

January 25, 2021

## **VIRTUAL CURRENCY/FINTECH UPDATE: OCC APPROVES ANCHORAGE TRUST'S CHARTER CONVERSION AND EXPANDS THE GENERAL FIDUCIARY POWERS OF NATIONAL BANKS**

To Our Clients and Friends:

On January 13, 2021, the Office of the Comptroller of the Currency (“OCC”) conditionally approved the charter conversion application for Anchorage Trust Company (“Anchorage”), permitting Anchorage to become a national trust bank.<sup>[1]</sup> This is the first approval by the OCC of a virtual currency firm’s becoming a federally regulated banking institution and demonstrates the ongoing leadership that the OCC has shown with respect to virtual currency issues.

Although this development is significant in and of itself, the Anchorage approval relies on a new OCC Chief Counsel’s Interpretation, released as OCC Interpretive Letter 1176,<sup>[2]</sup> that substantially increases the trust powers of national banks, making them a more attractive business model generally and particularly for fintech firms. This Client Alert discusses these developments.

### **I. The Anchorage Approval – Virtual Currency Activities Are Permissible Fiduciary Activities under the National Bank Act**

The OCC’s approval order affirms that the following virtual currency activities, which were fiduciary in nature under the law of Anchorage’s home state, South Dakota, are permissible under the National Bank Act:

1. Fiduciary custody of digital assets.
2. Custody of cash deposits (Anchorage holds such deposits at FDIC-insured banks, in omnibus accounts for its clients).
3. Providing on-chain governance services allowing Anchorage clients to participate in the governance of the underlying protocols on which their virtual assets operate.
4. Via an affiliate or otherwise, operating validator nodes, providing staking as a service, and providing clients the ability to delegate staking to third-party validators.
5. Settling transactions facilitated by its affiliates, other third-party brokers, and clients. Clients or their brokers may direct Anchorage Trust to receive digital assets into and to transfer digital assets out of their vaults from and to external accounts or digital asset addresses controlled by third parties, including but not limited to transfers made in connection with the settlement of a purchase or sale of digital assets.

Tellingly, the OCC did not discuss each of these activities as fiduciary activities under its applicable regulation, 12 C.F.R. Part 9. Part 9 defines “fiduciary capacity” as follows:

Fiduciary capacity means: trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a.

12 C.F.R. § 9.2(e).

Relying on Section 9.2(e) would have required analogies to have been drawn to the specific activities in that section. Rather than making such analogies, the approval order notes simply that “since ADB-NA will continue performing the current activities of Anchorage Trust, in a manner authorized by South Dakota law for a state trust company, ADB-NA will be a national bank whose operations are those of a trust company and activities related thereto. Accordingly, ADB-NA’s activities are permissible pursuant to the plain terms of 12 U.S.C. § 27(a).”<sup>[4]</sup>

## II. New Expansion of National Bank Fiduciary Powers

12 U.S.C. § 27(a), which was enacted in 1978 in reaction to a federal district court case that called into question the propriety of the OCC’s chartering a non-depository trust bank under the National Bank Act, states that “[a] National Bank Association . . . is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to be limited to those of a trust company and activities related thereto.”<sup>[5]</sup>

Section 27(a) thus clearly authorizes national trust banks. However, notwithstanding an apparently clear statutory command that national bank fiduciary powers include “any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located,” 12 U.S.C. § 92a, the OCC has traditionally not exercised its legal authority to the full extent under that statute. Rather, as Interpretive Letter 1176 states, a prior OCC interpretation had required that the OCC look to state law “to determine whether a fiduciary capacity of national bank is permissible [only] *after* the activity is determined to be ‘fiduciary’ within the meaning of 12 U.S.C. § 92a.”<sup>[6]</sup>

Interpretive Letter No. 1176 reverses this at least 37-year-old position. For the OCC to use Section 92a’s so-called “bootstrap provision” and determine that an activity that a state’s law regards as being performed in a fiduciary capacity is a fiduciary capacity for purposes of 12 U.S.C § 92a, the OCC must determine that a national bank is engaging in the relevant activity, role, or function consistent with the parameters provided for in the relevant state law to the same extent as a state bank to qualify as a fiduciary capacity. This will make conversions of state trust companies much easier as a powers matter.

