February 3, 2025

Office of the Comptroller of the Currency
400 7th ST, SW, Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219
Attn: Michael Hsu, Acting Comptroller of the Currency

Board of Governors of the Federal
Reserve System
20th ST and Constitution Avenue N.W.
Washington, D.C. 20551
Attn: Michael Barr, Vice Chair for Supervision

Federal Deposit Insurance Corporation
550 17th ST NW
Washington, DC 20429
Attn: Travis Hill, Acting Chairman

Re: Request for Action and Confirmation - Authority of Banks to Provide and Outsource Cryptocurrency Custody and Execution Services on Behalf of Customers

Dear Sirs,

Coinbase Global, Inc. (together with its subsidiaries, **Coinbase**) is writing to request that the Office of the Comptroller of the Currency (**OCC**), the Board of Governors of the Federal Reserve System (**Board)**, and the Federal Deposit Insurance Corporation (**FDIC**, and together with the OCC and the Board, the **Banking Agencies**) act promptly to remove unlawful and unjustified impediments to the ability of banking organizations to provide cryptocurrency custody and execution services (**C&E Services**) on behalf of customers, and to establish appropriate business arrangements to outsource such C&E Services to third parties such as Coinbase.

The principle of fair access to permissible banking services for all lawful businesses is fundamental to the strength and safety and soundness of the banking system and has been recognized by Congress and the Banking Agencies in numerous contexts. C&E Services are just one example of the many ways in which traditional, authorized bank activities are now able to be conducted by banking organizations, both directly and through third-party service providers, using new technologies, on a safe and sound basis, and consistently with fundamental prudential and compliance expectations familiar to bank examiners. Accordingly, banking organizations should not be artificially restrained from using new technologies to conduct permissible banking business, including by using third parties to achieve the benefits of outsourcing relationships, such as quicker and more efficient access to technologies, human capital, delivery channels, products, services, and markets. Taking the actions and publishing the confirmations requested below also would be fully consistent with the recent Executive Order on Strengthening America's Leadership in Digital Financial Technology (**Executive Order**).

Actions and Confirmations Requested

For these reasons, and as explained in more detail below and in the materials accompanying this letter, we respectfully request that the Banking Agencies take the following actions and publish the following confirmations:

1. The OCC should withdraw Interpretive Letter (IL) 1179. It imposes a de facto application process for novel bank activities without going through an appropriate rulemaking process and therefore violates the Administrative Procedure Act. Relatedly, and for the avoidance of doubt, the OCC should reaffirm its conclusions in IL 1170, 1172, and 1174 regarding crypto custody and other crypto-related activities permissible for national banks.

2. The Board and the FDIC should confirm that state-chartered banks subject to their jurisdiction may provide and outsource C&E Services for customers, when consistent with applicable state banking law, under outstanding interpretive positions and guidance of the Board and the FDIC.

3. Each of the Banking Agencies should confirm the following for banking organizations subject to their jurisdiction:

    a. Under the relevant respective authorities, a bank may buy and sell crypto assets held in custody, upon the instruction of the asset owner, and if consistent with the terms of the fiduciary agreement with that customer.

    b. The well-recognized principle that banks are permitted to outsource bank-permissible activities to third parties applies to bank-permissible crypto asset activities, including C&E Services, subject to appropriate third-party risk management practices being established.

Policy Rationales

We believe there are compelling policy reasons that should lead the Banking Agencies to concur with the conclusions outlined above.

- First, withdrawing IL 1179 reflects a clear commitment to the rule of law. The core concept represented by the withdrawal – that institutions and the public will have prior notice of, and an opportunity to comment on, government mandates that are treated as binding by agency examiners – is a well settled principle of American administrative law. And while the principle is true regardless of whether an agency chooses to acknowledge it, the OCC's express affirmation of the principle by withdrawing IL 1179 will signal a renewed commitment to that core principle.

- Second, the express confirmation of legal and interpretive points relevant to the provision and outsourcing of C&E Services serves the interests of consumers and competition by allowing institutions to know what the law is when developing and delivering products and services that meet the needs of their customers, without substantial uncertainty as to regulatory consequences.

- Third, the confirmation by the Board and the FDIC of their positions regarding the provision and outsourcing of C&E Services by state-chartered banks subject to

their jurisdiction should serve the interests of consumers and competition by clarifying the relative role of state and federal laws in this product category.

- Finally, each of the actions and confirmations individually, and their expected effects collectively, would be fully consistent with the letter and the spirit of the President's recent Executive Order.

Legal Reasoning

In addition, we believe that existing law and precedent support the requested actions and confirmations by the Banking Agencies. Accordingly, we believe the Banking Agencies' confirming that they will approach the provision of C&E Services by banking organizations in the manner described above will not represent a departure from existing law; rather it will reassure banks and their third party outsourcing counterparts that the Banking Agencies will not seek to impose new legal impediments to the conduct of legally permissible banking business, including by using publicly traded and appropriately regulated third parties like Coinbase to achieve the benefits of outsourcing relationships. Accordingly, such actions and confirmations would help to eliminate the uncertainties that banking organizations which seek to provide C&E Services for customers, together with companies like Coinbase, find troublesome.

