



12 CFR Part 208

[Docket No. R-1800]

RIN 7100-AG-53

Policy Statement on Section 9(13) of the Federal Reserve Act

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Board is issuing a policy statement interpreting section 9(13) of the Federal Reserve Act and setting out a rebuttable presumption that it will exercise its discretion under that provision to limit state member banks to engaging as principal in only those activities that are permissible for national banks—in each case, subject to the terms, conditions, and limitations placed on national banks with respect to the activity—unless those activities are permissible for state banks by federal statute or under part 362 of the Federal Deposit Insurance Corporation’s regulations. The policy statement also reiterates to state member banks that legal permissibility is a necessary, but not sufficient, condition to establish that a state member bank may engage in a particular activity. A state member bank must at all times conduct its business and exercise its powers with due regard to safety and soundness. For instance, it should have in place internal controls and information systems that are appropriate and adequate in light of the nature, scope, and risks of its activities. The Supplementary Information section provides examples of how the policy statement would be applied to certain crypto-asset-related activities.

DATES: This policy statement is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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Regulation, Board of Governors of the Federal Reserve System, 20th Street and C Streets NW, Washington, DC 20551. For users of TTY-TRS, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, the Board has received a number of inquiries, notifications, and proposals from state member banks and applicants for membership regarding potential engagement in novel and unprecedented activities.¹ For example, the Board has received inquiries from banks regarding potentially engaging in certain activities involving crypto-assets.² In January 2023, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Board issued a statement highlighting significant risks associated with crypto-assets and the crypto-asset sector that banking organizations should be aware of, including significant volatility in crypto-asset markets, risks of fraud among crypto-asset sector participants, legal uncertainties, and heightened risks associated with open, public, and/or decentralized networks.³ As part of its careful review of proposals from banking organizations to engage in activities involving crypto-assets, and in light of these risks, the Board is clarifying its interpretation of section 9(13) of the Federal Reserve Act (Act) and setting out a rebuttable presumption for how it will exercise its authority under that statutory provision. This

¹ See SR Letter 22-6, CA Letter 22-6: Engagement in Crypto-Asset-Related Activities by Federal Reserve-Supervised Banking Organizations (August 16, 2022) (providing guidance to banking organizations engaging or seeking to engage in crypto-asset-related activities).

² Throughout this Supplementary Information, the term “crypto-assets” refers to digital assets issued using distributed ledger technology and cryptographic techniques (for example, bitcoin and ether), but does not include such assets to the extent they are more appropriately categorized within a recognized, traditional asset class (for example, securities with an effective registration statement filed under the Securities Act of 1933 that are issued, stored, or transferred through the system of a regulated clearing agency and in compliance with all applicable federal and state securities laws). To the extent transmission using distributed ledger technology and cryptographic techniques changes the risks of a traditional asset (for example, through issuance, storage, or transmission on an open, public, and/or decentralized network, or similar system), the Board reserves the right to treat it as a “crypto-asset.”

³ Board, FDIC, and OCC, Joint Statement on Crypto-Asset Risks to Banking Organizations, at 1 (January 3, 2023) (Joint Statement). In the Joint Statement, “crypto-assets” refers “generally to any digital asset implemented using cryptographic techniques.” The Board believes that these risks similarly apply to crypto-assets as defined in this Supplementary Information. See *supra* note 2.

Supplementary Information also provides examples of how the Board intends to apply this presumption in the context of certain crypto-asset-related activities.

As expressed in the policy statement, the Board generally believes that the same bank activity, presenting the same risks, should be subject to the same regulatory framework, regardless of which agency supervises the bank. This principle of equal treatment helps to level the competitive playing field among banks with different charters and different federal supervisors, and to mitigate the risks of regulatory arbitrage.

In alignment with this principle, the Board generally presumes that it will exercise its discretion under section 9(13) of the Act to limit state member banks to engaging as principal in only those activities that are permissible for national banks—in each case, subject to the terms, conditions, and limitations placed on national banks with respect to the activity—unless those activities are permissible for state banks by federal statute or under part 362 of the FDIC’s regulations. The Board also reiterates to state member banks that legal permissibility is a necessary, but not sufficient, condition to establish that a state member bank may engage in a particular activity. A state member bank must at all times conduct its business and exercise its powers with due regard to safety and soundness.⁴ For instance, it should have in place internal controls and information systems that are appropriate in light of the nature, scope, and risks of its activities.⁵

A. Legal Authority

Under section 9(13) of the Act, the Board “may limit the activities” of a state member bank and its subsidiaries to those activities that are permissible for a national bank in a manner consistent with section 24 of the Federal Deposit Insurance Act (FDIA).⁶ Section 24 of the

⁴ 12 CFR 208.3(d)(1).

