

# OCC Affirms Authority of National Banks to Engage in Additional Cryptocurrency-Related Activities, Including Issuing Stablecoins

January 15, 2021

On January 4, 2020, the Office of the Comptroller of the Currency (“OCC”) published an [interpretive letter](#) (the “Letter”) clarifying that national banks and federal savings associations (“banks”) may engage in and facilitate payment activities through new technological means, including serving as a node in a distributed ledger system such as those utilized by some stablecoins, facilitating customer conversion of fiat currency to or from digital currencies, and issuing stablecoins.

The Letter reasons that payment services are a core banking function, and that independent node verification networks (“INVNs”) and stablecoins are merely new means of effecting pre-existing permissible bank activities.

The letter follows other recent actions by former Acting Comptroller of the Currency Brian Brooks to clarify the authority of national banks to engage in certain digital asset activities, including the issuance of two other interpretive letters last year clarifying permissible cryptocurrency-related activities for banks ([custodying digital assets](#) and [holding certain stablecoin reserves](#)). The Acting Comptroller, whose resignation became effective today, also spearheaded an initiative to grant national bank and national trust bank charters to fintech companies.

The Letter notes that banks “should consult with OCC supervisors, as appropriate, prior to engaging in these activities.” This guidance, OCC precedents in expanding permissible bank activities, and the controversy surrounding recent crypto-related charter applications may lead to a deliberative approach by the OCC to banks expanding into these activities.

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## I. The Interpretive Letter

The Letter states that banks may use INVNs<sup>1</sup> and related stablecoins to carry out permissible bank activities, which includes buying, selling, and issuing stablecoins. These activities grow out of the authority to validate, store, and record payment transactions by serving as a node on an INVN—modern means of carrying out the traditional function of transmitting and validating payments.

The Letter notes the long history of banks facilitating payment systems, and analogizes stablecoins to existing bank products such as checks, debit cards, and electronically stored value (“ESV”) systems (*e.g.*, pre-paid cards).<sup>2</sup> In particular, the Letter explains the similarity of stablecoins to ESVs, in which cash is exchanged for an ESV card and the cardholder makes payment by transferring the ESV to another party who may redeem the ESV for cash. Like ESV cards, stablecoins can serve as an electronic representation of U.S. dollars or other fiat currency, with the value represented in the stablecoin, rather than stored on a card.

While stating that the OCC “neither encourages nor discourages banks from participating in and supporting INVNs and stablecoins,” the Letter goes on to say that in light of market developments, “banks should evaluate the appropriateness of INVNs and stablecoin participation in order to ensure banks’ continuing ability to provide payment services to their customers in a manner that reflects changing demand.” The Letter cites various potential benefits of bank INVN activities, including the ability of INVNs to enhance efficiency of payment activities (*e.g.*, shorter settlement times) and stability (*e.g.*, decentralization prevents tampering and single points of failure). Further, the Letter notes that allowing banks to engage in stablecoin activities will enable banks to participate in a changing and increasingly competitive market, while still benefitting from the stability of fiat currency inherent to stablecoins

<sup>1</sup> The OCC defines an INVN as a “shared electronic database where copies of the same information are stored on multiple computers.” INVN nodes are those participants who “typically validate transactions, store transaction history, and broadcast data to other [participants].” The likely most common form of an INVN is a distributed ledger, on which many cryptocurrency transactions are recorded (*e.g.*, blockchain is a form of distributed ledger).

(unlike the volatility of most non-stablecoin cryptocurrencies).

The Letter also cautions banks on the attendant risks in these activities. First, the letter notes the operational risks, including fraud and the need for personnel with appropriate technology expertise. Second, the Letter notes the compliance risks, including Bank Secrecy Act/anti-money laundering (“BSA/AML”) and countering the financing of terrorism (“CFT”) risks. However, the Letter notes the significant experience banks have already developed in implementing other technological and electronic services and BSA/AML compliance programs.

A bank’s risk management of any INVN or stablecoin activity should be commensurate with the complexity of any product or service offered, and new activities should be both consistent with sound risk management practices and aligned with the bank’s overall business plan and strategies. The Letter also notes that banks engaging in such activities must ensure that the activities are (1) conducted in a safe and sound manner and (2) consistent with applicable laws and regulations (*e.g.*, BSA/AML and consumer protection).