To explain our perspective more fully, we have included as an Annex to this letter a memorandum of law from our legal advisors presenting their analysis of these topics by reference to cryptocurrencies, stablecoins, and other digital assets Coinbase accepts for custody and offers for purchase and sale by institutional customers as at January 1, 2025. We hope the Banking Agencies will find that helpful in considering our requests.

Conclusion

Thank you in advance for considering our requests set forth above, and our rationales for them. Coinbase appreciates that the Banking Agencies have many matters requiring their attention and must make difficult decisions on prioritization. We are confident this topic is worthy of a place on your agenda.

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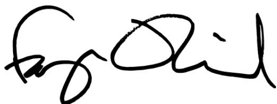
Given that our requests seek only to correct an agency action taken in manifest error, and to confirm agency interpretations already adopted or substantially free from doubt as a matter of law, we look forward to your prompt response. Both we and our advisors are also prepared to answer any questions staff of the Banking Agencies may have as they consider our requests.

Yours sincerely,



Faryar Shirzad
Chief Policy Officer

Annex 1: Additional Background
Annex 2: Legal Memorandum:
Authority of Banking Organizations in the United States to Provide and Outsource Cryptocurrency Custody and Execution Services on Behalf of Customers

cc: Office of the Comptroller of the Currency
Ted Dowd
Stuart Feldstein
Jonathan Fink

Board of Governors of the Federal Reserve System
Mark Van Der Weide

Annex 1: Additional Background

About Coinbase

Coinbase operates the nation's largest and most trusted platform for customers to buy, sell, hold, and manage digital assets. Coinbase started in 2012 with the idea that anyone, anywhere, should be able to send and receive Bitcoin easily and securely. We believe that open protocols for money will create more innovation, economic freedom, and equality of opportunity in the world, just like the Internet did for publishing information. Today, we are publicly listed in the United States and provide a trusted and easy-to-use platform that millions of verified users in over 100 countries rely on to access the crypto economy. We see the substantial benefits cryptocurrencies and permissionless blockchain systems have brought to people all around the world and want to see those benefits continue to grow and spread - safely - for years to come.

Statement of Interest

Coinbase Inc. (**CBI**) is a Delaware corporation and its subsidiary Coinbase Custody Trust Company, LLC, is a New York-chartered limited purpose trust company (**Coinbase Custody** and together with CBI, the **Coinbase Entities**). Among their various business activities, the Coinbase Entities hold certain cryptocurrencies, stablecoins, and other digital assets (**Digital Assets**) in custody for institutional clients (each, an **Institutional Client**) pursuant to custody agreements established for these purposes between the Coinbase Entities and each Institutional Client as principal and as agent for one or more customers of each Institutional Client. Institutional Clients of Coinbase may also elect to buy and sell Digital Assets through affiliates of CCTC, including CBI, under the terms of separate agreements. For purposes of these agreements, the term "Digital Assets" refers to assets that, in their native form, are maintained and transferred on a distributed ledger, including, but not limited to, Ethereum or the Bitcoin blockchain.

Institutional Clients of Coinbase have included one or more national banks chartered by the OCC and state-chartered banks subject to the jurisdiction of the Board and the FDIC. We also actively market our cryptocurrency custody and execution services to national and state-chartered banking organizations. Accordingly, we believe that actions taken by the Banking Agencies in supervising the national banks and state-chartered banking organizations subject to their jurisdiction have directly and indirectly affected the commercial affairs of Coinbase. And we believe that our experience in providing these services, and our broader expertise in digital asset markets generally, directly informs the substance of our views on the propriety of the actions and confirmations we are requesting to be taken and made by the Banking Agencies.

Arnold&Porter CLEARY GOTTLIEB STEEN & HAMILTON LLP WILMERHALE®

Authority of Banking Organizations in the United States to Provide and Outsource Cryptocurrency Custody and Execution Services on Behalf of Customers

February 3, 2025

Introduction

There is ample authority under U.S. federal law for national and state banks and their parent bank holding companies and affiliates ("Banking Organizations") to provide cryptocurrency[1] custody services to their customers and execute purchases and sales of cryptocurrency on behalf of their customers ("Cryptocurrency C&E Services") and enter into outsourcing agreements with third parties to facilitate engaging in those activities. However, recent pronouncements in the form of interpretive letters, guidance, and policy statements from the Banking Agencies have effectively prohibited Banking Organizations from engaging in these lawful activities.

This memorandum, which is provided in support of Coinbase's letter to the Banking Agencies dated February 3, 2025, describes the existing federal laws and regulations that authorize Banking Organizations to engage in Cryptocurrency C&E Services and related outsourcing arrangements. For the reasons described below, federal laws and regulations: (i) support the withdrawal of Interpretive Letter 1179; (ii) permit Banking Organizations to provide Cryptocurrency C&E Services; and (iii) allow banks to outsource bank-permissible cryptocurrency activities to third parties just like other bank-permissible activities.

