

July 15, 2021

**FEDERAL DEPOSIT INSURANCE CORPORATION**

James P. Sheesley  
Assistant Executive Secretary  
Attention: Comments-RIN 3064-ZA5  
Federal Deposit Insurance Corporation  
550 17th Street NW  
Washington, DC 20429

**Re: Request for Information and Comment on Digital Assets (RIN 3064–ZA25)**

Ladies and Gentlemen:

The American Bankers Association (“**ABA**”)<sup>1</sup> welcomes the opportunity to comment on the request by the Federal Deposit Insurance Corporation (“**FDIC**”) for information and comment concerning insured depository institutions’ current and potential activities related to digital assets (“**RFI**”).<sup>2</sup> This RFI is a timely look at an important issue. Digital asset markets are relatively new and have the potential to be a catalyst for change in financial markets.

Banks are actively evaluating ways to safely and responsibly allow their customers to buy, hold, and sell digital assets through their existing banking relationships. ABA believes that customers who choose to access these markets are best served when they can do so through banks that are subject to rigorous oversight and supervision to ensure compliance with appropriate safety and soundness and consumer protection requirements. However, significant questions remain regarding the regulation of these markets. In this letter, we highlight the need for (1) a consistent taxonomy for digital assets, (2) regulatory clarity regarding what digital asset activity is permissible for a bank, and (3) consistent regulation of banks and non-banks engaged in digital asset activity.

Accordingly, we support the FDIC’s efforts to seek more information regarding the use of digital assets in financial markets and intermediation, as well as in connection with settlement and payment systems. ABA encourages the FDIC to promote responsible innovation so that banks can meet their customers’ needs by offering products and services in the digital asset space.

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<sup>1</sup> The American Bankers Association is the voice of the nation’s \$21.5 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$18 trillion in deposits and extend nearly \$11 trillion in loans.

<sup>2</sup> FDIC, Request for Information and Comment on Digital Assets, 86 Fed. Reg. 27602 (May 21, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-05-21/pdf/2021-10772.pdf>.

## I. Background

The FDIC requests comment generally on the broad categories of digital assets and related activities described in the RFI. However, the RFI does not define the term “digital asset.” While there is no generally agreed upon definition, for the purposes of this letter, we will broadly construe the term “digital asset” to mean private digital assets that depend primarily on cryptography and distributed ledger or similar technology.<sup>3</sup> This includes privately-issued cryptocurrencies (such as Bitcoin and Ethereum), stablecoins, and non-fungible tokens. In this letter, we will not address the treatment of tokenized commercial bank money,<sup>4</sup> tokenized securities, or central bank digital currencies (“CBDCs”).<sup>5</sup>

Digital assets, in the form of cryptocurrencies, were initially intended to be used to facilitate payments transactions. In some cases, their protocols claim to make participants’ transactions anonymous. As the market has developed, new use cases have emerged. In fact, there is a diverse, complex, and rapidly evolving ecosystem of digital asset products today. The digital and programmable nature of these products means that they can be used to facilitate many kinds of financial activities that increasingly mirror the products and services offered by traditional financial institutions—to cite two examples: decentralized finance (“DeFi”) lending and stablecoin yield farming.<sup>6</sup>

Although this market continues to develop at a rapid pace, there remains significant uncertainty related to the regulation of digital assets. Among other things, this uncertainty makes it difficult to identify the legal status of a cryptocurrency. Given the regulatory uncertainty surrounding the framework applicable to digital assets, banks have moved more carefully to market than many of the less regulated providers of these services. Such non-bank market entrants are typically not subject to prudential regulation and examination, are not subject to robust capital and liquidity requirement, and could expose consumers and counterparties to harm.<sup>7</sup>

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<sup>3</sup> See, e.g., Financial Stability Board, Regulation, *Supervision and Oversight of “Global Stablecoin” Arrangements* (Oct. 13, 2020), <https://www.fsb.org/wp-content/uploads/P131020-3.pdf>.

<sup>4</sup> Tokens and/or digital coins issued by commercial banks that represent U.S. dollars held in specified accounts are fundamentally different from stablecoins issued by non-bank entities, as they present a mere alternative means for accessing and using funds placed with depository institutions, similar to checks and prepaid debit cards. As direct bank liabilities that meet the statutory definition of “deposits,” such tokens do not raise the same risks and issues posed by stablecoins and are already subject to a robust and extensive regulatory framework.

<sup>5</sup> CBDC raise important and complex policy issues that are beyond the scope of this letter.

<sup>6</sup> For a discussion of products and services in the digital asset marketplace, please see ABA, *Understanding Cryptocurrency: What Banks Need to Know* (July 2021), <https://www.aba.com/news-research/research-analysis/understanding-cryptocurrency>.

<sup>7</sup> Given customer demand, not having a clear regulatory framework for financial institutions may push this activity to a less regulated sector with potential implications for financial stability and consumer protection.

