



STATE OF WYOMING

DEPARTMENT OF AUDIT

DIVISION OF BANKING

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23 October 2020

McDermott Will & Emery LLP
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(via e-mail)

Re: No-Action Letter on Custody of Digital Assets and Qualified Custodian Status

Dear Counsel,

The Wyoming Division of Banking (the Division) has received your letter¹ dated 27 July 2020 requesting a no-action letter from the Division on behalf of your client Two Ocean Trust (Two Ocean), a Wyoming-chartered public trust company located in Jackson, Wyoming. The letter requested the Division's position on the following:

- (1) Whether Two Ocean, a public trust company, is permitted to provide custodial services for digital assets, including virtual currency and digital (tokenized) securities under Wyoming law;²
- (2) Whether the Division would pursue enforcement action if Two Ocean held itself out to the public as a “qualified custodian,” which includes the definition of “bank” under the Investment Advisers Act of 1940³ and the Securities and Exchange Commission (SEC) Custody Rule.⁴

The Division has determined that Two Ocean is permitted to provide custodial services for both digital and traditional assets under Wyoming law. Additionally, the Division finds that Two Ocean may serve as a “qualified custodian.” This determination is based on the definition of “bank” in the Advisers Act and because Two Ocean exercises genuine fiduciary powers as a substantial portion of its business.

Based on the facts presented, the Division would not pursue enforcement action against Two Ocean for holding itself out to the public as a “qualified custodian” if Two Ocean operates in conformity with applicable laws and rules surrounding the safekeeping of customer assets, including both Wyoming and federal law.

This letter does not conclude that all chartered, non-depository trust companies are within the definition of “bank” under the Advisers Act, or that all trust companies are “qualified custodians.”

¹ James H. Cundiff, Joseph B. Evans, Elise J. McGee and David L. Taub are counsel to Two Ocean on this matter.

² Wyo. Stat. § 34-29-101(a).

³ 15 U.S.C. § 80b-1 *et seq.*

⁴ 17 C.F.R. § 275.206(4)-2.



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This is a fact-intensive analysis based on the assertions made in your letter of 27 July 2020. The guidance provided in this letter may no longer apply if these facts were to materially change.

I. DIVISION OF BANKING AUTHORITY

The Banking Commissioner, through the Division, is Wyoming's prudential regulator/supervisor of state-chartered banks and trust companies.⁵ Among other duties, the Commissioner is responsible for:

- (1) Investigating and making recommendations on charter applications to the State Banking Board;⁶
- (2) Conducting regular and emergency examinations of banks and trust companies to assess safety and soundness in accordance with broadly accepted banking and trust principles;⁷
- (3) Conducting regular off-site monitoring of banks and trust companies;
- (4) Providing supervisory guidance on issues relevant to safe and sound banking and trust company operations;
- (5) Conducting enforcement and remedial action, as warranted by the condition or actions of a particular institution, or an institution's directors, officers or employees;⁸ and
- (6) Resolving failed institutions.⁹

The Commissioner, as the chief banking regulator in Wyoming, has historically provided formal and informal guidance to regulated financial institutions regarding the application of both Wyoming and federal law, including interpretive matters relating to both banks and trust companies.¹⁰ Guidance is typically provided after Attorney General review.

The SEC maintains broad regulatory/supervisory authority over the securities markets and investment advisers, with certain exceptions.¹¹ There is regulatory overlap between the authority of the Division and SEC relating to certain issues surrounding the safekeeping and protection of customer assets held by investment advisers. Under the SEC Custody Rule, investment advisers are required to store customer assets with a “qualified custodian,” which includes “banks,” as defined by the Advisers Act. Most investment advisers are regulated and supervised by the SEC, and their fiduciary duties relating to custody are an important component of this supervision.¹² State and federal banking regulators—including the Division—regulate and supervise the “qualified custodians” that are considered “banks” on matters relating to the safety and soundness of the custodian, including legal status and internal operations.¹³

⁵ See Wyo. Stat. §§ 13-1-603; 13-5-410(a).

⁶ Wyo. Stat. §§ 13-2-211; 13-5-506; 13-5-606.

⁷ Wyo. Stat. §§ 13-3-702(a); 13-5-410(a)(i); 13-5-521(a); 13-5-607.

⁸ See, e.g., Wyo. Stat. §§ 13-1-603(c)(i); 13-5-410(a)(ii); 13-5-420; 13-10-201 *et seq.*

⁹ Wyo. Stat. §§ 13-4-301 *et seq.*; 13-5-417.

