



Financial Services Management

State Member Bank Powers

Cite

Federal Reserve, Policy Statement on Section 9(13) of the Federal Reserve Act

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<https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20230127a2.pdf>

Impact Assessment

- The FRB for the first time expressly applies the same-risk/same-rule construct recently established by global standard-setters.
- That many otherwise-impermissible activities are in uninsured depositories now does not affect Fed application of this principle.
- State-permissible crypto powers not also allowed for federal charters are now strictly regulated and, in most cases, also likely prohibited.
- More broadly applied, this principle has significant impact for other powers that are not also approved by the OCC and/or federal law.

Overview

In conjunction with rejecting an uninsured crypto bank's application for Federal Reserve membership, the Federal Reserve issued a policy statement conforming state member bank powers only to those authorized for national banks even if the state member is an uninsured depository institution. While it is possible for state member banks to gain greater powers following Fed deliberations, the new approach sharply limits the ability of states to empower uninsured charters not only focused on cryptoasset activities, but also other non-traditional ones such as those involved in certain fintech "partnerships." Payment-system access now will be more circumscribed, limiting the comparative advantage non-traditional charters have or hope to enjoy as well as reducing competitive disparities between state-member and national charters.

Impact

Under this new policy, the FRB has roundly rejected the "states as laboratories for change" construct that previously allowed non-traditional state-chartered banks, including uninsured ones, often to operate within the Fed's ambit, thereby gaining payment-system access and even discount-window, reserving, and other rights. To be sure, the Fed's stand is not new – it for example decided not to grant a bank focused on interest on reserves this status in 2019

even though its activities were expressly authorized under Connecticut law and indirectly also approved for national banks.¹ However, the Fed took this preemptive stand only on a case-by-case basis, continuing to allow payment-system access to non-traditional charters in its most recent edict on payment-system access.² Key to the Fed's new policy is its new emphasis that, in all cases, just because an activity is legally permissible, the Federal Reserve need not and often will not allow it at institutions under its control.

Historically, the banking agencies have competed to enhance the relative merits of their charter options to increase the odds that banks will elect governance by the agency and, in the case of the OCC, also enlarge its assessment revenue. In this policy statement, the Fed formally eschews its past accommodations for state member charters, now laying out the benefits of a "level playing field" irrespective of charter choice. If this policy applies as the Fed says it will to activities other than crypto, then it gives nontraditional banks less ability to arbitrage state powers versus national preemption, likely making charter choice rest principally on the costs and remaining benefits of each agency's assessment, regulatory, and supervisory construct rather than giving consideration also to any authority for a wider scope of permissible activities.

The policy statement expressly describes how this "level playing field" will work when it comes to cryptoasset activities, essentially banning them unless an activity has been approved by the OCC (i.e., when national banks create the equivalent of proprietary stablecoins to facilitate certain wholesale transactions). The policy also expressly authorizes state member banks to provide custody services for cryptoassets, but it carefully constrains this permission within the boundaries of detailed risk-management requirements based on another recent Fed policy statement with direct regard to this sector.³ As well as an inter-agency policy statement making clear that the Fed's concerns are shared by the FDIC and OCC.

The Fed's stand is not a flat-out ban on other crypto activities. However, these are possible only within the confines of a rebuttable presumption that none will meet the Board's risk-management requirements. Although expressly focused on cryptoassets, the policy statement's scope applies to any activity authorized by states that is not expressly allowed by the OCC or FDIC. Even when an activity per se has been approved – e.g., lending – the statement mandates that state member banks undertake the activity only within all the boundaries established for it by the OCC and/or stipulated by the FDIC. Thus, banks that support third-party fintech entities by lending to make use of national-preemption powers can do so only within the scope of the OCC's rules governing "true-lender" activities.⁴ Similarly, banks that facilitate third-party fund-gathering must do so strictly within the confines of FDIC rules to differentiate uninsured deposits.⁵

¹ See **CHARTER25**, *Financial Services Management*, March 18, 2019.

² See **PAYMENT26**, *Financial Services Management*, November 9, 2022.

³ See **CRYPTO31**, *Financial Services Management*, August 22, 2022.

⁴ See **PREEMPT35**, *Financial Services Management*, November 2, 2020.

⁵ See **DEPOSITINSURANCE114**, *Financial Services Management*, June 28, 2022.

What's Next

The Fed issued this statement on January 27. It is officially effective when published in the *Federal Register* but, as noted above, it has already adversely affected plans of at least one crypto-focused state bank to acquire member-bank status and thereby payment-system access and numerous other privileges.

The policy statement does not grandfather existing activities that do not meet its standards. Instead, it states that any state member banks engaging in activities that do not meet the clear permissibility standards now enunciated in the statement must seek Fed approval to continue to do so unless the activity was clearly within the bounds of the bank's initial charter approval.

Analysis

A. Coverage

Even if an activity is not expressly focused on cryptography, the Board retains the right to treat it as such if it involves activities such as transmitting financial information on a decentralized or other form of DLT.

B. Rebuttal Presumption

1. Policy

Under this policy, the Fed limits state member banks to engaging as principal only in activities permissible for national banks subject to the terms, conditions, and limitations placed on national banks unless the activities are otherwise permissible under federal law or FDIC actions applicable to more than a single bank. State member insured and uninsured institutions would first need to look to the OCC to determine if an activity is permissible and, if it is not, then they must ensure compliance with FDIC regulation in order to offer the product or service unless the Board approves of the activity following consideration of the rebuttable presumption that it should not do so. State member banks seeking this approval will need to file an application that demonstrates a "clear and compelling rationale."

2. Risk Management

To engage in a permissible state-authorized activity also authorized for national banks, a company would need to demonstrate its risk-management capabilities on criteria detailed in the policy statement.

C. Crypto Activities

Any permissible cryptographic, DeFi, or similar activities must not only meet the

permissibility standards above, but also comply with express risk-management expectations that are detailed in the statement. The Board makes it clear that it has identified no action by the OCC allowing national banks to hold most cryptoassets as principal, detailing recent actions overturning prior rulings by the agency towards the end of the Trump Administration. It also fails to find any express authority for this under federal law for state-chartered banks. Citing recent FSOC reports,⁶ the Board also states that it has found no compelling reason to allow this activity given the absence of natural-use cases for it and an array of risks.

State member banks seeking to issue dollar tokens must do so under the terms and conditions applicable to national banks and, even then, also to assure that an activity the Board states poses significant risk can be conducted in a safe and sound manner. Nothing in the statement should be read to bar state member banks from providing crypto custody services if these meet safety-and-soundness and related risk-management standards.

⁶ See *Client Report CRYPTO33*, October 5, 2022.