I. National Bank Authority

A. Status of Interpretive Letter 1179

OCC Interpretive Letter 1179[2] ("IL 1179") sets out a *de facto* application approval process if national banks seek to engage in any of the cryptocurrency-related activities that OCC Interpretive Letters have specifically found to be permissible for national banks. In contrast, previous Interpretive Letters, such as OCC Interpretive Letter 1170 ("IL 1170"), envisioned that a national bank would consult with its supervisors regarding novel activities and that the OCC would review those activities as part of its "ordinary supervisory process" for each bank.[3]

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[1] The Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("FRB"), and the Federal Deposit Insurance Corporation ("FDIC," collectively, the "Banking Agencies") have used various terms to refer to assets based on distributed ledger technology, including "digital asset," "cryptocurrency," and "crypto-asset." In this memorandum, "cryptocurrency" is used to collectively refer to these distributed ledger-based assets, with further specifications by type of asset as relevant.

[2] OCC, Interpretive Letter No. 1179 (Nov. 18, 2021).

[3] OCC, Interpretive Letter No. 1170 at 10 (Jul. 22, 2020) (stating that "[t]he OCC will review [cryptocurrency custody] activities as part of its ordinary supervisory processes.").

In substance, IL 1179 is a rule as defined by the Administrative Procedure Act[4] ("APA").[5] Under the APA, rules that "impose new obligations or prohibitions or requirements on regulated parties" require, at a minimum, notice-and-comment rulemaking.[6] This precisely describes the broad impact of IL 1179. Whether or not an agency calls an issuance a "rule," any action meeting the APA definition must be promulgated according to APA requirements.[7] The OCC did not comply with this process in issuing IL 1179.

B. Status of IL 1170, IL 1172, and IL 1174.

The status of IL 1179 described above does not impact the validity and authority of OCC Interpretive Letters 1170, 1172,[8] and 1174.[9] Accordingly, all of the bank activities found to be authorized in those letters remain permissible.[10] These letters draw on a long line of OCC

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[4] 5 U.S.C. § 551 *et seq.*

[5] Under the APA, a "rule" is defined as follows:

> The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. 5 U.S.C. § 551(4).

[6] Courts have repeatedly held that agencies cannot sidestep the APA's notice-and-comment proceedings by calling a rule by another name, including an interpretation. *See*, *e.g.*, *Batterton*, 648 F.2d at 708; *Lewis-Mota v. Sec. of Labor*, 469 F.2d 478, 481-82 (2nd Cir. 1972).

[7] *See Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) (finding "[W]here, as here, the agency action satisfies the APA's definition of a rule and eludes exemptions to § 553, it is procedurally defective unless promulgated with the procedures required by law."). When an agency fails to follow APA procedures for the promulgation of a rule, the statute is clear—a reviewing court must "hold unlawful and set aside" the improperly-promulgated rule. 5 U.S.C. § 706(2)(A).

[8] OCC, Interpretive Letter No. 1172 (Sept. 21, 2020) ("IL 1172").

[9] OCC, Interpretive Letter No. 1174 (Jan. 4, 2021) ("IL 1174").

[10] Collectively, the activities found to be legally permissible in IL 1170, IL 1172, and IL 1174 included the provision of cryptocurrency custody services for customers, including the holding of private cryptographic keys; the holding of deposits as reserves for a certain type of stablecoin; and the use of new technologies, including independent node verification networks ("INVNs") and related stablecoins, to perform bank-permissible functions such as payment activities. These Interpretive Letters additionally reaffirmed a national bank's ability to provide permissible banking services to any lawful business provided the bank does so in compliance with applicable law and effectively manages the associated risks. This principle is fundamental to the strength and safety and soundness of the banking system and has been recognized by Congress and the Banking Agencies in numerous contexts, including in the mission statement of the OCC. 12 U.S.C. § 1.

precedents, dating back to at least the 1990s.[11] All three of these letters follow the approach the OCC has relied upon for decades in providing guidance and guardrails for engaging in bank-permissible activities using new technologies, enabling banks to remain at the center of a safe and sound financial system. As IL 1170 articulates, "[t]he OCC recognizes that, as the financial markets become increasingly technological, there will likely be an 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." As all three letters and even IL 1179 acknowledge, the activities described in IL 1170, IL 1172, and IL 1174 are traditional bank functions, carried out through new technological means associated with cryptocurrencies.

As an example, IL 1170 affirms national banks' ability to (1) provide custody services to customers when the assets being custodied are cryptocurrency, and (2) provide permissible banking services to all lawful businesses, including cryptocurrency businesses. In this respect, IL 1170[12] merely reaffirms national banks' ability to engage in a core banking function—custody of customer assets—using new technologies. As IL 1170 points out, "[n]ational banks have long provided safekeeping and custody services for a wide variety of customer assets, including both physical objects and electronic assets."[13]

The authority of national banks to engage in cryptocurrency custody services does not mean that those activities are conducted in an unregulated or uncontrolled manner. To the contrary, as IL 1170 emphasizes, national banks must apply the same risk management principles to this type of activity as to any other type of activity they propose to conduct and maintain appropriate policies and procedures, internal controls, accounting records, security systems, and other controls and capabilities in order to be able to engage in cryptocurrency custody activities in a safe and sound manner. As with any other customer account, banks need to assess the risks associated with an

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[11] For example, IL 1174 cites OCC Interpretive Letter 854, dated March 1999, as an example of the OCC recognizing banks' ability to carry out traditional activities using new technologies. *See* IL 1174, *fn*. 10. IL 1170 cites OCC precedents dating back to 1996. *See* IL 1170, *fn*. 36.