The Letter explains that the bank must also have in place the following:

- the capability to verify the identity of all transacting parties, including for those using unhosted wallets;<sup>3</sup> and
- appropriate systems, controls, and practices to manage the attendant risks, including ensuring a 1:1 reserve ratio and maintaining adequate resources to absorb losses and meet liquidity needs.

Finally, the letter closes by stating that banks “should consult with OCC supervisors, as appropriate, prior to engaging in these payment activities” and that

Stablecoins, pegged to the value of some asset or fiat currency (*e.g.*, U.S. dollars) through the maintenance of a reserve, are one particular means by which value may be stored and transferred on an INVN.

<sup>2</sup> See 12 CFR 7.5002(a)(3).

<sup>3</sup> An unhosted wallet is a digital asset account that is not provided by a third-party financial system.

the “OCC will review these activities as part of its ordinary supervisory processes.”

## II. Key Takeaways

The analysis in the Letter is relatively straightforward, analogizing INVN and stablecoin activities to traditional payment systems activities and the authority banks traditionally have had in the payments space.

The Letter builds on recent actions by the OCC and former Acting Comptroller Brooks to promote fintech and cryptocurrency initiatives within the confines of nationally chartered banks. In particular, the OCC issued two prior interpretive letters clarifying the scope of permissible bank crypto-activities. The first letter concluded that cryptocurrency custody services fall within previously recognized authorities to engage in safekeeping and custody activities, and that banks may offer these services in a fiduciary or non-fiduciary capacity.<sup>4</sup> Such services also include a broad range of custody-related services, including facilitating the customer’s cryptocurrency and fiat currency exchange transactions, transaction settlement, trade execution, recording keeping, valuation, tax services, reporting, or other appropriate services. The second letter concluded

that banks may hold deposits for customers that serve as reserves for stablecoins backed on a 1:1 basis by a single fiat currency.<sup>5</sup>

Further, the OCC made a push in former Acting Comptroller Brooks’ closing days in office to approve national trust bank charter applications for fintechs and other non-traditional applicants.<sup>6</sup> However, the OCC’s efforts have run into opposition from some industry participants,<sup>7</sup> state bank regulators,<sup>8</sup> and members of Congress.<sup>9</sup>

Given the controversy and the pending change of administration, the Letter’s closing lines recommending that banks consult with the OCC prior to engaging in these activities may take on added importance. In practice, the OCC may take an incremental approach, potentially limiting the range of INVN and stablecoin activities banks may initially engage in, or creating a more prescriptive framework, a tool that the OCC has used before in the context of potentially controversial expansions of national bank activities.

Finally, the Letter’s endorsement of the recent statement by the President’s Working Group on Financial Markets<sup>10</sup> that all stablecoin arrangements “should have the capability to obtain and verify the identity of all transacting parties, including for those

<sup>4</sup> *Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers*, OCC Interpretive Letter No. 1170 (July 22, 2020), available at: <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf>.

<sup>5</sup> *OCC Chief Counsel’s Interpretation on National Bank and Federal Savings Association Authority to Hold Stablecoin Reserves*, OCC Interpretive Letter No. 1172 (Sept. 21, 2020), available at: <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1172.pdf>. The bank must also verify at least daily that the reserve account balances are always at least equal to the number of the issuer’s outstanding stablecoins.

<sup>6</sup> See, e.g., *OCC Conditional Approval of Conversion Application by Anchorage Trust Company* (Jan. 14, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6a.pdf>; applications by Paxos (*Why Paxos is Seeking a National Trust Bank Charter—and Why We Remain Committed to New York*, Paxos (Dec. 9, 2020), available at: <https://www.paxos.com/why-paxos-is-seeking-a-national-trust-bank-charter-and-why-we-remain-committed-to-new-york/#:~:text=This%20week%2C%20Paxos%20submitted%20an,the%20state%20and%20federal%20levels>) and Figure Bank (*National Bank Charter Will Enable Figure to Fulfill Promises of Efficiency, Affordability and Financial Inclusion*, Figure Bank (Nov. 6, 2020), available at: <https://www.figure.com/blog/figure-applies-for-national-bank-charter-from-the-occ/>).

