

## Alert | Blockchain



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### The OCC and SEC’s FinHub Issue Guidance on Fiat-Backed Stablecoin Reserves

On Sept. 21, 2020, the Office of the Comptroller of the Currency (the OCC) issued guidance pertaining to whether national banks could hold stablecoin reserves. That same day, the Securities and Exchange Commission Strategic Hub for Innovation and Financial Technology Staff (the SEC) issued a statement in response to that guidance, advising whether such digital asset, or stablecoin, constituted a security for purposes of the federal securities laws.

The OCC guidance confirmed that national banks may hold stablecoin reserves,<sup>1</sup> or cryptocurrency backed by reserve assets,<sup>2</sup> as deposits. Issued in response to numerous questions regarding whether national banks could provide banking services to cryptocurrency businesses, the OCC **expressly granted** national banks the authority to receive stablecoin reserve deposits from stablecoin issuers.

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<sup>1</sup> See *OCC Chief Counsel’s Interpretation on National Bank and Federal Savings Association Authority to Hold Stablecoin Reserves*, Sept. 21, 2020: “Companies that issue stablecoins often desire to place the funds backing the stablecoin, or reserve funds, with a U.S. bank . . . Several of these issuers promote these reserves—and the fact that they are held by banks—to support the trustworthiness of their stablecoin.”

<sup>2</sup> The Organization for Economic Co-operation and Development defines “reserved assets” as assets consisting of external assets that are readily available to and controlled by monetary authorities for direct financing of payments imbalances, for indirectly regulating the magnitude of such imbalances through intervention in exchange markets to affect the currency exchange rate and/or for other purposes.

The OCC guidance only pertains to banks holding stablecoin backed on a 1:1 ratio, by a single fiat currency,<sup>3</sup> where the bank verifies, at least daily, that the issuer's stablecoin reserve account balances are equal to, or greater than, the number of such issuer's outstanding stablecoins.<sup>4</sup> This new guidance also requires that banks holding stablecoin reserves comply with appropriate regulations while (i) monitoring customer relationships by implementing controls, and (ii) implementing risk assessment procedures associated with holding stablecoin reserves. In assessing risk, the OCC encourages national banks to conduct due diligence with the goal of not only facilitating an understanding of the issuer's stablecoins, but also making sure that both the bank and the issuer comply with all laws and regulations regarding the Bank Secrecy Act of 1970, as amended (BSA), and anti-money laundering regulations. Although this guidance provides some clarity regarding a framework for risk assessment, it gives national banks a broad range of authority to "properly manage customer relationships and effectively mitigate [the] risks" assessed through the performance of due diligence,<sup>5</sup> thereby insinuating that most of the responsibility to navigate bank and client relationships falls solely on the bank.<sup>6</sup>

The SEC's statement on the OCC guidance opined that stablecoin reserves could constitute securities and therefore subject issuers of such stablecoins to registration, reporting, and other requirements under federal securities laws. Within its statement, the SEC did not provide guidance pertaining to the circumstances where a stablecoin would constitute a security for federal securities law purposes, stating that whether a stablecoin reserve constituted a security was an "inherently facts and circumstances determination...[requiring] a careful analysis of the nature of the instrument, including the rights it purports to convey, and how it is offered and sold."<sup>7</sup> While the SEC stated that it was confident that issuers could structure and sell stablecoins in such a way that would not constitute a security, it encouraged issuers seeking to structure digital assets to contact SEC FinHub Staff through its dedicated webpage. While not providing much clarity on the "facts and circumstances" that would cause the SEC to deem a stablecoin a security, this statement put issuers on notice of the potential implications of offering stablecoins.

While national banks bear the brunt of creating risk assessment frameworks, complying with the BSA, properly managing customer relationships to mitigate risk, and the SEC assumes the responsibility of creating frameworks for assessing whether digital assets are securities, it is the issuer that must navigate its relationships with both the national bank and the SEC to ensure stablecoins being held and sold are done so under all applicable laws and regulations thereunder.

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<sup>3</sup> Fiat currency is a government-backed currency backed by the government that issued it. Examples of fiat currencies are: the U.S. dollar, the euro, or other major global currencies.

<sup>4</sup> See *OCC guidance*. Generally, fiat-backed stablecoins are redeemable for the underlying fiat currency, where one unit of the stablecoin can be exchanged for one unit of the underlying fiat currency. However, there are other types of stablecoin cryptocurrencies that may be more complex. This guidance only pertains to 1:1 fiat-backed stablecoins.

<sup>5</sup> See IL 1170, at 1. In IL 1170, the OCC reaffirmed its view that banks determine the levels and types of risks that they will assume. Banks that operate in compliance with applicable law, properly manage customer relationships and effectively mitigate risks by implementing controls commensurate with those risks are neither prohibited nor discouraged from providing banking services. As the federal banking agencies have previously stated, banks are encouraged to manage customer relationships and mitigate risks based on customer relationships rather than declining to provide banking services to entire categories of customers. See *Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision*, at 2 (July 22, 2019).

<sup>6</sup> See *OCC guidance*. "A bank providing services in support of a stablecoin project must comply with all applicable laws and regulations and ensure that it has instituted appropriate controls and conducted sufficient due diligence commensurate with the risk associated with maintaining a relationship with a stablecoin issuer. The due diligence process should facilitate an understanding of the risks of cryptocurrency and include a review for compliance with applicable laws and regulations, including those related to the Bank Secrecy Act (BSA) and anti-money laundering. In this regard, the review should include, but not be limited to, customer due diligence requirements under the BSA, and the customer identification requirements under section 326 of the USA PATRIOT Act."

<sup>7</sup> See *SEC statement*: "Whether a particular digital asset, including one labeled a stablecoin, is a security under the federal securities laws is inherently a facts and circumstances determination. This determination requires a careful analysis of the nature of the instrument, including the rights it purports to convey, and how it is offered and sold."

## Authors

This GT Alert was prepared by:

- **Carl A. Fornaris** | +1 305.579.0626 | [fornarisc@gtlaw.com](mailto:fornarisc@gtlaw.com)
- **Barbara A. Jones** | +1 310.586.7773 | [jonesb@gtlaw.com](mailto:jonesb@gtlaw.com)
- **William B. Mack** | +1 212.801.2230 | [mackw@gtlaw.com](mailto:mackw@gtlaw.com)
- **Jocelyn M. Coney** | +1 703.749.1331 | [coneyj@gtlaw.com](mailto:coneyj@gtlaw.com)

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