy Sprint Initiative and Next Steps (Nov. 23, 2021), available [here](#). For more information about this statement, please refer to our *Alert* “Federal Agencies Issue Joint Statement on Approach to Crypto-Asset Regulation for Banking Organizations” (Dec. 1, 2021), available [here](#).

management program for those specific risks; (iii) understands the relevant compliance and legal issues related to the activities; and (iv) has systems in place to ensure compliance with those obligations. Banks should not engage in any of the activities until receiving written notification of the supervisory office's non-objection.

Schulte Roth & Zabel's lawyers are available to assist you in addressing any questions you may have regarding these developments. Please contact the Schulte Roth & Zabel lawyer with whom you usually work, or any of the following attorneys:

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