¹⁰ *Financial Technology Sandbox*, WYO. BANKING DIV., <http://wyomingbankingdivision.wyo.gov/home/areas-of-regulation/laws-and-regulation/financial-technology-sandbox> (last visited 20 October 2020). See also Wyo. Stat. §§ 13-1-603(c)(i), (vii); 13-5-213(a)(iv) (2018); 13-5-410(a)(i).

¹¹ See 15 U.S.C. § 80b-1 *et seq.*

¹² See, e.g., SEC. & EXCH. COMM'N, 2019 SEC No. Act. LEXIS 114, at *3 (12 March 2019) (“it is a fraudulent, deceptive or manipulative act, practice or course of business for an investment adviser that is registered or required to be registered under the Advisers Act to have ‘custody’ of client funds or securities unless they are maintained in accordance with the requirements of the Custody Rule.”); 2017 SEC No. Act. LEXIS 136, at *3–7 (21 February 2017); 2016 SEC No. Act. LEXIS 288 (25 April 2016).

¹³ See Wyo. Stat. § 34-29-104; OFFICE OF THE COMPTROLLER OF THE CURRENCY, CUSTODY SERVICES: COMPTROLLER'S HANDBOOK 1 (2002), available at <https://occ.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/pub-ch-custody-services.pdf> [hereinafter CUSTODY HANDBOOK].

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The questions presented are whether Two Ocean may provide custodial services for digital assets and whether the company may act as a “qualified custodian” to investment advisers. Given the Division's responsibility to regulate and supervise trust companies in Wyoming, it is incumbent on the Division to provide guidance to Two Ocean. Consistent with federal law, we do so here.

II. TWO OCEAN TRUST

Two Ocean is a Wyoming-chartered, non-depository public trust company currently operating pursuant to Wyo. Stat. § 13-5-501 *et seq.* Two Ocean is authorized to do business with the public.¹⁴ Among other powers, Two Ocean is empowered to:

- (1) “Act as a fiduciary in the regular course of its business[;]”
- (2) “Act or be appointed by any court to act in like manner as an individual or as a fiduciary for any purpose permitted by law;”
- (3) “Purchase, invest in and sell stocks, bonds, mutual funds, mortgages and other securities for the account of trusts;”
- (4) “Make any lawful fiduciary investment as permitted by W.S. 2-3-301;” and
- (5) “[P]erform all acts necessary to exercise the powers enumerated in this chapter.”¹⁵

Based on your letter, the Two Ocean website,¹⁶ and Two Ocean's other representations to the Division, we understand your client to be currently engaged in the following activities/business lines:

- (1) Equities
 - a. Domestic and international equity investments for customers, covering core domestic equities, core international equities and secular growth domestic and international equities.
 - b. Customer equity portfolios, primarily invested in direct equity investments amongst publicly listed stocks or passive exchange-traded funds.
 - c. Nominal mutual fund activities.
- (2) Fixed Income
 - a. Proprietary cash management strategy for customers, focused on risk adjusted returns compared to similar short duration cash management alternatives, based on U.S. Government securities, investment-grade corporate bonds and AAA-rated mortgages.
 - b. Core fixed income exposure in U.S. Government bonds, investment-grade and high-yield corporate bonds, U.S. mortgages, commercial mortgage backed securities, asset-backed securities and other debt-based investment vehicles.
- (3) Commodities
 - a. Spot and futures market exposure for customers.
- (4) Alternative Investments
 - a. Private equity partnerships.
 - b. Residential, commercial and mixed-use real estate investments.
- (5) Private Trust Services
 - a. Trust administration for family trust companies.
- (6) Other Trustee Functions
 - a. Directed/discretionary trustee, co-trustee, trust advisor and trust protector services.

¹⁴ Wyo. Stat. §§ 13-5-301(a)(xiv).

¹⁵ Wyo. Stat. § 13-5-510(b).

¹⁶ *Our Capabilities*, TWO OCEAN TRUST, <https://www.twocean.com> (last visited 20 October 2020).

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(7) Custodial Services

a. Asset safekeeping.