This new interpretation accords not only with the plain language of Section 92a, but also with its legislative history, when the relevant provision was added to the Federal Reserve Act in 1918.<sup>[7]</sup> As an example, under the New York Banking Law in 1918, a national bank was prohibited by state law from

acting as a fiscal and paying agent in New York,[8] even though doing so was a permissible fiduciary activity for a New York state-chartered trust company. Section 92a was enacted to level this playing field.

### **III. Confirmation That National Trust Banks Are Not Limited to Performing Primarily in a Fiduciary Capacity and May Exercise Banking Powers**

In addition, Interpretive Letter 1176 confirms that national trust banks may perform other national bank activities permitted under 12 U.S.C. § 24(SEVENTH), and, indeed, that fiduciary activities need not be their primary business activity: “ A national bank that only performs one fiduciary capacity under 12 U.S.C § 92a would need trust powers. Conversely, there is also no requirement that a national trust bank chartered under 12 U.S.C. § 27(a) perform primarily in a fiduciary capacity.”[9]

This confirmation – of what is clearly the case under the National Bank Act – is an important one. National trust banks are clearly authorized by Congress under 12 U.S.C. § 27(a), and they not “banks” within the meaning of the Bank Holding Company Act.

The OCC’s confirmation means that as long as a national trust bank has a valid fiduciary business, it may engage in a traditional bank power such as lending, with all of the preemption benefits of a national charter, without concern over whether such activities are beyond the OCC’s authority to permit as a matter of statutory interpretation.

### **IV. Confirmation That Certain State Trust Company Activities May Be Permissible for National Banks under Traditional Banking Powers**

Interpretive Letter 1176 also confirms that the OCC may find that an activity of a state-chartered trust company is permissible under 12 U.S.C. § 24(Seventh), which permits national banks may engage in the business of banking and activities incidental to the business of banking.

When determining whether an activity is part of the business of banking, the OCC considers the following factors under 12 C.F.R. § 7.5001(c)(1):

- Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- Whether the activity strengthens the bank by benefiting its customers or its business;
- Whether the activity involves risks similar in nature to those already assumed by banks; and
- Whether the activity is authorized for state-chartered banks.

The OCC stated that, given the fourth factor, “an activity permitted for state trust banks may be part of the business of banking under the authority of 12 U.S.C. § 24(Seventh) for national banks if the activity is authorized for state-chartered banks, and the OCC is satisfied that the remaining three factors are also sufficiently met.”[10]

## V. Conclusion

The Anchorage approval came at the end of Brian Brooks' tenure as Acting Comptroller of the Currency. It is another sign of the OCC's leadership on virtual currency issues and Acting Comptroller Brooks' pushing at the boundaries of the National Bank Act to facilitate innovation in financial services. In this case, the expansion of the national trust bank fiduciary and banking powers is well grounded in federal statutory law, and should benefit numerous companies, including fintech companies, that are seeking to benefit from a federal charter.

Gibson Dunn has extensive experience with the issues related to national trust bank chartering and would be pleased to discuss them with you.

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[1] <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-6a.pdf>.

[2] <https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf>.

[3] OCC Conditional Approval, Application by Anchorage Trust Company to Convert to a National Trust Bank (January 13, 2021).

[4] *Id.*

[5] 12 U.S.C. § 27(a).

[6] Interpretive Letter No. 1176, OCC Chief Counsel's Interpretation on National Trust Banks (January 11, 2021) (emphasis added) (citing OCC Interpretive Letter No. 265, reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCP) ¶ 85,429 (July 14, 1983)). Interpretive Letter 1176 states that Interpretive Letter 265's position on this issue is superseded.

[7] Walter S. Logan, "Amendments to the Federal Reserve Act," The Annals of the American Academy of Political and Social Science, Vol. 99, The Federal Reserve System – Its Purpose and Work (January 1922), pp. 114-121. The authority over national bank fiduciary powers was transferred from the Federal Reserve Board to the OCC in 1962.

[8] New York Banking Law, § 223 (1918) (currently, Section 131 of the New York Banking Law).

[9] Interpretive Letter No. 1176, OCC Chief Counsel's Interpretation on National Trust Banks (January 11, 2021).

[10] *Id.*



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