⁵ 12 CFR 208, app. D-1.

⁶ 12 U.S.C. 330 (as amended by Federal Deposit Insurance Corporation Improvement Act of 1991 § 303(b), Pub. L. 102-242, 105 Stat. 2236, 2353).

FDIA generally prohibits insured state banks from engaging as principal in any activity that is not permissible for national banks, unless authorized by federal statute or the FDIC.⁷

The National Bank Act enumerates certain powers that national banks may exercise and authorizes national banks to exercise “all such incidental powers as shall be necessary to carry on the business of banking.”⁸ The OCC has the authority to interpret provisions of the National Bank Act and is charged with the “discretion to authorize activities beyond those specifically enumerated,” within reasonable bounds.⁹ Section 7.1000 of the OCC’s regulations identifies the criteria that the OCC uses to determine whether an activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh).¹⁰ If a national bank has not been authorized by federal law, including the National Bank Act, to engage in an activity, then national banks are not permitted to engage in such activity.

B. Application

This policy statement applies to insured and uninsured state member banks. The statement does not impact the legal obligation of insured state member banks to seek approval from the FDIC when required under section 24 of the FDIA and part 362 of the FDIC’s regulations. As established under those provisions, insured state banks may not engage as principal in any type of activity that is not permissible for a national bank unless—(i) the FDIC has determined that the activity would pose no significant risk to the Deposit Insurance Fund; and (ii) the state bank is, and continues to be, in compliance with applicable capital standards.¹¹

By issuing this statement, the Board is setting out a clear expectation that state member banks look to federal statutes, OCC regulations, and OCC interpretations to determine whether an activity is permissible for national banks. If no such source authorizes national banks to

⁷ 12 U.S.C. 1831a(a); 12 CFR part 362.

⁸ 12 U.S.C. 24(Seventh).

⁹ *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

¹⁰ 12 CFR 7.1000.

¹¹ 12 U.S.C. 1831a(a)(1).

engage in the activity, then state member banks should look to whether there is authority for state banks to engage in the activity under federal statute or part 362 of the FDIC's regulations. If there also is no authority for a state bank to engage in the activity under federal statute or part 362 of the FDIC's regulations, a state member bank may not engage in the activity unless it has received the permission of the Board under § 208.3(d)(2) of the Board's Regulation H. Under that provision, a state member bank may not, without the permission of the Board, change the general character of its business or the scope of the corporate powers it exercised at the time of its admission to membership. In such instances, insured state banks would be required to submit an application to the FDIC under part 362 of the FDIC's regulations.

In determining whether to grant a state member bank permission to engage in an activity under § 208.3(d)(2) of Regulation H, the Board, consistent with the policy statement, will rebuttably presume that a state member bank is prohibited from engaging as principal in any activity that is impermissible for national banks, unless the activity is permissible for state banks under federal statute or part 362 of the FDIC's regulations. This presumption may be rebutted if there is a clear and compelling rationale for the Board to allow the proposed deviation in regulatory treatment among federally supervised banks, and the state member bank has robust plans for managing the risks of the proposed activity in accordance with principles of safe and sound banking.

In assessing permissibility, the Board is intending to align its process with that of the FDIC under section 24 of the FDIA.¹² If the FDIC, by rule, permits insured state banks to engage in the activity, no Board approval would be required to establish permissibility.¹³

¹² See, e.g., FDIC FIL-54-2014: Filing and Documentation Procedures for State Banks Engaging, Directly or Indirectly, in Activities or Investments that are Permissible for National Banks (November 19, 2014).

¹³ As noted below, legal permissibility is a necessary, but not sufficient, condition to establish that a state member bank may engage in a particular activity. Regardless of the legal permissibility of a proposed activity, if commencing the proposed activity would constitute a change in the general character of the state member bank's business or in the scope of corporate powers it exercised at the time of its admission to membership, prior permission of the Federal Reserve pursuant to § 208.3(d)(2) of Regulation H would be required.

