



## Interpretive Letter #1179 November 2021

### Chief Counsel's Interpretation Clarifying: (1) Authority of a Bank to Engage in Certain Cryptocurrency Activities; and (2) Authority of the OCC to Charter a National Trust Bank

November 18, 2021

#### I. Introduction

The Chief Counsel issued three interpretive letters in 2020 and early 2021 addressing whether it is permissible for national banks and Federal savings associations (collectively referred to as “banks”) to engage in certain cryptocurrency, distributed ledger, and stablecoin activities. The interpretive letters are:

- OCC Interpretive Letter 1170, addressing whether banks may provide cryptocurrency custody services;
- OCC Interpretive Letter 1172, addressing whether banks may hold dollar deposits serving as reserves backing stablecoin in certain circumstances; and
- OCC Interpretive Letter 1174, addressing (1) whether banks may act as nodes on an independent node verification network (i.e., distributed ledger) to verify customer payments and (2) banks may engage in certain stablecoin activities to facilitate payment transactions on a distributed ledger.<sup>1</sup>

This letter clarifies that the activities addressed in those interpretive letters are legally permissible for a bank to engage in, *provided* the bank can demonstrate, to the satisfaction of its supervisory office, that it has controls in place to conduct the activity in a safe and sound manner. As discussed below and consistent with longstanding OCC precedent, a proposed activity cannot be part of the “business of banking” if the bank lacks the capacity to conduct the activity in a safe and sound manner.<sup>2</sup>

Specifically, as described further below, a bank should notify its supervisory office, in writing, of its intention to engage in any of the activities addressed in the interpretive letters. The bank should not engage in the activities until it receives written notification of the supervisory office’s non-objection. In deciding whether to grant supervisory non-objection, the supervisory

<sup>1</sup> See Interpretive Letter 1170 (July 22, 2020), available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf>; Interpretive Letter 1172 (Sept. 21, 2020), available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1172.pdf>; and Interpretive Letter 1174 (Jan. 4, 2021), available at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf>.

<sup>2</sup> This letter is being issued as a result of the OCC’s review of interpretive letters regarding cryptocurrencies and digital assets.

office will evaluate the adequacy of the bank's risk management systems and controls, and risk measurement systems, to enable the bank to engage in the proposed activities in a safe and sound manner.<sup>3</sup>

This letter also clarifies OCC Interpretive Letter 1176, which addressed the OCC's authority to charter, or approve the conversion to, a national bank that limits its operations to those of a trust company and activities related thereto. In particular, this letter reiterates that Interpretive Letter 1176 addressed the OCC's chartering authority and did not expand or otherwise change existing banks' obligations under the OCC's fiduciary activities regulation, 12 C.F.R. Part 9.<sup>4</sup> This letter further clarifies that the OCC retains discretion in determining whether an activity is conducted in a fiduciary capacity for purposes of federal law.

## II. Supervisory Process for Cryptocurrency Activities

On July 22, 2020, the OCC issued Interpretive Letter 1170, which concluded that banks may provide certain cryptocurrency custody services on behalf of customers, including by holding the unique cryptographic keys associated with cryptocurrency. In Interpretive Letter 1170, the OCC found that providing cryptocurrency custody services is a modern form of the traditional bank activities of custody and safekeeping, and that providing cryptocurrency custody services is a permissible form of a traditional banking activity that banks are authorized to perform via electronic means.<sup>5</sup>

On September 21, 2020, the OCC issued Interpretive Letter 1172, which recognized that stablecoin issuer may desire to place their cash reserves in a reserve account with a bank to provide assurance that the issuer has sufficient assets backing the stablecoin in certain situations. Interpretive Letter 1172 concluded that banks may hold deposits that serve as reserves for stablecoins that are backed on a 1:1 basis by a single fiat currency and held in hosted wallets.

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<sup>3</sup> Banks already engaged in cryptocurrency, distributed ledger, or stablecoin activities as of the date of publication of this letter do not need to obtain supervisory non-objection. However, consistent with the relevant interpretive letters, the OCC expects that a bank that has commenced such activity will have provided notice to its supervisory office. The OCC will examine these activities as part of its ongoing supervisory process. Banks engaged in such activities should have systems and controls in place consistent with those described in this letter to ensure that all activities are conducted in a safe and sound manner and consistent with all applicable law. *See, e.g.*, 12 U.S.C. § 1818.