[12] *See* OCC, IL 1170, *fn* 39 ("The services national banks may provide in relation to the cryptocurrency they are custodying may include services such as facilitating the customer's cryptocurrency and fiat currency exchange transactions, transaction settlement, trade execution, recording keeping, valuation, tax services, reporting, or other appropriate services. A bank acting as custodian may engage a sub-custodian for cryptocurrency it holds on behalf of customers and should develop processes to ensure that the sub-custodian's operations have proper internal controls to protect the customer's cryptocurrency." (citation omitted)).

[13] OCC, IL 1170 at 6. Consistent with such authority, banks have long custodied a variety of assets on behalf of their customers—including, but not limited to, cash, securities, mutual fund assets, retirement plan assets, jewelry, art, coins, and certain hard-to-value assets such as mineral interests, insurance, notes, and collectibles. *See* Comptroller's Handbook, Custody Services (Jan. 2002) ("OCC Custody Handbook"); Comptroller's Handbook, Unique and Hard-to-Value Assets (Aug. 2012); Comptroller's Handbook, Retirement Plan Products and Services (Feb. 2014) ("Banks may provide custody services to retirement plans. Typical custody services include settlement, safekeeping, determining the market value of the assets held, and reporting customers' transactions.").

individual account, and they should have the capacity and knowledge to assess accounts and assets for risk, including money laundering risk.

Notably, IL 1170 (and IL 1174) envision that the OCC will review the authorized activities "as part of its ordinary supervisory processes." Presumably, in making that statement, the OCC believed that it had the capacity to do so. IL 1179 contains no explanation of why that view changed from late 2020 to 2021.

C. Authority of National Banks to Buy and Sell Assets Held as Custodian Pursuant to Customer Direction.

OCC precedent recognizes that national banks acting as custodians may buy and sell assets held in custody pursuant to customer direction where authorized by the bank's agreement with its customer. IL 1170 expressly recognizes that part of the services national banks can provide in connection with cryptocurrency include facilitating the customer's cryptocurrency and fiat currency exchange transactions, transaction settlement, and trade execution.[14]

The OCC's regulations also clearly contemplate fiduciaries effecting transactions on customers' behalf; the Comptroller's Handbook on Custody Services includes trade settling as a "core custody service."[15] Part 9 of the OCC's regulations prohibits self-dealing when engaging in "loans, sales or other transfers from fiduciary accounts," but permits those transactions where authorized by the terms of the agreement that governs the fiduciary relationship, thus clearly contemplating that national banks will be engaging in "loans, sales, or other transfers" of customers' assets in fiduciary accounts.[16] The authority for national banks acting as custodians to buy and sell assets, including cryptocurrency, on behalf of customers is consistent with longstanding precedents regarding authorized activities of custodians and is not dependent on asset type.

In fact, a long line of court and OCC precedents recognize the ability of a bank to buy and sell assets as agent for customers.[17]

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[14] OCC, IL 1170, *fn* 39.

[15] *See* OCC Custody Handbook at 2.

[16] *See* 12 C.F.R. § 9.12(b).

[17] *See*, *e.g.*, OCC, Interpretive Letter No. 1013 (Jan. 7, 2005) (citing additional OCC precedents to conclude that "[i]t is permissible for a national bank to buy and sell, as agent for customers and for its own account, gold, silver, platinum, palladium and copper coins and bullion under the express authority in 12 U.S.C. § 24(Seventh) to buy and sell 'exchange, coin, and bullion.'"); OCC, Corporate Decision #2000-04 (Mar. 23, 2000) ("National banks have long been recognized to have broad authority to underwrite, reinsure, and sell as agent, credit-related insurance products."); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (declining, in the context of annuity sales, to overturn the OCC's conclusion that "[n]ational banks … are authorized to serve as agents for their customers in the purchase and sale of various financial investment instruments.").

D. The Authority of National Banks to Outsource Bank-Permissible Activities to Third Parties Subject to Effective Third-Party Oversight is Well Established.

It is well established that national banks may outsource bank-permissible activities to third parties, so long as the banks remain ultimately responsible for the activities and maintain appropriate third-party risk management oversight.[18] Bank regulators have long recognized such outsourcing as standard practice that can provide "significant benefits" to banking organizations, providing them with "access to new technologies, human capital, delivery channels, products, services, and markets."[19] Outsourcing may also benefit bank customers and clients by providing enhanced levels of expertise in supporting a customer activity.

