

## Catching up with Crypto: Federal Banking Agencies' Joint Statement on "Crypto Sprint" Initiative Provides Roadmap for Future Guidance, and OCC Clarifies Prior Interpretations

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On November 23, 2021, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency issued a [joint statement](#) on an inter-agency initiative to address bank and bank holding company participation in crypto-asset-related businesses. The Agencies' label for the initiative ("crypto sprint") is undoubtedly more of a relative term, as both banks and non-bank fintechs have clamored for guidance for some time, and the Agencies' publication last week amounts to a plan to issue more guidance in the future. Nevertheless, the statement provides a useful overview of the Agencies' recent crypto-related efforts and includes a roadmap of priorities for the coming year. It remains to be seen whether the crypto sprint is a harbinger of new regulations or whether the agencies will continue to adapt existing regulations and interpretations to new activities.

On the same day, the OCC issued [Interpretive Letter 1179](#), which confirms that it remains permissible for national banks to engage in the cryptocurrency, distributed ledger and stablecoin activities addressed in previous OCC letters on these topics. However, the OCC modified the overall outcome of those previous letters by requiring prior approval from a national bank's examiner-in-charge before commencing these crypto-related activities. Separately, Interpretive Letter 1179 also clarifies a recent OCC interpretive letter on the activities of national trust banks and the scope of fiduciary powers subject to OCC rules.

This Memorandum provides an overview of the Agencies' joint statement on their crypto sprint and of the OCC's Interpretive Letter 1179, highlighting key takeaways.

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## I. Crypto Sprint Update

The Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”) and the Office of the Comptroller of the Currency (“OCC”, and together, the “Agencies”) have, for the past several months, collaborated in an effort that the Agencies have labeled the “crypto sprint”. In the software development world, a “sprint” refers to a time-limited, focused period of work during which a team concentrates on solving a particular challenge.

As described in the November 23 joint statement (the “Joint Statement”), during the crypto sprint, Agency staff focused on (i) establishing a common vocabulary to describe banking organizations’ crypto-asset-related activities,<sup>1</sup> (ii) identifying and assessing the risks of these activities (e.g., in terms of safety and soundness, consumer protection, and compliance), (iii) the legal permissibility of these activities and (iv) assessing how current regulations and guidance apply to these activities, including where additional clarity may be needed.

The Joint Statement does not provide additional detail on the substance of the inter-agency discussions during the crypto sprint. However, as highlighted in the box below, it includes a roadmap of areas in which the Agencies intend to provide more guidance in 2022. The Joint Statement also notes that the Agencies intend to assess how capital and liquidity standards apply to crypto-asset-related activities, and that the Agencies will continue to interact with the Basel Committee’s consultative process.

While the contents of the roadmap are not particularly surprising given banking organizations’ and other market participants’ interest in these topics, the roadmap provides a useful indication of the future direction of travel for what is likely to be a full year of crypto-related regulatory activity. Any eventual

legislative activity or Financial Stability Oversight Council (“FSOC”) determinations on stablecoins—i.e., per the recent President’s Working Group on Financial Markets [report](#)—or other crypto-related legislation also would affect Agency priorities, as would crypto-related developments from the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”).<sup>2</sup> It remains to be seen whether the crypto sprint is a harbinger of new regulations or whether the Agencies will continue to adapt existing regulations and interpretations to new activities.

### Crypto-Related Agency Roadmap for 2022

In 2022, the Agencies intend to provide greater clarity on the legal permissibility of the following activities, as well as on the Agencies’ expectations for safety and soundness, consumer protection and compliance:

- Crypto-asset safekeeping and traditional custody services.
- Ancillary custody services; the term “ancillary custody services” could encompass activities such as staking, facilitating crypto-asset lending and providing distributed ledger technology governance services.
- Facilitation of customer purchases and sales of crypto-assets.
- Loans collateralized by crypto-assets.
- Issuance and distribution of stablecoins.
- Activities involving the holding of crypto-assets on balance sheet.

## II. Interpretive Letter 1179

### A. Background

In 2020 and early 2021, the OCC issued three interpretive letters that focused on the cryptocurrency,

<sup>1</sup> The challenge of establishing a common vocabulary to describe activities related to cryptocurrencies, stablecoins, distributed ledger technology and the like is a familiar one for those who practice in this space. The Joint Statement explains, “By ‘crypto-asset,’ the [A]gencies refer generally to any digital asset implemented using cryptographic techniques”. This Alert Memorandum also uses the terms “crypto-asset” and “crypto-asset-related” (or, as shorthand, “crypto-related”).

<sup>2</sup> Today, CFTC Commissioner Dawn Stump released a [statement](#) applauding the Joint Statement, also noting, “Until we remedy the current confusion about the application of federal and state regulators’ existing legal authorities with respect to digital assets, we cannot have an honest conversation about whether any agency needs new authorities.”

distributed ledger and stablecoin activities of national banks and federal savings associations (together, “national banks”). In brief, [Interpretive Letter 1170](#) (Alert Memorandum available [here](#)) permits national banks to provide cryptocurrency custody services on behalf of customers; [Interpretive Letter 1172](#) permits national banks to hold stablecoin reserves for issuers of stablecoins, provided that the stablecoins are held in hosted wallets and backed 1:1 by one fiat currency; and [Interpretive Letter 1174](#) (Alert Memorandum available [here](#)) allows national banks to use independent node verification networks (e.g., distributed ledger technology) and stablecoins to facilitate payments.