<sup>7</sup> See, e.g., *Comment Letter on Applications by BitPay and Paxos*, ABA et al. (Jan. 8, 2021), available at: <https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-to-occ-re-trust-charter-application-01082021.pdf?rev=6976b47cbb8e4ed9be290e523da3bd66>; *Comment Letter on Figure Bank Application*, Bank Policy Institute, et al. (Dec. 7, 2020), available at: <https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-to-occ-re-figure-bank-12072020.pdf?rev=5d9f1ec2048142baac94d12008eef004>.

[/media/documents/comment-letter/joint-trades-letter-to-occ-re-trust-charter-application-01082021.pdf?rev=6976b47cbb8e4ed9be290e523da3bd66](https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-to-occ-re-trust-charter-application-01082021.pdf?rev=6976b47cbb8e4ed9be290e523da3bd66); *Comment Letter on Figure Bank Application*, Bank Policy Institute, et al. (Dec. 7, 2020), available at: <https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-to-occ-re-figure-bank-12072020.pdf?rev=5d9f1ec2048142baac94d12008eef004>.

<sup>8</sup> See *Conference of State Bank Supervisors, Inc. v. OCC*, Complaint for Declaratory and Injunctive Relief (D.D.C. Dec. 22, 2020), available at: <https://www.csbs.org/system/files/2020-12/Complaint.pdf> (challenging Figure Bank’s charter application as essentially reviving the OCC’s fintech charter (struck down in court, but which decision the OCC is appealing) and exceeding the bounds of the OCC’s statutory authority).

<sup>9</sup> *Letter to President-elect Joseph Biden*, House of Representatives Committee on Financial Services (Dec. 4, 2020), available at: [https://financialservices.house.gov/uploadedfiles/120420\\_cmw\\_ltr\\_to\\_biden.pdf](https://financialservices.house.gov/uploadedfiles/120420_cmw_ltr_to_biden.pdf) (urging the incoming Biden administration to rescind the OCC’s interpretive letter on the permissibility of banks’ cryptocurrency custody activities).

<sup>10</sup> *President’s Working Grp. on Fin. Markets Statement on Key Regulatory and Supervisory Issues Relevant to Certain Stablecoins*, Treas. SM-1223 (Dec. 23, 2020), available at: <https://home.treasury.gov/system/files/136/PWG-Stablecoin-Statement-12-23-2020-CLEAN.pdf>.

using unhosted wallets,” creates uncertainty and compliance challenges for regulated banks who wish to issue stablecoins that are not limited to customers and “whitelisted” parties who voluntarily share their information with the bank or parties within a closed system. This constraint should not be problematic for use cases such as a consortium of banks utilizing a stablecoin to increase the efficiency of settlement among parties in the consortium, but creates challenges for any stablecoin intended to be transferable outside a closed system. The Financial Crimes Enforcement Network issued a proposed rule (the “**Unhosted Wallet Rule**”) <sup>11</sup> shortly after the Letter imposing, among other things, similar requirements for banks and money service businesses processing certain transactions in digital assets above certain thresholds to identify counterparties in such transactions. <sup>12</sup> While the final contours of the Unhosted Wallet Rule are yet to be determined, it is part of a trend by regulators to increase the BSA/AML, CFT, and sanctions obligations on those involved in the digital assets space. <sup>13</sup>

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<sup>11</sup> *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83840 (Dec. 23, 2020).

<sup>12</sup> The statement quoted in the Letter may suggest an even more burdensome requirement than that set forth in the Unhosted Wallet Rule, however, in that the Letter seems to suggest that not just identification but also verification would be required of all parties to a transaction, while the Unhosted Wallet Rule only has an explicit verification requirement for bank customers. The

Unhosted Wallet Rule requires collection of the name and address of each counterparty, and the preamble states that banks “would continue to follow risk-based procedures to determine whether to obtain additional information about their customer’s counterparties or take steps to confirm the accuracy of counterparty information.”

<sup>13</sup> See, e.g., *President’s Working Grp. on Fin. Markets Statement*, *supra*, note 10.