However, if the FDIC permits the activity only for a particular bank, separate Board approval would be required for all other state member banks.

In a case where a state member bank determines that an activity is permissible for national banks under federal statute, OCC regulations, or OCC interpretation, the bank may only engage in the activity if the bank adheres to the terms, conditions, and limitations placed on national banks by the OCC with respect to the activity. For example, if the OCC conditions permissibility on a national bank demonstrating, to the satisfaction of its supervisory office, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving a written nonobjection from OCC supervisory staff before engaging in a particular activity, then the activity would not be permissible for a state member bank unless the bank makes the same demonstration and receives a written nonobjection from Federal Reserve supervisory staff before commencing such activity.

C. Safety and Soundness

In the statement, the Board also reiterates to state member banks that legal permissibility is a necessary, but not sufficient, condition to establish that a state member bank may engage in a particular activity. A state member bank must at all times conduct its business and exercise its powers with due regard to safety and soundness.¹⁴ For instance, it should have in place internal controls and information systems that are appropriate to the nature, scope, and risks of its activities.¹⁵ Further, a state member bank must comply at all times with Regulation H, conditions of membership prescribed by the Board,¹⁶ and other applicable laws and regulations, including those related to consumer compliance and anti-money laundering. With respect to any novel and unprecedented activities, such as those associated with crypto-assets or use of distributed ledger technology, it is particularly important for a state member bank to have in

¹⁴ 12 CFR 208.3(d)(1).

¹⁵ 12 CFR 208, app. D-1.

¹⁶ 12 CFR 208.3(d)(3).

place appropriate systems to monitor and control risks, including liquidity, credit, market, operational (including cybersecurity and use of third parties), and compliance risks (including compliance with Bank Secrecy Act and Office of Foreign Asset Control requirements to reduce the risk of illicit financial activity). Federal Reserve supervisors will expect state member banks to be able to explain and demonstrate an effective control environment related to such activities.

D. Specific Activities of Interest

The Board has received inquiries as to the permissibility of certain crypto-asset-related activities for state member banks. Below, the Board discusses how it would presumptively apply section 9(13) of the Act to these activities. In practice, this presumption could be rebutted if there is a clear and compelling rationale for the Board to allow deviations in regulatory treatment among federally supervised banks, and the state member bank has robust plans for managing the risks of such activities in accordance with principles of safe and sound banking. However, the Board has not yet been presented with facts and circumstances that would warrant rebutting its presumption. Nothing in the policy statement would prohibit a state member bank, or an applicant to become a state member bank, once approved, from providing safekeeping services for crypto-assets in a custodial capacity if such activities are conducted in a safe and sound manner and in compliance with consumer, anti-money-laundering, and anti-terrorist-financing laws.

Holding Crypto-Assets as Principal. The Board has not identified any authority permitting national banks to hold most crypto-assets, including bitcoin and ether, as principal in any amount,¹⁷ and there is no federal statute or rule expressly permitting state banks to hold

¹⁷ To date, the OCC has not made a determination addressing the permissibility of a national bank holding crypto-assets as principal, other than “stablecoins” to facilitate payments subject to the conditions of OCC Interpretive Letter 1179. *See* OCC Interpretive Letter No. 1174 (January 4, 2021) (Interpretive Letter 1174); OCC Interpretive Letter No. 1179 (November 18, 2021) (Interpretive Letter 1179). The OCC has required a national bank to divest crypto-assets held as principal that it acquired through a merger with a state bank. Specifically, the OCC conditioned its recent approval of the merger between Flagstar Bank, FSB and New York Community Bank into Flagstar Bank, NA on the divestiture of holdings of “Hash,” a crypto-asset, after a conformance period, as well as a commitment not to increase holdings of any crypto-related asset or token “unless and until the OCC determines that . . . Hash or other crypto-related holdings are permissible for a national bank.” OCC Conditional Approval Letter No. 1299, at 9 (October 27, 2022).

crypto-assets as principal. Therefore, the Board would presumptively prohibit state member banks from engaging in such activity under section 9(13) of the Act.¹⁸