Two Ocean also states that it provides Wyoming situs for trusts and related investments.¹⁷ The Division also understands that Two Ocean currently restricts its customers to accredited investors and qualified purchasers.¹⁸

III. DIGITAL ASSET CUSTODIAL SERVICES

Chartered trust companies, whether public¹⁹ or family,²⁰ have long had the authority to provide asset custodial services for customer assets in Wyoming. Custodial services typically include “the settlement, safekeeping, and reporting of customers’ marketable securities and cash . . . to a variety of customers, including mutual funds and investment managers, retirement plans, bank fiduciary and agency accounts, bank marketable securities accounts, insurance companies, corporations, endowments, foundations and private banking clients.”²¹ Custodial services also are provided by trust companies and banks for commodities and hybrid assets.²²

Wyoming trust companies may properly provide custodial services to their clients as an incidental activity²³ which is related to the investment management, advisory, trade execution and trustee functions authorized by Wyoming law. As a legal matter, the Division views digital assets in the same light as traditional asset classes, and therefore Wyoming trust companies may properly provide custodial services for virtual currency, digital securities and digital consumer assets.²⁴ Wyoming has also clearly established the commercial/property law status of digital assets, which is a key prerequisite for banks and trust companies to operate safely in the digital asset space.²⁵

As a supervisory matter, digital assets pose unique opportunities and challenges,²⁶ but this does not diminish the authority of trust companies and banks to provide custody for digital assets.²⁷ As discussed in Part IV(5) below, the Division is finalizing development of a comprehensive regulatory and supervisory framework to ensure the safety and soundness of digital asset activities conducted by banks and trust companies.

¹⁷ *Id.*

¹⁸ See 15 U.S.C. § 80a-2(a)(51)(A); 17 C.F.R. § 230.501(a).

¹⁹ Chartered and operating pursuant to Wyo. Stat. § 13-5-501 *et seq.* “Public” means authorized to conduct “trust company business” with the general public. See Wyo. Stat. § 13-5-301(a)(xviii). A chartered family trust company is only permitted to conduct “trust company business” with two familial lines. See *id.* at (a)(v)(A).

²⁰ Chartered and operating pursuant to Wyo. Stat. § 13-5-601 *et seq.*

²¹ CUSTODY HANDBOOK, at 1. See also Wyo. Stat. § 34-29-104(p)(iii).

²² See, e.g., 17 C.F.R. § 1.20; 17 C.F.R. § 30.7; Commodity Futures Trading Comm., *Retail Commodity Transactions Involving Certain Digital Assets*, 85 Fed. Reg. 37,734 (24 June 2020); R. WYO. BANKING DIV., ch. 19, § 2(a)(iii).

²³ Wyo. Stat. § 13-5-510(b)(vii). See also Wyo. Stat. § 13-5-301(a)(xviii)(K) (noting that custody of an account for which a trust company exercises “substantial discretion” would be considered “fiduciary” in nature and constitute “trust company business”). Similarly, custody which does not involve “substantial discretion” is not “fiduciary” and is an incidental trust company power. *Id.*

²⁴ Wyo. Stat. §§ 34-29-101(a)(ii), (iii) and (iv).

²⁵ *Id.*

²⁶ At the time of this letter, the Division is finalizing development of a holistic supervisory program relating to digital assets to provide regulatory expectations, which will include policy manuals and examiner work programs.

²⁷ See generally Office of the Comptroller of the Currency, Interpretive Letter #1170, 22 July 2020.

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In your letter, you queried whether Wyoming's statutory framework for bank digital asset custodial services²⁸ precluded trust companies from providing similar services, or from providing custodial services in an identical manner to that statute. Consistent with the analysis contained in this section, Two Ocean, and other Wyoming-chartered trust companies may properly provide custodial services for digital assets²⁹ in a similar manner to the framework contained in Wyo. Stat. § 34-29-104,³⁰ or may otherwise provide custody consistent with appropriate safety and soundness principles for digital assets after consultation with the Division.³¹

This determination is based on the fact that Wyo. Stat. § 34-29-104(a) states that “[t]he provisions of this section are cumulative and not exclusive as an optional framework for enhanced supervision of digital asset custody.”³² Additionally, no provision of Wyoming law exclusively restricts digital asset activities to “banks.”³³ The Division understands that the Wyoming Legislature enacted this statute to provide a standard-setting model for bank digital asset custody activities and to provide legal clarity—not to preclude others from safely providing custodial services for this asset class.