## II. General Considerations

ABA recognizes that regulators are increasingly interested in the digital asset ecosystem, and we support their continued work to ensure that banks can provide their customers products and services related to digital assets. We encourage regulators to continue to engage in a coordinated fashion to help develop a framework for banks to engage in such activities in a safe and responsible manner. To that end, we wish to raise the following general considerations in connection with the RFI.

### A. Characterization of Digital Assets

The ability to understand these markets and how existing regulation applies requires a clear and consistent taxonomy between the FDIC and other regulators. A common taxonomy and understanding of crypto assets' risks and features, broadly consistent and coordinated across all the relevant regulators, is essential to fostering prudent innovation within a sound risk management framework.

To the extent that the FDIC or other U.S. regulator provides regulatory guidance or policy regarding digital assets, it is critical that it work with other regulators and stakeholders to define the term "digital asset," and any related terms, clearly for purposes of the guidance or policy. Lack of clarity regarding what products and services are being addressed or covered by agency action can inadvertently sweep in more products than intended. This can discourage banks from engaging in digital asset activity by imposing unnecessary regulatory costs. For example, the risk profiles of cryptocurrencies like Bitcoin are different from the risk profiles of stablecoins, and therefore their regulatory treatment should be tailored to correspond to their respective riskiness.

Furthermore, to avoid confusion and simplify regulatory compliance, it is critical that the FDIC and other regulators use digital asset terms consistently. Different categorization of the same instrument by different regulators will increase legal uncertainty and lead to unnecessary complexity and inefficiency. In addition, we encourage the FDIC and other banking regulators to work with non-banking regulators to reach consensus and clarity regarding the status of digital assets as cash equivalents, intangibles, securities, or commodities that are not securities, as the legal characterization of digital assets affects their bank regulatory treatment. Regulatory coordination will inevitably take time, so regulators should be transparent in their process and be ready to quickly respond to requests.

### B. Regulatory Clarity

Well managed banks have robust risk management and compliance systems that can account for the risks of digital assets, particularly where the core products and services offered (*e.g.*, secured lending) are largely consistent with those offered by banks today. Consistent with prior agency actions, we think it would be appropriate for the FDIC and other banking regulators to clarify that such activities are generally permissible when conducted in a safe and sound manner, notwithstanding the novel technology involved.

Furthermore, since banks often have multiple regulators, it is important for regulators to take a coordinated approach that fosters innovation and gives banks clarity regarding their expectations for safe and responsible digital asset activities. The FDIC can play an important role in collaborating with other banking agencies to promote a common understanding and consistent

application of laws, regulations, and guidance that will support responsible innovation. The FDIC could work more closely not only with the other banking agencies, but also with non-bank agencies whose actions can affect innovation by banks (*e.g.*, the Commodity Futures Trading Commission, Securities and Exchange Commission, Consumer Financial Protection Bureau, and Federal Trade Commission).

### C. Consumers and other Market Participants Should Receive Consistent Protections

Banks are already subject to a comprehensive regulatory framework and supervision that help ensure that digital asset activities are implemented carefully and do not lead to unintended consequences. This activity is backed by a culture of compliance and supervision and examination that ensures that any risks are identified and remediated before there is harm to consumers or other market participants.

This level of oversight and supervision should be applied to banks and non-banks alike to ensure all customers are protected equally, regardless of where they engage with the financial marketplace. To this end, the FDIC and other regulators should coordinate their approaches to digital assets to create consistent expectations regarding digital assets, to the extent possible and appropriate. As non-bank technology firms begin offering banking products and services through digital channels, the FDIC and other regulators should coordinate their efforts, to the extent the activity falls within their jurisdiction, to ensure that these activities are appropriately monitored, emerging risks adequately captured, and all applicable legal requirements met.

Certain novel charters raise concerns regarding an uneven application of supervision and regulation. The state of Wyoming created a Special Purpose Depository Charter (“**SPDI**”) for cryptocurrency-focused firms that accept uninsured deposits. This exempts these state-chartered banks from being subject to the prudential standards required of federally-insured or supervised financial institutions. The OCC has granted three trust charters to firms operating business models facilitating cryptocurrency payments and digital asset custody instead of traditional trust fiduciary services.<sup>8</sup> Bank policy makers should recognize that although these entities are chartered, they are not subject to all of the same laws and regulations as insured banks.<sup>9</sup>

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<sup>8</sup> See OCC Interpretive Letter No. 1176, OCC Chief Counsel’s Interpretation on National Trust Banks (Jan. 11, 2021), <https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf>.

<sup>9</sup> See ABA’s previous advocacy in this area: ABA Statement for the Record Before the Subcommittee on Consumer Protection and Financial Institutions re: Banking Innovation and Financial Charters (Apr. 15, 2021), <https://www.aba.com/advocacy/policy-analysis/aba-statement-consumer-protection-financial-institutions-banking-innovation>; Joint Trades Letter on Interpretive Letter 1176 (May 27, 2021), <https://www.aba.com/advocacy/policy-analysis/joint-trades-il-1176>; Joint Trades Letter to OCC re: Trust Charter Application (Jan. 8, 2021), <https://www.aba.com/advocacy/policy-analysis/joint-trades-letter-to-occ-re-trust-charter-application>; Joint Trades Letter to OCC re: Figure Bank (Dec. 7, 2020), <https://www.aba.com/advocacy/policy-analysis/joint-trades-letter-to-occ-re-figure-bank>; and Joint Trades Letter to OCC re: Novel National Bank Chart Applications (Nov. 20, 2020), <https://www.aba.com/advocacy/policy-analysis/joint-trades-letter-to-occ-re-novel-national-bank-chart-applications>.

