



Federal Crypto Powers

Cite

Office of the Comptroller of the Currency, Interpretive Letter #1179 – 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

Recommended Distribution

Crypto, Fintech, Corporate Planning, Policy, Legal, Government Relations

Website

<https://www.moneylaunderingnews.com/wp-content/uploads/sites/12/2021/11/Interpretive-Letter-1179.pdf>

Impact Assessment

- Crypto activities and charters under the OCC's aegis face new safety-and-soundness thresholds for continued operation and/or entry.
- This policy sets barriers not only for novel ventures, but even for established banking organizations that may not have addressed the crypto-specific prudential issues now specified as a condition for doing business in a federal charter.

Overview

Although the OCC joined other agencies issuing a non-committal "roadmap" for future cryptography actions, the agency at the same time and far more decisively stated that crypto activities are permissible only if they are also safe and sound. As a result, national banks and federal savings associations (FSAs) may no longer simply undertake approved crypto activities and now instead must receive prior OCC consent to do so. This may prove challenging to banks now using or seeking to use national charters for their own businesses, for partnerships with state-chartered entities, or via their own fintech ventures.

Impact

This interpretive letter (IL) builds on several OCC rulings that were precedent-setting expansions of national bank and FSA crypto powers. These include actions

by the prior Acting Comptroller establishing custody authority,¹ addressing reserve assets,² and defining bank powers to act as nodes or otherwise interface with digital ledger technology (DLT) to provide stablecoins.³

The new IL does not repeal prior ILs or revoke any charters. As a result, the activities and charters countenanced in them remain permissible. However, the agency now clarifies that permissibility is conditional on demonstrable safety and soundness. Further, the OCC will not wait for examiners to spot problems in these emerging activities; instead, a national bank or FSA wishing to conduct them must first give the OCC prior notice and show via that notice that it has the controls specified in the new IL prior to proceeding upon receipt of an OCC non-objection to the bank in fact doing so. This reverses prior statements suggesting that offerings could commence upon a bank's desire to do so, leaving safety-and-soundness considerations for ongoing supervision at a later date.

The new IL also clarifies another prior interpretive letter addressing the ability of cryptography companies to obtain national trust charters leading to provisional approval of at least one such charter. Again, the prior IL is not withdrawn, but the agency now makes it clear that nothing in it exempted a crypto charter from the fiduciary duties otherwise applicable to national trust charters or any related obligations.

Under the prior Acting Comptroller, the OCC was also considering a variety of additional charters for companies with significant cryptography operations following conditional approval for several of these under the prior Administration.⁴ Nothing in the new IL addresses these broader charters, but its inference seems clearly to signify that none will be approved or allowed to continue to operate absent showing not only of safety and soundness as traditionally judged for national charters, but also with specific regard to cryptography-related risk.

What's Next

This interpretive letter is dated November 18 but was issued on November 23 in concert with the roadmap noted above. It is effective immediately. It comes in concert with the OCC's commitment after the President's Working Group on Financial Markets' stablecoin report,⁵ coming well ahead of like-kind commitments from the other agencies, likely because none had legacy crypto policies from the prior Administration that contradicted the PWG's findings or posed what may now be considered immediate risks.

Analysis

A. Crypto Activities

To engage in certain crypto activities, a national bank or FSA must receive an agency non-objection following the bank's prior notice to do so. The IL stipulates

¹ See **CUSTODY4**, *Financial Services Management*, May 9, 2019.

² See **CRYPTO15**, *Financial Services Management*, September 28, 2020.

³ See **CRYPTO17**, *Financial Services Management*, January 31, 2021.

⁴ See *Client Report CHARTER28*, December 8, 2020.

⁵ See *Client Report CRYPTO21*, November 2, 2021.

that an activity that is not satisfactorily sound safe and sound is not permissible, thereby signaling that any company proceeding under either prior approval or now doing so without due caution is at risk of having its business model severely disrupted by OCC enforcement actions.

The IL also stipulates that ordinary processes and procedures do not suffice given the unique nature of cryptographic activity. It lays out an array of specific risks and resulting controls a bank thus must have to meet the OCC's safety-and-soundness standards, noting in particular the need for banks to demonstrate in writing how their cryptographic activities will comply with laws such as those governing securities activities, AML and sanctions standards, and consumer protection.

B. National Trust Bank Charters

This IL as noted also stipulates that these charters must comply with federal fiduciary duties regardless of applicable state law.