It is important to carefully consider the legal status of digital assets under both state³⁴ and federal law.³⁵ Many digital assets, including virtual currency, may be commodities governed by the Commodity Exchange Act³⁶ and the Commodity Futures Trading Commission (CFTC),³⁷ while others may be securities regulated by the SEC and state authorities.³⁸

IV. QUALIFIED CUSTODIAN/DEFINITION OF “BANK”

Custody of financial assets is a difficult area of the law. The law governing custodial services of banks and trust companies, in the context of both traditional and digital assets, is not fully developed.³⁹ One commentator has noted that the word “custody” is frequently used in a “diffuse and inexact” manner,⁴⁰ although the SEC Custody Rule presents this term with some specificity.⁴¹

²⁸ Wyo. Stat. § 34-29-104.

²⁹ This statement should not be construed to mean that all chartered, non-depository trust companies may derive “qualified custodian” status. This is a fact-based inquiry dependent on the circumstances of a particular trust company.

³⁰ A trust company is not a “bank” within the meaning of Wyo. Stat. § 34-29-104(p)(i), but this is not material in this context because of the optional nature of that statute.

³¹ The Division recognizes that a trust company may be able to provide custodial services for digital assets without following each of the requirements in Wyo. Stat. § 34-29-104. However, the Division’s expectation is that the standards set forth in that statute are generally best practices for digital asset custody, subject to the particular situation of each trust company and appropriate risk management.

³² Furthermore, the rules implementing this section state that these provisions are “opt-in.” R. WYO. BANKING DIV., ch. 19, § 1(b).

³³ Wyo. Stat. § 13-1-101(a)(i).

³⁴ Wyo. Stat. § 34-29-101(a).

³⁵ See, e.g., SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

³⁶ 7 U.S.C. § 1 *et seq.*

³⁷ See, e.g., Commodity Futures Trading Comm., *Retail Commodity Transactions Involving Certain Digital Assets*, 85 Fed. Reg. 37,734–744 (24 June 2020).

³⁸ See, e.g., Sec. & Exch. Comm’n, *Framework for Investment Contract Analysis of Digital Assets*, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> (last visited 20 October 2020).

³⁹ See, e.g., Edward H. Klees, *How Safe are Institutional Assets in a Custodial Bank’s Insolvency*, 68 BUS. LAWYER 103, 105 (2012) (“The challenges in understanding U.S. custody law start with the fact that ‘custody’ is not usually a legal term of art, and while, traditionally, most analysis starts with common law concepts of trust, agency, and bailment, no one—including legislators, courts and even the U.S. Federal Deposit Insurance Corporation (the FDIC)—applies them consistently or always accurately.”).

⁴⁰ *Id.* at 111, 133.

⁴¹ 17 C.F.R. § 275.206(4)-2(d)(2).

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There is also a lack of legal clarity concerning which entities are permitted to provide custody for certain assets and how those assets would be treated in a bank or trust company receivership.

There are a series of entities that are considered “qualified custodians” for the purposes of the Advisers Act, including a bank, broker-dealer, futures commission merchant or a foreign financial institution.⁴² The Advisers Act provides the following definition of “bank”:

“Bank” means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 2(5) of the Home Owners’ Loan Act, (B) a member bank of the Federal Reserve System, (C) any other banking institution, savings association, as defined in section 2(4) of the Home Owners’ Loan Act, or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.⁴³

Under this definition, a number of factors must be satisfied for the trust company to qualify as a “bank.” These are:

- (1) Incorporated or unincorporated entity doing business under the laws of a state or the United States;
- (2) Receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency;
- (3) The activities described in (2) must be a substantial portion of the trust company's business;
- (4) The trust company must be supervised and examined by a state or federal banking or savings association regulator; and
- (5) The trust company must not be operating for the purposes of evading securities laws.

The Division has examined each element below, in detail, and has determined that Two Ocean falls within the Advisers Act definition of “bank.”

1. Incorporation/Laws

This element requires that the trust company be incorporated/organized or unincorporated and doing business under state or federal law.

Two Ocean is duly organized as a Wyoming limited liability company,⁴⁴ and has a Wyoming public trust company charter.⁴⁵ Consequently, Two Ocean satisfies this element.

⁴² *Id.* at (d)(6).

⁴³ 15 U.S.C. § 80b-2(a)(2) (emphasis added).

⁴⁴ *Two Ocean Trust, WYO. SEC. STATE.,*

<https://wyobiz.wyo.gov/Business/FilingDetails.aspx?eFNum=138236240048091200186199182173228107028090089010> (last visited 20 October 2020).