Prior OCC guidance on third-party risk management recognized that national banks have permissibly outsourced entire bank functions, lines of business, or products to third parties.[20] Banks can operate in a safe and sound manner by "establish[ing] risk management practices to effectively manage the risks arising from [their] activities, including from third-party relationships."[21]

These outsourcing principles are fundamental and apply to outsourcing bank-permissible activities, whether they be traditional functions or cryptocurrency custody, distributed ledger use in payments, stablecoin activities and other services described in sections I.B and I.C above. Outsourcing with respect to bank permissible cryptocurrency custody, as an example, can enable a bank to utilize a third party to provide the unique technology that safeguards the cryptocurrency held in custody for customers. This ability is of growing importance as client diversification of investments between traditional investment sources and cryptocurrencies is a growing trend. The ability to outsource permissible cryptocurrency services thus may be crucial to a bank's ability to fully serve both needs.

Moreover, where custody is being provided by a national bank in a fiduciary capacity, OCC regulations specifically permit national banks to engage in agency agreements related to the provision of fiduciary services and provide that a national bank may "purchase services related to the exercise of fiduciary powers from another bank or other entity."[22] National banks engaged in cryptocurrency custody in a fiduciary capacity may, therefore, enter into agency agreements with

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[18] *See generally* FRB, FDIC, OCC, *Interagency Guidance on Third-Party Relationships: Risk Management*, 88 Fed. Reg. 37920 (Jun. 9, 2023) ("Interagency TPRM Guidance").

[19] *See* Interagency TPRM Guidance at 37927.

[20] *See* OCC Bulletin 2013-29, *Third-Party Relationships: Risk Management Guidance* (Oct. 30, 2013) at 4 (Rescinded).

[21] Interagency TPRM Guidance at 37927.

[22] 12 C.F.R. § 9.4(c).

qualified third parties to perform custody services, including cryptocurrency custody services, for customers.

II. State Member Bank Authority

A. Upon Rescission of IL 1179, Consistent with the Policy Statement under Section 9(13) of the Federal Reserve Act, State Member Banks Do Not Need Further Permission to Exercise the Same Powers as National Banks to Engage in Cryptocurrency C&E Services, If Authorized by State Law.

Upon rescission of IL 1179 by the OCC, banks that are members of the Federal Reserve System ("state member banks") may engage in the same cryptocurrency activities as national banks, including the Cryptocurrency C&E Services discussed herein, without further action by the FRB, so long as those activities are authorized by state law. In general, state banking laws authorize state-chartered banks to engage in activities that are also permissible for national banks. This is either because the relevant state has a so-called "wild card" statute that puts state banks in parity with national banks, or because the powers of state banks under the relevant state law align closely with the powers of national banks under the National Bank Act and OCC interpretations. The Federal Reserve Act (the "FRA") should not be construed to impose an additional constraint on permitted national bank custody activities.

This position is consistent with the policy statement the FRB issued under Section 9(13) of the FRA on January 27, 2023.[23] The Policy Statement was prompted by the FRB's receipt of numerous proposals by state member banks and other banking organizations to engage in various activities involving cryptocurrencies. Section 9(13) provides, in relevant part, that a state member bank is authorized to "exercise all corporate powers granted it by the state in which it was created . . . except that the [FRB] may limit the activities of state member banks and [their] subsidiaries in a manner consistent with [Section 24 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831a]."[24] The Policy Statement enunciates the sensible principle that the "same bank activity, presenting the same risks, should be subject to the same regulatory framework, regardless of which agency supervises the bank," which principle of equal treatment "helps to level the competitive playing field among banks with different charters and different federal supervisors, and to mitigate the risks of regulatory arbitrage."[25] It states that "the [FRB] is setting out a clear expectation that state member banks look to federal statutes, OCC regulations, and OCC interpretations to determine whether an activity is permissible for national banks."[26]

[23] FRB Policy Statement on Section 9(13) of the FRA, 88 Fed. Reg. 7848 (Feb. 7, 2023) ("Policy Statement"); 12 C.F.R. § 208.112.

[24] 12 U.S.C. § 330.

[25] Policy Statement at 7848.

[26] Policy Statement at 7849.

To this end, the Policy Statement provides that the FRB will exercise its discretion under Section 9(13), as outlined above, "to limit state member banks to engaging *as principal* in only those activities that are permissible for national banks, subject to the terms, conditions, and limitations placed on national banks with respect to the activity."[27]

With regard to Cryptocurrency C&E Services provided by state member banks, the FRB made clear that nothing in the Policy Statement would prohibit a state member bank from providing safekeeping services for cryptocurrency in a custodial capacity, rather than as principal, presuming that such activities are conducted in accordance with safe and sound banking principles and applicable anti-money laundering laws and regulations as discussed above.[28] It follows that, upon the OCC's affirmation of IL 1170 and related precedent, state member banks shall not be limited in their exercise of national bank permissible Cryptocurrency C&E Services by Section 9(13) of the FRA.

B. Engaging in Cryptocurrency C&E Services Authorized Under Federal Law Does Not Require Prior FRB Approval Under Regulation H.

