

May 21, 2021

DIGITAL CURRENCY DEVELOPMENTS: ACTING COMPTROLLER ORDERS REVIEW OF RECENT DECISIONS AND FDIC ISSUES INFORMATION REQUEST

To Our Clients and Friends:

This week, there were important virtual currency developments at two of the principal federal banking agencies, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC). Both of these developments occurred as the markets for digital currencies showed substantial volatility. First, in testimony before Congress on Wednesday, Acting Comptroller of the Currency Michael Hsu expressed concerns about the OCC's recent actions for digital currency companies and stated that he had "asked staff to review these actions."^[1] Second, the FDIC published a request for information (RFI) about digital assets and the banking system.^[2] Comments on the RFI are due by July 16, 2021.

I. Office of the Comptroller of the Currency

Prior to Acting Comptroller Hsu's appointment by Treasury Secretary Yellen, the OCC was the federal banking agency that had taken the lead on digital currencies, recently approving three applications by digital currency companies. Of these actions, Acting Comptroller Hsu stated his "broad[] concern . . . that these initiatives were not done in full coordination with all stakeholders. Nor do they appear to have been part of a broader strategy related to the regulatory perimeter."^[3]

The OCC approvals involved two applications for conversion from state trust companies to national trust banks, those of Anchorage Digital Bank, National Association, and Protego Trust Bank, National Association, and one application for a new national trust bank charter, for Paxos National Trust.^[4] Each approval therefore involved a type of national bank specifically authorized by Congress, and not a special purpose "fintech" charter.

The activities that the OCC stated were permissible for national banks in the approvals covered many digital currency activities, including:

- fiduciary custody of digital assets
- custody of client cash deposits
- providing on-chain governance services allowing clients to participate in the governance of the underlying protocols on which their digital assets operate
- operating validator nodes

- providing staking as a service
- providing clients the ability to delegate staking to third-party validators
- settling transactions facilitated by affiliates, third-party brokers and clients
- determining that customers should claim forked assets
- custody and management of U.S. dollar stablecoin reserves
- payment, exchange, and other agent services
- trading services and enabling partners to buy and sell cryptocurrency
- “know your customer” as a service, including customer identification, sanctions screening, enhanced due diligence, customer risk rating, and other related services^[5]

It is not clear what form the OCC staff review mandated by Acting Comptroller Hsu will take. It does appear from the rest of his testimony, however, that the OCC will no longer “go it alone” when it comes to digital assets. As Mr. Hsu – formerly a career supervisor at the Federal Reserve – stated, “[r]ecognizing the OCC’s unique authority to grant charters, we must find a way to consider how fintechs and payments platforms fit into the banking system, and we must do it in coordination with the FDIC, Federal Reserve, and the states.”^[6] Mr. Hsu also warned of the potential of systemic risk from digital activities, stating that he was feeling “some déjà vu,” having seen the financial disintermediation of the late 1990s and 2000s that contributed to the Great Recession.^[7]

II. Federal Deposit Insurance Corporation

If the OCC appears to be putting on the brakes, the FDIC – the primary federal supervisor for insured state banks, including industrial banks, that are not members of the Federal Reserve system, the U.S. deposit insurer, and the U.S. bank resolution authority – signaled that it wishes to know more about digital assets and the banking system. On May 17, it issued a request for information, soliciting comments regarding insured depository institutions’ (IDIs) current and potential digital asset activities.^[8] The FDIC noted that banks are exploring several roles in the digital asset ecosystem, with digital use cases and related activities potentially falling into the following categories:

- Technology solutions, such as those involving closed and open payment systems, other token-based systems for banking activities other than payments (g., lending), and acting as nodes in networks (e.g., distributed ledgers)
- Asset-based activities, such as investments, collateral, margin lending and liquidity facilities
- Liability-based activities, such as deposit services and where deposits serve as digital asset reserves

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- Custodial activities, such as providing digital asset safekeeping and related services, such as secondary lending, as well as acting as a qualified custodian on behalf of investment advisors
- Other activity including market-making and decentralized financing

Current and Potential Use Cases

The RFI seeks information regarding current and potential use cases of digital assets, including categories of digital assets and related activities, activities or use cases that IDIs are currently engaging in or considering, and the demand for digital asset-related services.