<sup>4</sup> *See* Interpretive Letter 1176 (Jan. 11, 2021), available at <https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf>.

<sup>5</sup> 12 C.F.R. § 7.5002(a) provides that a national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver. This regulatory provision is based on the longstanding "transparency doctrine," under which the OCC looks through the means by which a product is delivered and focuses instead on the authority of the national bank to offer the underlying product or service. *See* 67 FR 34992, 34996 (May 17, 2002).

The OCC concluded that this activity is permissible for banks due to the express authority of banks to receive deposits.<sup>6</sup>

On January 4, 2021, the OCC issued Interpretive Letter 1174, which concluded that banks may use distributed ledgers and stablecoins to engage in and facilitate payment activities. In Interpretive Letter 1174, the OCC found that using independent node verification networks, such as distributed ledgers, to facilitate payments transactions for customers represents a new means of performing banks' permissible payments functions. In addition, Interpretive Letter 1174 concluded that, just as banks may buy and sell electronically stored value (ESV)<sup>7</sup> as a means of converting the ESV into dollars (and vice versa) to complete customer payment transactions, banks may buy, sell, and issue stablecoin to facilitate payments.

Consistent with OCC precedent, Interpretive Letters 1170, 1172, and 1174 indicated that banks must conduct the activities described in those letters consistent with safe and sound banking practices.<sup>8</sup> A longstanding corollary to this principle is that a proposed activity is not legally permissible if the bank lacks the capacity to conduct the activity in a safe and sound manner.<sup>9</sup> This letter explains the process by which a bank may demonstrate that it will engage in the activities in a safe and sound manner.<sup>10</sup> Specifically, before engaging in the activities

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<sup>6</sup> See 12 U.S.C. § 24 (Seventh); 12 U.S.C. § 1464(b).

<sup>7</sup> See 12 C.F.R. § 7.5002(a)(3).

<sup>8</sup> For example, Interpretive Letters 1170 and 1174 specifically stated that banks should consult with OCC supervisors, as appropriate, prior to engaging in the activities and that the OCC would review the activities as part of its ordinary supervisory processes.

<sup>9</sup> In other words, a proposed activity cannot be part of the "business of banking" if the bank in question lacks the capacity to conduct the activity on a safe and sound basis. Courts have long recognized this linkage between qualifying activities and safety and soundness. See, e.g., *First National Bank v. Exchange National Bank*, 92 U.S. 122, 127 (1875); *Merchants National Bank v. Wehrmann*, 202 U.S. 295 (1906). In addition, the OCC considers safety and soundness issues when determining whether an activity is part of, or incidental to the business of banking. See, e.g., OCC Interpretive Letter 1060 (Sept. 2018) (national bank may engage in customer-driven, perfectly-matched, cash-settled derivative transactions with payments based on reference assets, including plastics, petroleum products, and metals, only if the bank has controls in place to conduct the activity on a safe and sound basis); OCC Interpretive Letter 949 (Jan. 2003) (national bank may engage in cash-settled options and forwards on equity securities only if the bank has in place an appropriate risk measurement and management process); OCC Interpretive Letter 892 (Sept. 2000) (national bank may engage in equity hedging activities only if it has an appropriate risk management process in place).

<sup>10</sup> The OCC, along with other federal financial regulatory agencies, recently committed to take action to address risks falling within each agency's jurisdiction given the significant and growing risks posed by stablecoins. See President's Working Group on Financial Markets, FDIC, and

addressed in the interpretive letters, a bank should notify its supervisory office, in writing, of the proposed activities and should receive written notification of the supervisory non-objection.

To obtain supervisory non-objection, the bank should demonstrate that it has established an appropriate risk management and measurement process for the proposed activities, including having adequate systems in place to identify, measure, monitor, and control the risks of its activities, including the ability to do so on an ongoing basis. For example, a bank should specifically address risks associated with cryptocurrency activities, including, but not limited to, operational risk (*e.g.*, the risks related to new, evolving technologies, the risk of hacking, fraud, and theft, and third party risk management), liquidity risk, strategic risk, and compliance risk (including but not limited to compliance with the Bank Secrecy Act, anti-money laundering, sanctions requirements, and consumer protection laws). This process is in addition to and does not replace the specific conditions, processes, and controls discussed in Interpretive Letters 1170, 1172, and 1174.