The Board believes this presumption is bolstered by safety and soundness concerns.¹⁹ The Financial Stability Oversight Council has observed that, in the absence of a fundamental economic use case, the value of most crypto-assets is driven largely by sentiment and future expectations, and not by cash flows from providing goods or services outside the crypto-asset ecosystem.²⁰ This prevents firms that hold crypto-assets from engaging in prudent risk management based on the underlying value of most crypto-assets, their anticipated discounted cash flows, or the historic behavior of the relevant markets. Moreover, the crypto-asset sector—which is globally dispersed—is largely unregulated or noncompliant with regulation from a market-conduct perspective, and issuers are often not subject to or not compliant with disclosure and accounting requirements. This opacity may make it difficult or impossible to assess market and counterparty exposure risks. Further, engagement in crypto-asset transactions can present significant illicit finance risks, in part due to the pseudonymity of transactors and validators. Finally, crypto-assets that are issued or transacted on open, public, and/or decentralized ledgers may involve significant cybersecurity risks—especially in comparison to traditional asset classes.

Issuing Dollar Tokens. Certain state member banks have proposed to issue dollar-denominated tokens (dollar tokens) using distributed ledger technology or similar technologies. The permissibility of the issuance of dollar tokens to facilitate payments for national banks is

¹⁸ In addition, insured state member banks would need to seek approval to hold crypto-assets, other than those permitted by OCC Interpretive Letters 1174 and 1179, from the FDIC under section 24 of the FDIA and part 362 of the FDIC's regulations.

¹⁹ See Joint Statement (noting that holding as principal crypto-assets that are issued, stored, or transferred on an open, public and/or decentralized network, or similar system, is highly likely to be inconsistent with safe and sound banking practices).

²⁰ Financial Stability Oversight Council, *Report on Digital Asset Financial Stability Risks and Regulation*, at 27 (October 3, 2022); see also *id.*, at 23–28.

subject to OCC Interpretive Letters 1174 and 1179, including the conditions set out therein.²¹ A state member bank seeking to issue a dollar token would be required to adhere to all the conditions the OCC has placed on national banks with respect to such activity, including demonstrating, to the satisfaction of Federal Reserve supervisors, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving a supervisory nonobjection before commencing such activity.

The Board generally believes that issuing tokens on open, public, and/or decentralized networks, or similar systems is highly likely to be inconsistent with safe and sound banking practices.²² The Board believes such tokens raise concerns related to operational, cybersecurity, and run risks, and may also present significant illicit finance risks, because—depending on their design—such tokens could circulate continuously, quickly, pseudonymously, and indefinitely among parties unknown to the issuing bank. Importantly, the Board believes such risks are pronounced where the issuing bank does not have the capability to obtain and verify the identity of all transacting parties, including for those using unhosted wallets.²³

List of Subjects

12 CFR Part 208

Accounting; Agriculture; Banks, Banking; Confidential business information; Consumer protection; Crime; Currency; Federal Reserve System; Flood insurance; Insurance; Investments; Mortgages; Reporting and recordkeeping requirements; Securities.

²¹ Interpretive Letter 1174; Interpretive Letter 1179.

²² See Joint Statement, at 2.

²³ Interpretive Letter 1174, at 4 (quoting President's Working Group on Financial Markets, *Statement on Key Regulatory and Supervisory Issues Relevant to Certain Stablecoins*, at 3 (December 23, 2020)).

12 CFR CHAPTER II

Authority and Issuance

For the reasons set forth in the Supplementary Information, part 208 of chapter II of title 12 of the Code of Federal Regulations is amended as follows:

PART 208 – MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321-338a, 371d, 461, 481-486, 601, 611, 1814, 1816, 1817(a)(3), 1817(a)(12), 1818, 1820(d)(9), 1833(j), 1828(o), 1831, 1831o, 1831p-1, 1831r-1, 1831w, 1831x, 1835a, 1882, 2901-2907, 3105, 3310, 3331-3351, 3905-3909, 5371, and 5371 note; 15 U.S.C. 78b, 78I(b), 78I(i), 780-4(c)(5), 78q, 78q-1, 78w, 1681s, 1681w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

Subpart J—Interpretations

2. Add § 208.112 to read as follows:

§ 208.112. Policy statement on section 9(13) of the Federal Reserve Act.