These letters require national banks to conduct these activities in accordance with sound risk management principles, and also provide parameters for these activities as well as examples of specific risks and considerations. For example, among several other things, Interpretive Letter 1172 describes what a national bank’s contractual arrangements with a stablecoin issuer might look like, and Interpretive Letter 1174 highlights the OCC’s expectation that national banks will update their anti-money laundering and Bank Secrecy Act programs “to address the particular risks of cryptocurrency transactions”. These letters do not require national banks to obtain prior approval for these activities, although each of Interpretive Letters 1170 and 1174 specify that national banks should consult with their OCC supervisors “as appropriate” prior to commencing these activities. The letters were important not only for national banks but also indirectly for state banks and branches of foreign banks, whose powers are often coterminous with those of national banks (including due to state “wild card” statutes enabling state banks to engage in activities legally permissible for national banks).

## **B. Clarifications and Non-Objection Process**

In Interpretive Letter 1179, the OCC confirms that it remains permissible for national banks to engage in the cryptocurrency, distributed ledger and stablecoin activities described in Interpretive Letters 1170, 1172 and 1174. However, Interpretive Letter 1179 explicitly requires that a national bank not engage in these activities until it has provided written notification to, and received written non-objection from, its supervisory office.

This additional supervisory non-objection requirement provides the OCC with much more control over the activities addressed in Interpretive Letters 1170, 1172 and 1174. It also runs counter to the direction that the OCC had traveled in recent years. For example, [Interpretive Letter 1160](#) (2018) indicated a shift in the OCC’s stance on the dichotomy between the legal permissibility of an activity and the safety, soundness and risk management aspects of an activity. Under the framework described in that letter, interpretive letters were to provide an opinion on the legal permissibility of an activity, while a “notice” (without asking for supervisory approval) to a national bank’s examiners should explain the bank’s risk management framework for the activity. The goal was to reduce the burden on both national banks and their examination teams, while permitting a bank to commence an activity on its own timeline. This was also the approach generally favored by the OCC’s 2020 “[Final Activities Rule](#)”, which also, more formally, retired the “prior approval” standard in favor of a “prior notice” standard for a number of banking activities (our Alert Memorandum on that rulemaking is available [here](#)).

Under Interpretive Letter 1179, to obtain supervisory non-objection, a national bank needs to show that it has created a suitable risk management and measurement process with respect to its proposed activities. The OCC emphasizes that this requirement does not modify the requirement also to comply with the parameters that Interpretive Letters 1170, 1172 and 1174 establish for various crypto-related activities.

National banks’ notifications to their supervisory offices in relation to crypto-asset-related activities are likely to take the form of lengthy written submissions, both to educate examiners on these new activities and their risks and to describe how the bank’s risk management framework addresses those risks. Interpretive Letter 1179 provides a nonexclusive list of the considerations that a national bank should discuss in its submission, including “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.” A similar list covers what a national bank should address to demonstrate its understanding of compliance obligations; topics include the potential requirements of federal securities laws and the Commodity Exchange Act, among others.

Before granting non-objection, the supervisory office—bringing in OCC subject matter experts or coordinating with the Chief Counsel’s office, as needed—will assess whether the national bank will be able to conduct the proposed activities in a safe and sound manner and whether the bank understands and will be able to meet its compliance obligations. The supervisory office also will evaluate “any other supervisory considerations relevant to the proposal”, an open-ended statement that hints at the rapid evolution of crypto-related activities and potential future legislation and regulatory initiatives. After granting non-objection, the supervisory office will continue to review a national bank’s crypto-related activities in the course of normal supervision.

As for national banks that are already conducting the activities described in Interpretive Letters 1170, 1172 and 1174, the OCC notes that they do not need to obtain supervisory non-objection and that these activities will be examined in the normal course. However, the OCC also specifies that these banks should have (i) provided notice of these activities “consistent with the relevant interpretive letters” and (ii) established the kinds of systems and controls that Interpretive Letter 1179 describes.

### **C. Clarifications on Fiduciary Powers and Standards for Chartering National Trust Banks**

Interpretive Letter 1179 also reaffirms a point raised by the OCC’s [Interpretive Letter 1176](#) (2021). Interpretive Letter 1176 addresses the OCC’s ability to charter national trust banks, including in relation to both the fiduciary and non-fiduciary activities of a trust bank. Although Interpretive Letter 1176 does not expressly address crypto-related activities, it is an important letter for the financial technology industry because it provides certain grounds for the OCC to grant national trust bank charters, including to entities engaging in crypto-related activities and desiring to convert from their limited purpose state trust company charters.

Interpretive Letter 1179 reemphasizes that the OCC’s view of the fiduciary and related non-fiduciary activities that may be undertaken by a national trust bank does not cause additional activities to become subject to the OCC’s fiduciary activity rules under 12 C.F.R. Part 9. Conversely, Interpretive Letter 1179 clarifies that those activities that are subject to Part 9 must continue to be

conducted in compliance with those regulations. The OCC also specifically retains discretion to determine which state trust or fiduciary activities qualify as trust or fiduciary activities, subject to Part 9, under federal law. Although these clarifications do not break any new ground, they respond to questions or concerns that the OCC has fielded in relation to Interpretive Letter 1176.

### **Conclusion**

The Joint Statement on the crypto sprint and Interpretive Letter 1179 were released against the backdrop of a number of recent crypto-related regulatory developments, including the report on stablecoins from the President’s Working Group on Financial Markets (recommending that stablecoin legislation be crafted to permit only federally insured banking institutions to issue stablecoins) and two speeches ([here](#) and [here](#)) by Acting Comptroller Michael J. Hsu outlining his vision for the OCC’s approach to modernizing the so-called “bank regulatory perimeter” (articulating a view that fintech and payment companies that reassemble certain financial activities, including payments, lending and the safekeeping of funds, into single entities should be regulated as banks). The Board is also [expected](#) to release a discussion paper evaluating the implications of a potential U.S. central bank digital currency.

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