BANK POLICY INSTITUTE

American Bankers Association

August 26, 2022

Via Electronic Mail

The Honorable Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th St. SW
Washington, DC 20219

Re: Interpretive Letters re banks' use of modernized technologies

Dear Acting Comptroller Hsu:

The Bank Policy Institute[1] and the American Bankers Association[2] are writing regarding the letter dated August 10, 2022, to you from Senators Warren, Durbin, Sanders, and Whitehouse addressing the OCC's Interpretive Letters authorizing banks to engage in certain traditional banking activities using modernized technologies.[3] These Interpretive Letters, issued pursuant to the OCC's authority to administer and interpret the National Bank Act, concluded that the following activities were within the scope of permissible traditional banking activities for national banks: providing certain cryptocurrency custody services on behalf of customers, including by holding the unique cryptographic keys associated with cryptocurrency; holding deposits that serve as reserves for stablecoins that are backed on a 1:1 basis by a single fiat currency and held in hosted wallets; and using distributed ledgers

[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

[2] The American Bankers Association is the voice of the nation's $24 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.9 trillion in deposits and extend $11.4 trillion in loans.

[3] Letter from Senators Warren, Durbin, Whitehouse, and Sanders to Acting Comptroller of the Currency, Michael J. Hsu (August 10, 2022), available at: 2022.08.10 Letter to OCC re crypto guidance.pdf (senate.gov).

and buying, selling, and issuing stablecoins to engage in and facilitate payment activities.[4] In each case, the OCC sensibly determined that the activity was simply a modernized version of a traditional banking activity and thereby permissible for banks.

The Congressional letter states that in light of the "recent turmoil in the crypto market," "the OCC's actions on crypto may have exposed the banking system to unnecessary risk" and asks that you withdraw "existing interpretive letters that have permitted banks to engage in certain crypto-related activities." However, the recent events in the crypto market were wholly unrelated to banks' involvement in the traditional banking activities described in the OCC Interpretive Letters. Thus, their rescission would not enhance the protections of bank investors, consumers, or the financial system in connection with cryptocurrency activities.[5] Rather, rescinding those letters would serve only to undermine banks' ability to leverage modernized technologies to bring traditional banking products and services to customers in more reliable, safer and more efficient ways.

Additionally, while we agree that the activities of largely unregulated nonbank crypto firms present meaningful and various risks (including the risk of consumer and investor harm), the conclusion that the OCC's Interpretive Letters must be rescinded to address these risks is inapposite. The withdrawal of those letters is not warranted, nor would such withdrawal achieve the goal of imposing "stronger protections . . . to mitigate crypto's risks to the financial system and consumers."

Indeed, as detailed below:

- The recent turmoil in the crypto market, including meltdowns by issuers of a particular type of stablecoin (so-called "algorithmic" stablecoin), are in no way related to banks' involvement in the traditional banking activities described in the OCC Interpretive Letters, and their rescission would not enhance the protections of bank investors, consumers, or the financial system;

- The appropriate way to address the risks highlighted in the Senators' letter is through appropriate regulation of nonbank crypto firms and products that are currently largely unregulated; and

- Banks, by contrast, are subject to comprehensive and robust risk management, supervision, and examination processes, and have substantial experience with incorporating new technologies into the business of banking, and thus, both the public and the broader financial system benefit from banks' involvement in the activities described in the Interpretive Letters.

[4] OCC Interpretive Letter #1170 (July 22, 2020), available at: Interpretive Letter 1170, Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers (occ.gov); OCC Interpretive Letter # 1172 (September 21, 2020), available at: Interpretive Letter #1172 OCC Chief Counsel's Interpretation on National Bank and Federal Savings Association Authority to Hold Stablecoin Reserves; OCC Interpretive Letter # 1174 (January 4, 2021), available at: Microsoft Word - Interpretive Letter #1174 -Crypto 1 INVN Stablecoin Letter (occ.gov).

[5] Moreover, such rescission would conflict with the principle of tech neutrality recently endorsed by Treasury Secretary Yellen regarding the regulation of digital and crypto assets and activities. Remarks from Secretary of the Treasury Janet L. Yellen at American University's Kogod School of Business Center for Innovation (April 7, 2022), available at: Remarks from Secretary of the Treasury Janet L. Yellen on Digital Assets | U.S. Department of the Treasury.

