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Is the Crypto Camel's Nose Under the Banker's Tent With the OCC's Interpretative Letter of July 22nd?

On July 22, 2020, the Office of the Comptroller of the Currency ("OCC") released [Interpretative Letter #1170](#). This letter was written in response to an unnamed national bank that requested authority to provide cryptocurrency custody services for its customers. The OCC began its analysis by noting that banks have long provided many types of custodial services for its customers. The classic example is the safe deposit box in which valuable documents, coins and jewelry are commonly stored.

As many already know, because virtual currencies are encrypted and built upon a decentralized blockchain platform, an owner may only realize the asset's value by also possessing an alphanumeric passcode or "key." If the key is stolen or misplaced, cryptocurrency becomes worthless to the owner, and these keys are essentially irreplaceable. Banks' reputations for safety and soundness, in addition to pervasive regulations governing operations, make them a logical custodian to hold a customer's keys to the customer's cryptocurrency assets. "Providing custody services for cryptocurrency falls within these long-standing authorities to engage in safekeeping and custody activities."

Under this Interpretive Letter, national banks are permitted to provide both non-fiduciary and fiduciary custodial possession of cryptocurrency. To understand this distinction, recognize that the OCC expects that in most cases a financial institution will possess the cryptographic access key associated with a unit of cryptocurrency, but typically will not take custody of the cryptocurrency itself. To the extent that a national bank, with trust powers, takes custody of cryptocurrency in a fiduciary capacity, the bank must operate in compliance with controlling federal regulations, applicable state laws and all other applicable law and contract documents. A national bank holding cryptocurrency in a fiduciary capacity, for example, as a trustee or an administrator of an estate, has the authority to manage those cryptocurrency

assets, just as they would any other asset held by a fiduciary. “This opinion clarifies that banks can continue satisfying their customers’ needs for safeguarding their most valuable assets, which today for tens of millions of American include cryptocurrency.”

The OCC cautions its jurisdictional financial institutions, i.e., nationally chartered banks and federal savings associations, who wish to engage in these described activities to proceed “consistent with sound risk management practices and align them with the bank’s overall business plans and strategies” pursuant to the OCC’s guidance. See e.g., [OCC Bulletin, 2017-43](#) “New, Modified or Expanded Bank Products and Services: Risk Management Principles.” Bankers understand the burdens this OCC directive imposes. This will mean the creation and implementation of policies governing internal control and management information systems which meet the OCC’s requirements. It further means that the on-boarding and supervision of these customer relationships must comply the Bank Secrecy Act and all other laws and regulations relating to the institution’s safety and soundness. The OCC expresses its intention to be rigorous in examining those banks that choose to begin offering these new crypto custody services. Given all the risks and rewards for expanding in this area, the OCC closes its Interpretive Letter with the direction that “[a] national bank should consult with OCC’s supervisors as appropriate prior to engaging in cryptocurrency custody activities.” In all candor, however, the fact that financial institutions are required to comply with pervasive safety and soundness regulations is one of the positive attributes greatly appreciated by the consuming public, whether the entrusted asset is money, valuable jewelry or now, cryptocurrency custody services.

What may be most interesting is how this Interpretive Letter suggests even more. “This letter also reaffirms the OCC’s position that national banks may provide permissible banking services to any lawful business they choose, including cryptocurrency business, so long as they effectively manage the risk and comply with applicable law” (emphasis added). The Interpretive Letter is revealing of the OCC’s growing comfort with virtual currencies and a welcoming attitude to technological innovation in general. “The OCC recognizes that, as financial markets become increasing

technological, there will likely be increasing need for banks and other service providers to leverage new technology and innovative ways to provide traditional services on behalf of customers. By providing such services, banks can continue to fulfill the financial intermediation function they have historically played in providing payment, loan and deposit services.” A blog article is not necessary to inform cryptocurrency businesses that banks have historically been closed to them. If this letter cracks the door open only a little bit, such that more banks will explore serving this important industry, so much the better.

All interpretive letters, including Interpretive Letter #1170, lack the force of law or regulation. In this case, Jonathan Gould, the OCC’s senior deputy comptroller and chief counsel, who authored Interpretive Letter #1170, best is offering only a road map and a sense of the OCC’s expectations in this banking function.

Some have expressed concern that cryptocurrency’s pride in the libertarian mantra of existing in a world without rules could limit its vast potential. Many users – consumers, businesses and intermediaries – simply are not comfortable with the resulting risks. And it is fascinating that a technology built upon immutable and secure blockchain technology is the subject of too many news stories about fraud, hacks and losses. On the other hand, banks are seldom accused of moving too quickly towards the cutting edge of technology. Their reputation is that of being staid, but always safe. The intertwining of transformative cryptocurrency with the nation’s traditional financial infrastructure offers great benefits for both industries and greater promise for the country as a whole. And, of course, it will be interesting to watch as this occurs, as it simply must.

For more information on how banks may create programs to implement services in this area or for guidance about cryptocurrencies, contact [Bill Repasky](#) or any of the lawyers practicing in Frost Brown Todd’s Financial Services or [Blockchain Technology](#) industry teams.

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