As noted above, national banks and, by extension, state member banks are not prohibited from providing safekeeping and custody services in respect of any particular asset or asset class, including cryptocurrencies, nor are national banks limited to providing such services for physical assets or by physical means only. Where a state member bank performs Cryptocurrency C&E Services within the scope of the corporate powers already authorized at the time of the bank's admission to membership in the Federal Reserve System, the provision of such services in the same capacity in respect of different classes of assets is not a material change to the business operations of the bank requiring FRB approval under Regulation H prior to the commencement of such activities. (By contrast, were a state member bank that has not been granted trust powers to seek to provide Cryptocurrency C&E Services in a fiduciary capacity rather than as agent in a non-fiduciary capacity, an application for FRB approval would be required.[29])

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[27] Policy Statement at 7848-49 (emphasis added).

[28] Policy Statement at 7850.

[29] *See* 12 C.F.R. § 208.3(d)(2); *see*, *e.g.*, *SVB Financial Group*, 2021 WL 4913150; FDIC, Trust Examination Manual, Section 10, *Trust Powers* (stating that commercial banks generally are permitted to provide escrow, safekeeping, custodian or similar directed-agency services without having a trust department or regulatory authorization to perform trust powers); *see also* 12 U.S.C. § 92a (providing that the OCC is authorized to grant national banks the power to act as "trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver," or in any other fiduciary capacity authorized by state law); 12 C.F.R. § 9.2 (defining "fiduciary capacity" to mean acting in the capacities enumerated by 12 U.S.C. § 92a, as well as acting as custodian under a uniform gifts to minors act, investment adviser for a fee, or in any other capacity in which the bank possesses investment discretion on behalf of another); 12 C.F.R. §§ 333.3, 333.101(b) (requiring state nonmember banks to obtain the FDIC's consent to exercise trust powers; provided, however, that a state member bank not exercising trust powers may serve as custodian of various retirement plan assets without prior FDIC approval). In each instance cited, a bank's offering of custody services as agent does not constitute the exercise of trust powers or acting in a fiduciary capacity and therefore is not material change in the character of a bank's business requiring prior regulatory approval.

An application for FRB permission to change the general character of a state member bank's business pursuant to Section 208.3(d)(2) of Regulation H is required where the bank seeks to "fundamentally or materially change" its core business plan or undertake a "material deviation from the bank's business plan that changes the scope of its business operations." FRB staff has advised that such a change occurs, for example, when a bank "primarily or exclusively" shifts its focus to activities that present novel risks and/or are associated with aggressive growth plans.[30]

Examples of changes in the general character of a state member bank's business requiring an application to the FRB include (i) shifting from a traditional or brick-and-mortar banking model to an Internet-only operation;[31] (ii) expanding a bank's business model from a limited-purpose credit card bank or trust company to a full-service bank;[32] or (iii) as noted above, expanding authorized banking powers to include the exercise of trust powers.[33]

Consistent with the Policy Statement,[34] upon the OCC's rescission of IL 1179, state member banks would not be required to apply for and receive supervisory non-objection to offer Cryptocurrency

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[30] *See*, *e.g.* FRB, Frequently Asked Questions about Regulation H, *What constitutes a change in the general character of a state member bank's business for purposes of Section 208.3(d)(2) of Regulation H?* (Mar. 31, 2021) ("Regulation H FAQs"); FRB, Supervision and Regulation Letter ("SR Letter") 02-09, *Guidance Regarding Significant Changes in the General Character of a State Member Bank's Business and Compliance with Regulation H* (Mar. 20, 2002); FRB, SR Letter 20-16, *Supervision of De Novo State Member Banks* (June 24, 2020); FRB, Electronic Applications and Filing Information, State Member Bank, ("Changes in the General Character of a State Member Bank's Business would include, for example, providing a significant level of credit facilities to a new customer base or in a new geographic area, or concentrating solely on subprime lending or leasing activities."). *Compare* FRB, Office of the Inspector General, *Review of the Supervision of Silvergate Bank* (Sept. 27, 2023) (finding that Silvergate Bank's shift from a traditional banking model to operating as a "monoline entity" serving the cryptocurrency industry and its associated rapid growth from $1 billion to $16 billion in total assets without obtaining prior approval contradicted the FRB's guidance).

[31] *See* Regulation H FAQs; *see also* 12 C.F.R. §§ 5.20(*l*)(2), 5.53 (requiring prior OCC approval for a "substantial asset change," including changing the nature of a national bank's charter, whether that be from one special purpose to another or from a special purpose to full-service national bank charter).

[32] FRB, Order Approving the Formation of A Bank Holding Company, *Capital One Financial Corporation*, 2004 WL 1538523 (July 6, 2004; FRB, Orders Under Section 3 of the Bank Holding Company Act, *Columbian Financial Corporation & The Columbian Trust Company*, WL 43753 (Aug. 1979).

[33] FRB, Orders Issued under the Bank Holding Act, *SVB Financial Group*, 2021 WL 4913150 (Sept. 2001). This approach is consistent with historic FRB practice and interpretations of Regulation H. *See* FRB, 17 Fed. Reg. 8006 (Sept. 4, 1952) (noting that the FRB historically imposed conditions of membership upon state member banks to ensure that banks carried out their affairs in a safe and sound manner; however, the elimination of this practice does not change the FRB's position regarding the "undesirability" of the practices previously prohibited by such conditions, specifically including the exercise of trust powers).