⁴⁵ *Wyoming Trust Companies*, WYO. BANKING DIV., <http://wyomingbankingdivision.wyo.gov/regulated-financial-institutions/trust-companies> (last visited 20 October 2020).

2. Receiving Deposits or Exercising Fiduciary Powers Similar to National Banks

This element requires that a trust company either: (1) receive deposits; or (2) exercise fiduciary powers similar to those permitted to national banks.

“Deposits” are generally viewed as on-balance liabilities of a bank denominated in fiat currency, which may be claimed by a customer on demand or at specific times.⁴⁶ Trust companies which accept deposits are somewhat of a historical vestige.⁴⁷ However, today, “trust company” refers to an entity that mainly conducts fiduciary, trust, custodial or related incidental activities. Many trust companies are prohibited by law from receiving deposits in a fiduciary capacity, including national trust banks.⁴⁸ In some states, mainly those which permit depository trust companies, non-depository trust companies are referred to as “limited-purpose trust companies” or “limited-liability trust companies.”⁴⁹ To the Division’s knowledge, the trust companies currently engaged in custodial activities for digital assets are primarily organized in Wyoming, South Dakota and Nevada (all of whose laws prohibit trust companies from accepting deposits), or are organized as limited-liability trust companies in New York.

Two Ocean, as a Wyoming-chartered trust company, is not permitted to receive deposits. Two Ocean’s ability to meet this second element therefore turns on whether it is “exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency.”

The meaning of “exercising fiduciary powers similar to those permitted to national banks” is a complicated question, one that has elicited interest and confusion⁵⁰ in the digital asset community.⁵¹ The SEC has historically deferred issuing no-action relief to trust companies seeking clarification of the definition of “bank” under securities laws.⁵² Since the Division is determining

⁴⁶ See 12 U.S.C. § 1813(l); Wyo. Stat. §§ 34.1-9-102(a)(ii) (“account”), 34.1-9-102(a)(xxix) (“deposit account”); S.D.C.L. § 51A-10-1; Bd. Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 363–73 (1986).

⁴⁷ See *2019 Resolution Plan*, STATE STREET CORP., at *48, <https://www.federalreserve.gov/supervisionreg/resolution-plans/state-street-3g-20190701.pdf> (noting that State Street Bank and Trust is a Massachusetts-chartered trust company, chartered in 1891, which is also a depository institution); *2017 Public Resolution Plan*, NORTHERN TRUST CORP., at *42, <https://www.federalreserve.gov/supervisionreg/resolution-plans/northern-tr-3g-20171231.pdf> (noting that Northern Trust Company is an Illinois-chartered bank organized in 1889). See also Mass. Gen. L. ch. 172 (trust company laws which permit banking business to be conducted); N.Y. Bank. L. § 96 (noting that every bank and trust company has the power to receive deposits and make loans).

⁴⁸ See, e.g., 12 U.S.C. § 92a(d); Wyo. Stat. § 13-5-510(c); Nev. Rev. Stat. § 669.210(2); N.H. Rev. Stat. Ann. § 383C-3-302; S.D.C.L. §§ 51A-5-1.2, 51A-6-12; Hawaii Rev. Stat. § 412:8-200(b)(3). *Contra* Alaska Stat. § 6.26.050(e); Rev. Stat. Mo. § 362.023. See also 12 U.S.C. § 1813(l), (p).

⁴⁹ Mass. Gen. L. ch. 172, § 9A (“ . . . any such limited purpose trust company shall not accept deposits . . . ”); N.Y. Bank. L. § 102-A (“Trust companies which (a) do not receive deposits from the general public and (b) have been exempted by the superintendent of financial services from the requirements of section thirty-two of this chapter, may be formed and operated as limited liability trust companies.”).

⁵⁰ See Lalita Clozel, *Are Trust Charters the Key to Simplifying Fintech Regulation?*, AM. BANKER, 16 November 2016, <https://www.americanbanker.com/news/are-trust-charters-the-key-to-simplifying-fintech-regulation> (observing state banking regulators’ comments that the meaning of the term “fiduciary” is inconsistent and confused).

⁵¹ See, e.g., Chris Kentouris, *National Banks as Digital Asset Custodians: Big Deal or Not?*, FINOPS REPORT, 14 August 2020, <https://finopsinfo.com/investors/national-banks-as-digital-asset-custodians-big-deal-or-not/> (“However, several legal experts dispute the validity of her stance also shared by some attorneys specializing in state trust law that the OCC’s guidance levels the playing field between national banks and state-chartered trust companies . . . What’s more the OCC does not define custody as a fiduciary responsibility.”).