In deciding whether to grant supervisory non-objection, the supervisory office will evaluate the adequacy of a bank's risk measurement and management information systems and controls to enable the bank to engage in the proposed activities on a safe and sound basis. The supervisory office will also evaluate any other supervisory considerations relevant to the particular proposal, consulting with agency subject matter experts as appropriate. As part of that review, and in coordination with the Chief Counsel as needed, the supervisory office will assess whether the bank has demonstrated that it understands and will comply with laws that apply to the proposed activities. After a bank has received supervisory non-objection, the OCC will review these activities as part of its ordinary supervisory processes.

To address compliance, the bank should demonstrate, in writing, an understanding of any compliance obligations related to the specific activities the bank intends to conduct, including, but not limited to, any applicable requirements under the federal securities laws, the Bank Secrecy Act, anti-money laundering, the Commodity Exchange Act, and consumer protection laws. For example, a bank should understand that there may be different legal and compliance obligations for stablecoin activities, depending on how the particular stablecoin is structured.<sup>11</sup> Prior to seeking supervisory non-objection, the bank should consider all applicable laws, ensure that the proposed structure of the activity is consistent with such laws, and that the compliance management system will be sufficient and appropriate to ensure compliance.

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OCC, Report on Stablecoins (Nov. 1, 2021), *available at* [https://home.treasury.gov/system/files/136/StableCoinReport\\_Nov1\\_508.pdf](https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf) (PWG Report). The process described in this letter is the OCC's first complementary action to this commitment.

<sup>11</sup> 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* PWG Report; SEC, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), *available at* <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>; SEC FinHub Staff Statement on OCC Interpretation (Sept. 21, 2020), *available at* <https://www.sec.gov/news/public-statement/sec-finhub-statement-occ-interpretation>.

The OCC believes that this clarification will enhance prudential supervision by ensuring that banks demonstrate, before engaging in the activities, that they can conduct them in a safe and sound manner and in compliance with applicable law.

### **III. Standards for Chartering National Trust Banks**

On January 11, 2021, the OCC issued Interpretive Letter 1176. This letter addressed the OCC's authority under the National Bank Act (12 U.S.C. § 27(a)) to charter, or approve the conversion to, a national bank that limits its operations to those of a trust company and activities related thereto. Interpretive Letter 1176 does not change the the current obligations of national banks with existing fiduciary powers under Part 9.<sup>12</sup> 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.

Whether an institution may be chartered under 12 U.S.C. § 27(a) is a question of federal law. The OCC may look to state law to determine if an applicant's activities are limited to the operations "of a trust company and activities related thereto," but an applicant's activities will not automatically be deemed to be trust activities—or to be fiduciary activities—solely by virtue of state law.<sup>13</sup> The OCC retains discretion to determine if an applicant's activities that are considered trust or fiduciary activities under state law are considered trust or fiduciary activities for purposes of applicable federal law.

Importantly, and as described in Interpretive Letter 1176, for national banks that have already been granted fiduciary powers, the requirements of 12 C.F.R. Part 9 continue to apply to current activities of the banks, as they have in the past. Moreover, national banks currently conducting activities in a non-fiduciary capacity that are not subject to Part 9 have not, and will not, become subject to 12 C.F.R. Part 9 because of the letter.

/s/

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<sup>12</sup> See Interpretive Letter 1176, *fn.* 15. Interpretive Letter 1176 did not change the definition of "fiduciary capacity" in 12 C.F.R. § 9.2(e) or authorize any additional fiduciary capacities under section 92a.

<sup>13</sup> In the context of chartering, Interpretive Letter 1176 explained, "a bank performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations *may be deemed to be* performing in a fiduciary capacity for purposes of 12 U.S.C. § 92a and subject to 12 C.F.R. Part 9." Interpretive Letter 1176 (emphasis added). When evaluating a charter or conversion application, the OCC may, in its discretion, consider the relevant state law to assess whether the specific activities in which the applicant is engaged are operations "of a trust bank and activities related thereto."