(a) Under section 9(13) of the Federal Reserve Act (12 U.S.C. 330), a state member bank may “exercise all corporate powers granted it by the State in which it was created . . . except that the [Board] may limit the activities of State member banks and subsidiaries of State member banks in a manner consistent with section 24 of the Federal Deposit Insurance Act.” The Board interprets this provision as vesting the Board with the authority to prohibit or otherwise restrict state member banks and their subsidiaries from engaging as principal in any activity (including acquiring or retaining any investment) that is not permissible for a national bank, unless the activity is permissible for state banks by federal statute or under part 362 of the Federal Deposit Insurance Corporation’s (FDIC) regulations, 12 CFR part 362. The Board reminds state member banks of the fundamental canon of federal banking law that activities are permissible for a national bank only if authority is provided under federal law, including the National Bank Act.

(b) The Board generally believes that the same bank activity, presenting the same risks, should be subject to the same regulatory framework, regardless of which agency supervises the bank. This principle of equal treatment helps to level the competitive playing field among banks with different charters and different federal supervisors and to mitigate the risks of regulatory arbitrage.

(c) In alignment with this principle, the Board generally presumes that it will exercise its discretion under section 9(13) of the Federal Reserve Act (12 U.S.C. 330) to limit state member banks and their subsidiaries to engaging as principal in only those activities that are permissible for national banks—in each case, subject to the terms, conditions, and limitations placed on national banks with respect to the activity—unless those activities are permissible for state banks by federal statute or under 12 CFR part 362. For example, if the OCC conditions permissibility on a national bank demonstrating, to the satisfaction of its supervisory office, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving a written nonobjection from OCC supervisory staff before engaging in a particular activity, then the activity would not be permissible for a state member bank unless the bank makes the same demonstration and receives a written nonobjection from Federal Reserve supervisory staff before commencing such activity.

(d) If a state member bank or its subsidiary proposes to engage in an activity as principal that is not permissible for a national bank or for an insured state member bank under federal statute or part 362 of this title, the state member bank or subsidiary may not engage in the activity unless the bank has received the prior permission of the Board under § 208.3(d)(2). Under that provision, a state member bank may not, without the permission of the Board, change the general character of its business or the scope of the corporate powers it exercises at the time of its admission. In determining whether to grant permission to engage in an activity under § 208.3(d)(2), the Board will rebuttably presume that a state member bank and its subsidiaries are prohibited from engaging as principal in any activity that is impermissible for national banks,

unless the activity is permissible for state banks under federal statute or part 362 of this title. This presumption may be rebutted if there is a clear and compelling rationale for the Board to allow the proposed deviation in regulatory treatment among federally supervised banks, and the state member bank has robust plans for managing the risks of the proposed activity in accordance with principles of safe and sound banking. Depending on the applicant and the activity, an application to the FDIC may also be required under section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a).

(e) This statement does not impact the legal obligation of insured state member banks to seek approval from the FDIC when required under section 24 of the Federal Deposit Insurance Act and part 362 of this title. As established under those provisions, insured state banks may not engage as principal in any type of activity that is not permissible for a national bank unless—

(1) the FDIC has determined that the activity would pose no significant risk to the Deposit Insurance Fund; and (2) the state bank is, and continues to be, in compliance with applicable capital standards.

(f) The Board also reiterates to state member banks that legal permissibility is a necessary, but not sufficient, condition to establish that a state member bank may engage in a particular activity. Under § 208.3(d)(1), a state member bank must at all times conduct its business and exercise its powers with due regard to safety and soundness. Under appendix D-1 of this part, at a minimum, a state member bank should have in place and implement internal controls and information systems that are appropriate for the nature, scope, and risks of its activities. Further, under § 208.3(d)(3), a state member bank must comply at all times with this part and conditions of membership prescribed by the Board; in addition, a state member bank must comply with other applicable laws and regulations, including those related to consumer compliance and anti-money laundering. With respect to any novel and unprecedented activities, appropriate systems to monitor and control risks, including liquidity, credit, market, operational,

and compliance risks, are particularly important; Federal Reserve supervisors will expect banks to be able to explain and demonstrate an effective control environment related to such activities.

By order of the Board of Governors of the Federal Reserve System, January 27, 2023.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023-02192 Filed: 2/6/2023 8:45 am; Publication Date: 2/7/2023]