⁵² See, e.g., SEC. & EXCH. COMM’N, 2005 SEC No. Act. LEXIS 507, at *2 (7 April 2005) (“The Division of Market Regulation has asked us to advise you that the staff has previously declined to answer whether a non-depository trust company is a ‘bank’ under Section 3(a)(6) of the Exchange Act.”); 1991 SEC No Act. LEXIS 825, at *1 (7 June 1991)

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what fiduciary powers are “similar to those permitted to national banks” as required by the Advisers Act, it considers rules and guidance adopted by the Office of the Comptroller of the Currency (OCC)—the regulator of national banks.

The OCC's rules and interpretive guidance, as well as other federal law and legal commentary, suggest that discretion is an essential element of the exercise of fiduciary powers by a putative fiduciary.

The OCC *Comptroller's Handbook: Custody Services* states that “[c]ustody is generally not considered a fiduciary capacity under 12 CFR 9.”⁵³ This statement is based on the OCC's regulations for national bank activities, which generally view the exercise of discretion, i.e., genuine decision-making, as an essential element of whether an activity is fiduciary in nature. National banks may also provide custodial services in a fiduciary capacity, but only when the bank is exercising discretionary authority while conducting investment management-type activities for assets “as a trustee, an executor of a will, an administrator of an estate, a receiver, or as an investment advisor [sic],” consistent with applicable OCC regulations and state law.⁵⁴ Custodial services conducted in a non-fiduciary capacity are generally grounded in the law of bailment, contract or Uniform Commercial Code Article 8. By contrast, fiduciary custody is grounded in trust law.

In a 2019 Advanced Notice of Proposed Rulemaking, the OCC considered amendments to the definition of “fiduciary capacity” which would include activities based on the authority a national bank has with respect to a trust, such as the power to make discretionary distributions, override the trustee, or select a new trustee.⁵⁵ These proposed and expanded roles still require the exercise of discretionary decision-making (though not always investment-related) as part and parcel of “trust adviser activities” by the national bank.⁵⁶

The OCC choice of law rule for national bank fiduciary powers states that “A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets.”⁵⁷ Additionally, 12 C.F.R. § 9.5 lists a number of required policies and procedures related to the fiduciary function which are related to discretion.

(“This position was based upon a determination that it is not appropriate for the staff to consider, in a no-action request, whether such an entity ‘is not operated for the purpose of evading’ the 1940 Act, a determination that must be made to find that a non-depository trust company is a ‘bank’ under the Act’s definition.”); 1985 SEC No. Act. LEXIS 2108, at *1 (25 April 1985).

⁵³ CUSTODY HANDBOOK, at 11.

⁵⁴ Office of the Comptroller of the Currency, Interpretive Letter #1170, 22 July 2020, at *9 (noting that national banks are required to “manage” digital assets in the fiduciary context, instead of merely providing “safekeeping”). *See* 12 C.F.R. § 9.6 (requiring national banks to conduct a pre-acceptance review of fiduciary accounts to determine whether it can “properly administer” the account and noting the presence of “investment discretion”). *See also* 12 U.S.C. § 92a.

⁵⁵ *See* Office of the Comptroller of the Currency, *Fiduciary Capacity; Non-Fiduciary Custody Activities*, 84 Fed. Reg. 17,967–969 (29 April 2019).

⁵⁶ *Id.*

⁵⁷ 12 C.F.R. § 9.7(d) (emphasis added). *See Dutcher v. Matheson*, 840 F.3d 1183, 1198 (10th Cir. 2016); *Bell v. Countrywide Bank, N.A.*, 860 F. Supp. 2d 1290, 1299–1300 (D. Utah 2012) (describing the exercise of discretion as a “core fiduciary function”); *Bank of Am., N.A. v. Sundquist*, 430 P.3d 623, 634 (Utah 2018). Note that 12 C.F.R. 9.7 may be inconsistent with the standards of 12 U.S.C. § 92a, based on the interplay of state and federal law.