Furthermore, the OCC, an independent bureau within the Department of the Treasury charged with administering the National Bank Act, acted wholly within its authority to provide clarity to institutions regarding the scope of permissible traditional bank activities in the Interpretive Letters. Any challenge to the conclusions drawn by the agency is more properly addressed by the judiciary or through legislative action amending the National Bank Act to codify the point of view expressed in the letter.

I. Cryptocurrency activities, like any financial activity, involve risk

The letter asserts that "[c]ryptocurrencies are highly volatile assets that offer few, if any, protections to retail investors," and points to the recent failure of "two of the three largest stablecoins" to maintain their pegs as evidence that "stronger protections are necessary to mitigate crypto's risks to the financial system and consumers." The overwhelming use case for stablecoins continues to be crypto trading, and the recent turmoil in the crypto markets and stablecoin meltdowns implicates that primary use case. We agree that stablecoins used for cryptocurrency trading – and as a potential payments tool – as issued by nonbanks present various risks, as has been well documented by the President's Working Group and many other policymakers.[6]

However, the Interpretive Letters do not authorize banks to engage in crypto trading, and no bank was involved in crypto trading underlying the recent volatility in the crypto market. Moreover, as you have pointed out, "there has been no contagion from cryptocurrencies to traditional banking and finance," although the letter dismisses your conclusion without providing evidence to the contrary.

II. The rescission of the Interpretive Letters would not mitigate the risks presented by nonbank crypto firms; those risks should be addressed by a comprehensive regulatory and supervisory framework applicable to those entities

Currently, there is no federal regulatory framework for nonbank companies engaged in crypto-related activities. Various federal regulatory agencies have taken initial, targeted steps to address certain risks posed by certain nonbanks engaged in crypto activities, some of which are mentioned in the letter. For example, the SEC fined the crypto exchange BlockFi $100 million for its crypto lending product that offered variable monthly returns because the SEC found the product was a security that

[6] *See* The President's Working Group on Financial Markets (PWG), the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, "Report on Stablecoins," (Nov. 1, 2021), available at: Report on Stablecoins (treasury.gov); *See also* Casey Wagner, Blockworks, "Secretary Yellen: Stablecoins Pose Significant Risk to Financial Stability" (May 10, 2022), available at: Secretary Yellen: Stablecoins Pose Significant Risk to Financial Stability (blockworks.co); *See also* Federal Reserve Monetary Policy Report (June 17, 2022) at 33 ("[S]tablecoins that are not backed by safe and sufficiently liquid assets and are not subject to appropriate regulatory standards create risks to investors and potentially to the financial system, including susceptibility to potentially destabilizing runs. These vulnerabilities may be exacerbated by a lack of transparency regarding the riskiness and liquidity of assets backing stablecoins. In addition, the increasing use of stablecoins to meet margin requirements for levered trading in other cryptocurrencies may amplify volatility in demand for stablecoins and heighten redemption risks"), *available at*: Monetary Policy Report, June 17, 2022 (federalreserve.gov).

had not been properly registered as a security.[7] The SEC also found that BlockFi made a false and misleading statement for more than two years on its website concerning the level of risk in its loan portfolio and lending activity. In connection with the announcement of this enforcement action, the SEC issued an Investor Bulletin on Crypto Asset Interest-bearing Accounts, warning investors that interest-bearing accounts for crypto asset holdings "may sound similar to interest-bearing accounts with a bank or credit union, but investors need to be aware that these crypto asset-related accounts are not as safe as bank or credit union deposits."[8]

More recently, Celsius, a crypto lender, and its affiliated companies filed for bankruptcy on July 13, 2022, one month after pausing all withdrawals, swaps, and transfers between accounts. Celsius had "held itself out as a safe alternative to traditional banks and promised users high interest rates. Customers could use their credit cards or bank accounts to buy crypto assets. To entice customers to stake their cryptocurrency with Celsius, the company promised returns of up to 20% on deposits, including 8.8% on stablecoins like Tether's USDT," and some Celsius customers have said that Celsius told them repeatedly that Celsius was "safer than a bank . . .with better returns."[9] In addition, Voyager, another crypto lending platform, suspended all trading, deposits, withdrawals, and rewards on July 1, 2022 and filed for bankruptcy on July 5, 2022. Voyager had misled its customers into thinking their money invested with Voyager was FDIC-insured, and therefore much safer than it was. It remains to be seen how much of their investments and cash Voyager and Celsius customers will be able to recoup. The Federal Reserve and the FDIC issued a joint letter demanding that Voyager cease and desist from making false and misleading statements regarding its FDIC deposit insurance status.[10] The FDIC subsequently issued an advisory reminding insured banks "that they need to be aware of how FDIC insurance operates and need to assess, manage, and control risks arising from third-party relationships, including those with crypto companies."[11]