### III. Specific Issues

#### A. Custody Services

ABA believes an appropriately chartered and regulated state or national bank may provide cryptocurrency custody services on behalf of customers, including by holding the unique cryptographic keys associated with cryptocurrency, as part of its existing custody business. Providing cryptocurrency custody services, including holding the unique cryptographic keys associated with cryptocurrency, is a modern form of traditional banking activities.<sup>10</sup> As financial markets develop and become increasingly technological, there will be increasing need for banks to leverage new technology and innovative ways to provide traditional services on behalf of their 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.<sup>11</sup> Banks are ideally suited to perform custody services in connection with digital assets because they have the legal and compliance systems in place to address applicable anti-money laundering (“AML”) requirements, as well as address cybersecurity and risk management issues.

We encourage the FDIC to recognize that providing custodial services for digital assets is a modern form of traditional banking activities.

#### B. Partnerships with Technology Firms

Developing and bringing to market new or improved financial products, services, and processes is an integral part of a typical bank’s business model. Technology firms partner with banks to access the payments system to onboard and offload deposits. Such partnerships are becoming increasingly common and already subject to existing regulatory requirements applicable to banks entering into partnerships with third parties.

We encourage the FDIC to support bank partnerships with non-bank technology firms, where appropriate.

#### C. Capital Treatment

ABA is working to provide a response to the recent Basel Committee’s consultation on the prudential treatment of cryptoasset exposures.<sup>12</sup> We would be happy to share our response to the Basel Committee with the FDIC after it is submitted. We encourage the FDIC to consider the information that is being gathered by the Basel Committee in connection with this consultation, as it is directly relevant to the use of digital assets by banks, as well as their characterization and treatment under various aspects of bank regulatory regimes, including capital and liquidity treatment.

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<sup>10</sup> See, e.g., OCC Interpretive Letter No. 1170, Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers (July 22, 2020), <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf>.

<sup>11</sup> See *id.*

<sup>12</sup> See Basel Committee on Banking Supervision, *Consultative Document: Prudential Treatment of Cryptoasset Exposures* (June 2021), <https://www.bis.org/bcbs/publ/d519.pdf>.

#### D. Stablecoins

ABA believes a state or national bank should be able to issue or hold stablecoin “reserves” as a service to bank customers that are issuers of stablecoin. For example, stablecoin issuers may desire to place assets in an account with a state or national bank to provide assurance that the issuer has sufficient assets backing the stablecoin in situations where there is a hosted wallet.<sup>13</sup> State or national banks should also be able to issue stablecoins as direct liabilities of the bank to ensure that utilization of the banking system is not lost over time due to the failure to provide products in demand by customers.<sup>14</sup>

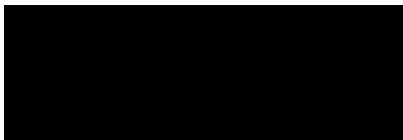
ABA further believes a state or national bank should be able to serve as a node on an independent node verification network (“INVN”) and use INVNs and related stablecoins to conduct permissible banking activities, including authorized payment activities.<sup>15</sup>

We encourage the FDIC to recognize that engaging in such activities with respect to stablecoins is permissible banking activity.

#### IV. **Conclusion**

ABA appreciates the opportunity to provide comments on the FDIC’s RFI on digital assets. Digital assets represent a rapidly developing marketplace, and banks are actively evaluating ways to safely and responsibly allow their customers to buy, hold, and sell digital assets through their existing banking relationships. For the reasons set forth above, we believe that customers who choose to access these markets are best served when they can do so through banks that are subject to rigorous oversight and supervision to ensure compliance with appropriate consumer protections and other regulatory requirements.

Sincerely,



Matthew A. Daigler

Vice President & Senior Counsel  
Innovation Policy and Regulation

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<sup>13</sup> See, e.g., OCC Interpretive Letter No. 1172, OCC Chief Counsel’s Interpretation on National Bank and Federal Savings Association Authority to Hold Stablecoin Reserves (Sep. 21, 2020), <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1172.pdf>.

<sup>14</sup> In addition, state and national banks should be able to record bank deposits using cryptography or other technology as a separate and distinct product from stablecoins. See *supra* note 4.

<sup>15</sup> See OCC Interpretive Letter No. 1174, OCC Chief Counsel’s Interpretation on National Bank and Federal Savings Association Authority to Use Independent Node Verification Networks and Stablecoins for Payment Activities (Jan. 4, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf>.