The OCC Custody Handbook observes:

However, a custodian may perform functions that are fiduciary in nature. For example, a custodian exercising discretion in managing a securities lending cash collateral pool would be acting in a fiduciary capacity and must comply with the relevant provisions of 12 CFR 9.⁵⁸

A 1998 OCC interpretive letter noted the following:

[A]gency services arrangements that do not involve the exercise of discretion or similar fiduciary responsibilities, such as escrow, safekeeping and custody, may be performed by a bank under the incidental powers of banking without having trust powers.⁵⁹

Another OCC interpretive letter states that “[a] custody relationship is a contractual arrangement” and are “often are in conjunction with the delivery of fiduciary services.”⁶⁰ If custody was itself typically a fiduciary activity, then there would likely be no need to provide these services in conjunction with fiduciary services. In short, OCC rules and guidance make it clear that custody is not generally a fiduciary activity for national banks in the absence of discretion (again, such as providing custody in conjunction with investment management-type activities). The OCC's position is largely consistent with other statutes, rules and cases,⁶¹ as well as legal commentary.⁶²

The Division notes that the National Bank Act may permit each state to define scope of fiduciary powers in that state. Under 12 U.S.C. § 92a (the OCC “wildcard statute”), the OCC can permit national banks to act in a fiduciary capacity to the extent by “which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.”⁶³ Therefore, while the OCC rules and guidance above are instructive, the National Bank Act itself may indicate that each state determines the scope of fiduciary activities it will permit (for the purposes of the Advisers Act and other relevant federal laws). However, the actual application of this statute is unclear because this statutory provision does not give guidance on whether state laws that define fiduciary powers must be consistent with the OCC position (e.g., discretion as an essential element) and whether “fiduciary capacity” should be construed to have an objective meaning.⁶⁴

⁵⁸ CUSTODY HANDBOOK, at 11.

⁵⁹ Office of the Comptroller of the Currency, Conditional Approval Letter #267, at *19 (12 January 1998).

⁶⁰ Office of the Comptroller of the Currency, Interpretive Letter #1078, at *3 (19 April 2007).

⁶¹ 29 U.S.C. § 1002(21)(A) (“a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority....”); 29 C.F.R. § 2510.3-21. *See, e.g., Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 912 (7th Cir. 2013); *Hamilton v. Carell*, 243 F.3d 992, 998 (6th Cir. 2001); *Cottrill v. Sparrow, Johnson & Ursillo*, 74 F.3d 20, 22 (1st Cir. 1996); *Pohl v. Nat'l Ben. Consultants*, 956 F.2d 126, 129 (7th Cir. 1992); *Commodity Futures Trading Comm. v. Heritage Capital Advisory Servs., Ltd.*, 823 F.2d 171, 173 (7th Cir. 1987); *Reeve v. Chase Nat'l Bank of N.Y.*, 247 A.D. 515, 517 (N.Y. App. Div. 1936) (“The trustee was to have no discretion, nor was it to exercise any judgment. It was, in effect, a mere custodian.”) (emphasis added).

⁶² Restatement (Third) of Trusts § 87; Robert Hockett, *Are Bank Fiduciaries Special?*, 68 ALA. L. REV. 1071, 1109 (2017) (“But this means the erstwhile firm fiduciary now is no longer a firm fiduciary at all. She is scarcely a fiduciary even for the firm's creditors, inasmuch as she has been divested of discretionary authority and been made something more like a custodian, charged simply with ensuring that no more of the soon-to-be bankrupt estate is lost.”) (emphasis added); Patricia Wick Hatamyar, *See No Evil? The Role of the Directed Trustee Under ERISA*, 64 TENN. L. REV. 1 (1996), at 46 (“... asserting that the Bank's status was 'sufficiently analogous' to that of an asset custodian (which several courts have found to be a non-fiduciary role....”)), 44 fn. 290 (“However, most courts have found that an asset custodian is not an ERISA fiduciary.”); 81 (“depository/custodian (non-fiduciary)”).

⁶³ *See* 12 U.S.C. § 92a(a).

⁶⁴ *See, e.g., Lalita Clozel, Are Trust Charters the Key to Simplifying Fintech Regulation?*, AM. BANKER, 16 November 2016, <https://www.americanbanker.com/news/are-trust-charters-the-key-to-simplifying-fintech-regulation>

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Furthermore, the Advisers Act definition of “bank” requires that fiduciary powers be “similar” to national banks. The fact that state laws may consider custodial services to be fiduciary/trust activities does not necessarily mean that such services are “similar” to the fiduciary powers granted to national banks, especially relating to the discretionary nature of fiduciary powers and the objective meaning of “fiduciary.” “Similar” means “alike in substance or essentials”⁶⁵ and the same core elements or characteristics, though not identical.⁶⁶ This is a material distinction because the Advisers Act definition of “bank” uses the term “fiduciary powers” and cites the OCC. These are important questions that may pose material risks to investment advisers and custodians today.