[34] The Policy Statement provides, as an illustrative example of its principle of equal treatment, that if the OCC were to condition permissibility on a national bank demonstrating that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving written non-objection from OCC supervisory staff before engaging in a particular activity, then the activity would not be permissible for a state member bank unless the bank makes the same demonstration and receives a written non-objection from FRB supervisory staff before commencing

C&E Services. Rather, state member banks may commence these activities upon implementing appropriate risk management and controls and notifying their supervisory points of contact. Such a prior notification is contemplated by the FRB's SR Letter 22-6; however, this notification procedure must not be administered as a *de facto* approval or non-objection process in practice.[35]

C. The Authority of State Member Banks to Outsource Bank-Permissible Activities to Third Parties Subject to Effective Third-Party Oversight is Well Established.

As discussed above in the context of national banks, state member banks may also outsource activities that they may engage in directly without prior FRB approval, so long as they prudently oversee such out-sourcing in compliance with applicable guidance, including guidance related to vendor management and the safe and sound conduct of custody activities.[36] Indeed, outsourcing Cryptocurrency C&E Services to qualified third parties experienced in the custody of cryptocurrencies may play an important role in state member banks' prudent risk management of Cryptocurrency C&E Services.

III. State Nonmember Bank Authority

A. Section 24 of the Federal Deposit Insurance Act Permits State Nonmember Banks to Engage in Cryptocurrency C&E Services and Related Outsourcing.

The legal authority of state nonmember banks to engage in Cryptocurrency C&E Services is defined in the first instance by state law. As discussed above, the laws of most states empower state-chartered banks to engage in activities that are also permissible for national banks under the National Bank Act and OCC regulations and guidance. For purposes of this memorandum, we assume that the national bank activities discussed in Part I above are permissible under relevant state law.

In general, federal banking law does not limit the ability of state nonmember banks to engage in the activities described in Part I. Although federal law limits the ability of a state nonmember bank to engage in activities *as principal* that are impermissible for a national bank,[37] this limitation does not apply to activities conducted as agent (or other non-principal capacities). The activities described in Part I do not involve activities conducted as principal. Under the FDIC's applicable

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the same activity. Therefore, upon the OCC's removal of such a requirement for national banks, the FRB is required to follow suit for state member banks. *See* Policy Statement at 7851.

[35] FRB, SR Letter 22-6, *Engagement in Crypto-Asset-Related Activities by Federal Reserve-Supervised Banking Organizations* (Aug. 16, 2022).

[36] *See generally* Interagency TPRM Guidance.

[37] *See* Section 24 of the Federal Deposit Insurance Act (the "FDI Act"), codified at 12 U.S.C. § 1831a(a) ("an insured State bank may not engage as principal in any type of activity that is not permissible for a national bank unless— (A) the Corporation has determined that the activity would pose no significant risk to the Deposit Insurance Fund; and (B) the State bank is, and continues to be, in compliance with applicable capital standards prescribed by the appropriate Federal banking agency.").

regulations, activities considered *not* to be activities as principal include "activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity."[38] Thus, the FDI Act and relevant FDIC regulations would not limit the authority of state nonmember banks to engage in these non-principal activities.

Lastly, state nonmember banks have the same authority to outsource activities as national banks as a matter of federal law. The FDI Act and the FDIC's implementing regulations do not contain any independent federal law limitations on outsourcing activities for state nonmember banks.

B. FDIC Interpretive Letter 16-2022

It would be inconsistent with existing law and precedent supporting the authority of state nonmember banks, as described above, for FDIC guidance to function as a *de facto* prohibition on state nonmember banks' engaging in activities that are well established as permissible. This would include FDIC Interpretive Letter 16-2022 ("FIL 16-2022"), which identifies risks and a potential feedback process for obtaining approval for engaging in activities involving cryptocurrency.[39] In practice, FIL 16-2022 has operated as a gate that interferes with state nonmember banks authority to engage in legally permissible activities. In contrast, the FDIC's historical prior notice process and review of activities through the ordinary supervisory process have allowed state nonmember banks to engage in legally permissible activities while ensuring they are conducted in a safe and sound manner.

In addition, for reasons comparable to the reasons discussed in Part II.B above (and even more clearly in the case of state nonmember banks), engaging in Cryptocurrency C&E Services generally would not involve a "change in general character of business" for a state nonmember bank under Part 333 of the FDIC's regulations.[40] A decision by a state nonmember bank that currently provides custody or fiduciary services to provide such services in relation to cryptocurrency would not represent a shift from one type of business or character to another. (In contrast, a proposal by a state nonmember bank to exercise trust powers for the first time generally would require FDIC approval based on an application under Part 303 of the FDIC's regulations.[41])

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[38] 12 C.F.R. § 362.1(b)(1).

[39] *See* FDIC, FIL 16-2022 (April 7, 2022).