While these targeted agency actions seek to address risks presented by various nonbank crypto activities, a broader regulatory framework should be established to comprehensively address the risks of crypto activities to consumers, investors, and the financial system. Restricting banks from engaging in permissible banking activities utilizing modern technologies would not mitigate these risks. Banks already have clear authority to engage in the activities described in the Interpretive Letters, and, moreover, banks must engage in those activities – as with all activities in which banks engage – in a manner consistent with their safety and soundness. Thus, banks' engagement in those activities does not present the risks the Senators describe in their letter.

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[7] SEC Press Release: "BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product" (Feb. 14, 2022), available at: SEC.gov | BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product.

[8] SEC Investor Bulletin: Crypto Asset Interest-bearing Accounts (Feb. 14, 2022), available at: Investor Bulletin: Crypto Asset Interest-bearing Accounts | Investor.gov.

[9] Hailey Lennon, "Bankrupt Crypto Lender Celsius Could Leave Customers Last In Line To Get Paid" (Aug. 1, 2022), available at: Bankrupt Crypto Lender Celsius Could Leave Customers Last In Line To Get Paid (forbes.com).

[10] FDIC and Federal Reserve Joint Letter Regarding Potential Violations of Section 18(a)(4) of the Federal Deposit Insurance Act (July 28, 2022), available at: Joint Letter Regarding Potential Violations of Section 18(a)(4) of the Federal Deposit Insurance Act (federalreserve.gov).

[11] FDIC Advisory to FDIC-Insured Institutions Regarding Deposit Insurance and Dealings with Crypto Companies (July 29, 2022), available at: Advisory to FDIC-Insured Institutions Regarding FDIC Deposit Insurance and Dealings with Crypto Companies.

III. Both the public and the financial system *benefit* from banks' involvement in the activities described in the Interpretive Letters – largely because banks are skilled managers of risk, and, unlike nonbank crypto firms, are already subject to a comprehensive federal regulatory and supervisory framework

The public and the financial system *benefit* from banks' involvement in the activities described in the Interpretive Letters. Banks are subject to comprehensive and robust risk management, supervision and examination processes, consumer protection laws and regulations, maintain strong capital buffers, carry deposit insurance, have well-developed anti-money laundering programs[12] including robust know-your-customer practices, and have substantial experience with incorporating new technologies into the financial system. Banks have the resources, talent, and expertise to implement robust compliance programs, which is especially important with respect to digital assets, which present novel illicit finance and other risks.

The letter criticizes the provision in Interpretive Letter 1179 that states that "'[b]anks already engaged in cryptocurrency, distributed ledger, or stablecoin activities as of the date of publication of this letter do not need to obtain supervisory non-objection.'" The letter asserts that this statement means "that banks that engaged in crypto-related activities prior to the letter's issuance can avoid putting in place proper risk management controls and systems." This statement reveals a fundamental misunderstanding about the nature and effectiveness of bank regulation and supervision.

As financial institutions subject to comprehensive safety and soundness and consumer protection regulation, supervision, and examination, banks would engage in digital asset and crypto-related activities only if they felt that the associated risks could be appropriately managed consistent with their risk appetites and risk management capabilities, and consistent with their regulators' supervisory expectations. Moreover, Interpretive Letter 1179 requires that banks receive written supervisory non-objection before engaging in any of the activities referenced in Interpretive Letters 1170, 1172 and 1174, ensuring that the OCC is comfortable with the banks' risk management and ability to meet supervisory expectations in connection with any proposed activity.

The way to protect consumers, investors, and the financial system is not to prohibit banks from engaging in "crypto activities" as the letter suggests, particularly those that are merely modernized versions of traditional banking activities. Prohibiting banks from engaging in those traditional banking activities would merely leave consumers to look solely to unregulated or lightly regulated nonbank entities for those services, instead of banks.[13] Rather, to protect investors and consumers and the

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[12] For the purposes of this letter, references to AML practices are inclusive of bank compliance with economic sanctions programs administered by the Office of Foreign Assets Control ("OFAC").