Risk and Compliance Management

The RFI asks for comment regarding risk and compliance management, including IDIs' existing risk and compliance management frameworks; unique risks that are challenging to measure, monitor, and control for the various digital asset use cases; unique benefits to operations from the various digital asset use cases; the integration of operations related to digital assets with legacy banking systems; potential benefits and unique risks of particular digital asset product offerings or services to IDI customers; and the integration of new technologies into existing cybersecurity functions.

Supervision and Activities

The RFI requests information regarding supervision and activities, including the unique aspects of digital asset activities that the FDIC should take into account from a supervisory perspectives; areas in which the FDIC should clarify or expand existing supervisory guidance to address digital asset activities; the difference between the custody of digital assets and the custody of traditional assets; and the interaction of digital assets with the FDIC's Part 362 application procedures, which cover applications by insured state nonmember banks to conduct principal activities that have not been approved for national banks.

Deposit Insurance and Resolution

The RFI asks for information regarding deposit insurance and resolution, including steps to ensure customers can distinguish between uninsured digital asset products and insured deposits; distinctions or similarities between fiat-backed stablecoins and stored value products where the underlying funds are held at IDIs and for which pass-through deposit insurance may be available; and complexities that might be encountered in valuing, marketing, operating, or resolving digital asset activity in the resolution process or in a receivership capacity.

Conclusion

This week's actions demonstrate that, as the Biden Administration takes shape, there is a change in banking agency approach to digital assets and that addressing the issues raised by digital assets remains a considerable regulatory priority. It appears that the OCC, Federal Reserve Board and FDIC will take a more coordinated approach to digital assets, one result of which may be that certain state bank regulatory agencies may take the lead on innovative proposals in the short term. For example, most of

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the activities that the OCC permitted in its digital currency approvals before Acting Comptroller Hsu was appointed had previously been deemed permissible for state-licensed trust companies.

[1] Statement of Michael J. Hsu, Acting Comptroller of the Currency, Committee on Financial Services, United States House of Representatives, May 19, 2021 (Hsu Statement).

[2] FDIC, Request for Information and Comment on Digital Assets (May 17, 2021), available at <https://www.fdic.gov/news/press-releases/2021/pr21046a.pdf>.

[3] Hsu Statement.

[4] Letter from Stephen A. Lybarger, Deputy Comptroller Licensing, OCC, to Nathan McCauley, President & Director, Anchorage Trust Company, Application by Anchorage Trust Company, Sioux Falls, South Dakota to Convert to a National Trust Bank (Jan. 13, 2021); Letter from Stephen A. Lybarger, Deputy Comptroller Licensing, OCC, to Greg Gilman, Founder & Executive Chair, Audaces Fortuna Inc., Application by Protego Trust Company, Seattle, Washington, to Convert to a National Trust Bank (Feb. 4, 2021); Letter from Stephen A. Lybarger, Deputy Comptroller Licensing, OCC, to Daniel Burstein, General Counsel and Chief Compliance Officer, Paxos, Application to Charter Paxos National Trust, New York, New York (Apr. 23, 2021).

[5] *See id.*, available at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6a.pdf>; <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19a.pdf>; and <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-49a.pdf>.

[6] Hsu Statement.

[7] Hsu Statement

[8] FDIC, Request for Information and Comment on Digital Assets (May 17, 2021), *available at* https://www.fdic.gov/news/press-releases/2021/pr21046a.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.



The following Gibson Dunn lawyers assisted in preparing this client update: Arthur Long and Samantha Ostrom.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's Financial Institutions practice group:

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