[40] *See* 12 C.F.R. § 333.2; *see also* FDIC, Applications Procedures Manual, Section 23 (Mar. 21, 2024) ("FDIC Applications Procedure Manual") (noting that Section 333.1 sets forth the following five categories into which state nonmember insured banks are divided for the purpose of classifying the general character or type of business: commercial banks; banks and trust companies; savings banks (including mutual and stock); industrial banks; and cash depositories).

[41] *See* 12 C.F.R. §§ 333.3, 303.242; *see also* FDIC Applications Procedures Manual, Section 13.

IV. Bank Holding Company and Financial Holding Company Authority

A. Finder Authority

The offering of Cryptocurrency C&E Services and the outsourcing thereof is also permissible for the parent bank holding companies (each, a "BHC") of national banks and state member and nonmember banks.[42]

In particular, BHCs that have elected to become financial holding companies (each, an "FHC") possess broad authority to act as a "finder," which would be clearly applicable to certain use cases involving Banking Organizations facilitating customer purchase and custody of cryptocurrency.[43] As an alternative to engaging in Cryptocurrency C&E Services directly with their customers and then outsourcing to conduct such activities, FHC could use their finder authority to facilitate direct provision of Cryptocurrency C&E Services to their customers by qualified third-party cryptocurrency custodians. Finders bring together one or more buyers and sellers of any product or service, whether financial or non-financial in nature, for transactions that the parties themselves negotiate and consummate.[44] Within the scope of this authority, FHCs may identify potential parties to a transaction, refer such parties to each other, arrange for contacts between the parties, and convey information to each party as an intermediary.[45] FHCs may provide such services through electronic and digital channels, including through an FHC's own public website or by operating a specialized website or other electronic network that facilitates connections and information sharing among potentially interested parties.[46]

B. Trust Company Functions and Other BHC Authorities

BHCs (including those that have elected to become FHCs) also are specifically authorized to perform functions or activities that may be performed by a trust company, specifically including activities of a fiduciary, agency, or custodial nature, in accordance with applicable federal and

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[42] Authority to engage in such activities is embedded in well-established FRB interpretations of (i) the nonbanking activities of bank holding companies that are deemed to be permissible under Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended (the "BHC Act"), by virtue of being so closely related to the business of banking to be a proper incident thereto. 12 U.S.C. § 1843(c)(8); 12 C.F.R. § 225.28.

[43] 12 U.S.C. §§ 1843(k)-(o); 12 C.F.R. § 225.86. In addition, the OCC has long-authorized national banks to act as "finders" in respect of potential buyers and sellers of a wide array financial and nonfinancial products and services as part of the business of banking. *See* 12 C.F.R. § 7.1002; *see also, e.g*., OCC Interpretive Letter No. 824 (Feb. 27, 1998); OCC Interpretive Letter No. 607 (Aug. 24, 1992).

[44] 12 C.F.R. § 225.86(d)(1).

[45] 12 C.F.R. § 225.86(d)(1)(i).

[46] 12 C.F.R. § 225.86(d)(1)(ii); *see also* FRB Final Rule, Bank Holding Companies and Change in Bank Control, 65 Fed. Reg. 80736-38 (Jan. 22, 2001) (codified at 12 C.F.R. § 225.86(d)) (providing that the "finder" rule under Regulation Y provides an illustrative, not exclusive, list of permissible activities, and that a "finder" may act through any means available so long as the activity complies with the requirements of the rule).

state law.[47] This would extend to the Cryptocurrency C&E Services described above when conducted within a BHC affiliate with such powers. In addition, although we do not address them specifically here, there are other authorities in Regulation Y that may be applicable to BHCs.[48] Additionally, U.S. BHCs, when operating outside the U.S., are permitted to engage in activities usual in connection with the banking of business abroad, which should include Cryptocurrency C&E Services.[49] Finally, as described above with respect to banks, BHCs and FHCs may outsource otherwise permitted activities in accordance with applicable guidance.[50]

Conclusion

In conclusion, for the reasons discussed above, federal laws and regulations (i) support the withdrawal of Interpretive Letter 1179; (ii) permit Banking Organizations to provide and outsource Cryptocurrency C&E Services; and (iii) allow banks to outsource bank-permissible cryptocurrency activities to third parties just like other bank-permissible activities.

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[47] 12 C.F.R. § 225.28(b)(5); *see also* FRB, Bank Holding Company Supervision Manual, Trust Services (Dec. 2024) ("BHC Manual") (providing that authorized trust services include "virtually any kind of fiduciary, agency, or custodial service commonly performed by a trust company so long as the subsidiary does not accept demand deposits or make loans").

[48] For example, BHCs are permitted to provide an array of agency transactional services in respect of customer investments, including with respect to any transaction that is permissible for a state member bank. 12 C.F.R. § 225.28(b)(7)(v).

[49] 12 C.F.R. §§ 211.8(a), 211.10(a)(4).

[50] *See* FRB, Guidance on Managing Outsourcing Risk, SR Letter 13-19 (Dec. 5, 2013) (rescinded); FRB, Risk Management of Outsourced Technology Services, SR 00-17 (Nov. 28, 2000); FRB, Outsourcing of Information and Transaction Processing, SR Letter 00-4 (Feb. 29, 2000).