[13] Nonbank financial service providers and limited-purpose banking institutions have been early providers of digital asset products and services. Many products and services offered by limited-purpose banking institutions resemble traditional bank products and activities, including custodial services, payment services, and activity akin to deposit-taking. States have established regulatory frameworks supporting non-bank financial services providers' offering of these products. For example, the New York State Department of Financial Services ("NYDFS") has been issuing licenses related to virtual currency business activities, known as BitLicenses, since 2015 pursuant to its virtual currency regulations under the New York Financial Services Law. The NYDFS has also granted limited-purpose trust company charters under the New York Banking Law, giving such entities state authority to act as qualified

financial system, policymakers should develop a comprehensive regulatory framework for nonbank entities engaged in digital assets-related activities.

IV. Although a consistent and coordinated approach to crypto-related activities by the federal banking agencies would be helpful, a repeal of the OCC Interpretive Letters would not advance that goal

Finally, the letter requests that the OCC "withdraw Interpretive Letters 1170, 1172, 1174, and 1179 and coordinate with the Federal Reserve and the Federal Deposit Insurance Corporation to develop a comprehensive approach [to cryptocurrencies] that adequately protects consumers and the safety and soundness of the banking system." First, as noted, the activities described in the Interpretive Letters are traditional banking activities permissible for national banks as determined by the OCC. The Interpretive Letters also explain that the activities described therein, as with all bank activities, should be conducted consistent with sound risk management; thus, the OCC has determined that national banks' engagement in the activities described in the Interpretive Letters does not pose a threat to consumers or to the safety and soundness of the banking system.

We agree that to the extent possible, a consistent approach among the federal banking agencies regarding the permissibility of, and risk management expectations for, banks engaged in crypto activities would be helpful to institutions and their customers. The withdrawal of the Interpretive Letters, however, is not necessary to achieve that goal. Rather, we urge the agencies to continue the work they have begun in this regard. The federal banking agencies jointly advised in November 2021 that throughout 2022 they would provide greater clarity on the legal permissibility of and expectations for safety and soundness, consumer protection, and compliance with existing laws and regulations related to: crypto-asset safekeeping and traditional custody services; ancillary custody services; facilitation of customer purchases and sales of crypto-assets; loans collateralized by crypto-assets; issuance and distribution of stablecoins; and activities involving the holding of crypto-assets on balance sheet."[14] However, the agencies have not jointly provided any additional clarity on these topics. While the OCC has opined in the Interpretive Letters on the legal permissibility of certain of these activities, the agencies should continue to work together to jointly provide additional clarity regarding permissibility, where appropriate, and on risk management expectations related to crypto activities in which banks may seek to engage.

Failure to provide clarity regarding the expectations for all banks engaging in crypto activities is hindering the ability of banks to engage in responsible innovation in this space, thereby requiring consumers to look solely to unregulated or lightly regulated nonbank financial service providers and limited-purpose, uninsured banking institutions for digital asset products and services, instead of banks. Therefore, we urge you to work with the FDIC and the Federal Reserve to provide clarity regarding the permissibility of, and risk management expectations related thereto, for banks engaged in crypto-related activities.

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custodians and exchanges for digital assets. Similarly, in 2019, the State of Wyoming created Special Purpose Depository Institution charters, Wyo. Stat. § 13-12-101, *et seq.*, authorizing the chartering of institutions focused on digital assets. *See, e.g.*, BPI, *Beware the Kraken* (Oct. 21, 2020), https://bpi.com/beware-the-kraken/; *See also* BPI, *Why a Wyoming Charter is No Hail Mary for the Anti-Fractional Banking Team* (Nov. 9, 2020), https://bpi.com/why-a-wyoming-charter-is-no-hail-mary-for-the-anti-fractional-banking-team/.

[14] Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (November 23, 2021), available at: Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (federalreserve.gov).

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As explained throughout this letter, consumers, investors, and the financial system would be best protected by banking entities providing the products and services described in the Interpretive Letters. The rescission of those letters would do nothing to address the harms cited that have occurred as a result of crypto activities. Prohibiting banks from engaging in those activities would limit consumers to obtaining these services from nonbanks, potentially exposing them to greater risk, contrary to the stated goals in the letter.

Sincerely,

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