Wyoming law is consistent with the OCC view of fiduciary powers. Under Wyoming law, “trust company business” means the “holding out by a person . . . that such person is available to act as a fiduciary in this state and accepting and undertaking to act as a fiduciary in the regular course of its business.”⁶⁷ However, “a person or entity does not engage in trust company business solely by [] [a]cting as a custodian, unless the activities involve a substantial exercise of discretion as determined by the commissioner.”⁶⁸

It is clear that the exercise of discretion (in tandem with the other requisites of a fiduciary relationship) constitutes a fiduciary power. It is the Division’s position that a non-depository trust company which is providing discretion-based fiduciary services, including investment management and adviser-type activities, is exercising “fiduciary powers similar to those permitted to national banks.” Under both Wyoming law and OCC rules and guidance, it is likely that non-discretionary activities, like custodial services, are not generally fiduciary in nature.

Part II of this letter describes the services in which Two Ocean is currently engaged in providing to its customers today. Of these services in Part II, the: (1) equities; (2) fixed income; (3) commodities; (4) alternative investments; and (6) “other trustee functions” involve the exercise of discretion by Two Ocean, in the context of a fiduciary relationship.

These discretionary functions include the structuring of investment products based on Two Ocean’s proprietary strategies, advising customers on investment products within the scope of its fiduciary duties, customer asset management and trust protector-type services. Each function involves the substantial exercise of professional judgment and skill by Two Ocean, based on the knowledge and experience of its officers and employees, within the scope of its fiduciary duties to customers.

(recounting the argument of one trust company who attempted to disclaim fiduciary liability in some states but accepted it in others, also noting “[f]iduciary duty should not be turned into a ‘legal artifice’ . . . [t]here’s a real danger we can lose some of the control we have over the business and dilute the meaning of a trust charter.”).

⁶⁵ *Similar*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=similar> (last visited 20 October 2020) (“Having a resemblance in appearance or nature; alike though not identical.”); *Similar*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/similar> (last visited 20 October 2020) (“alike in substance or essentials”).

⁶⁶ *Obasi Inv., Ltd. v. Tibet Pharm., Inc.*, 931 F.3d 179, 186 (3d Cir. 2019) (“The question is rather whether they possess at least some of the core powers and responsibilities....”); *Ayes v. United States VA*, 473 F.3d 104, 108 (4th Cir. 2006) (discussing the importance of common characteristics) (“Although the term ‘grant’ is not defined in the statute, the use of the word ‘similar’ limits the universe of ‘grants’ to which § 525(a) applies, ensuring that only grants bearing a family resemblance to licenses, permits, charters, and franchises enjoy the antidiscrimination protections of the Bankruptcy Code.”) (emphasis added). *See also Yates v. United States*, 574 U.S. 528, 563 (2015) (“The first of those related canons advises that words grouped in a list be given similar meanings. The second counsels that a general term following specific words embraces only things of a similar kind.”) (emphasis added).

⁶⁷ *See Wyo. Stat. § 13-5-301(a)(xviii).*

⁶⁸ *See Wyo. Stat. § 13-5-301(a)(xviii)(K)* (emphasis added).

For the reasons discussed in this subsection, Two Ocean is likely “exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency” because, consistent with the Advisers Act and the scope of fiduciary activities for national banks, Two Ocean is exercising genuine discretion as a fiduciary trust company.

3. Substantial Portion of Business

We now turn to the third element of the definition of bank under the Advisers Act—that discretion-based activities constitute a substantial portion of trust company activities. “Substantial” means “significantly great,” “important, essential,”⁶⁹ “considerable in quantity”⁷⁰ or “considerable in importance, value, degree, amount, or extent.”⁷¹ Consequently, the exercise of discretionary, fiduciary powers must be, at a minimum, an important, sizable component of trust company’s business—i.e., a core (though not necessarily predominant or exclusive) business line or one that would likely cause great harm were it to disappear.

A trust company that merely provides incidental or minor fiduciary services cannot satisfy this element of the definition of bank. Fiduciary services must rise to the level of a substantial part of the custodian’s business. “Business” also implies that the fiduciary powers must be currently exercised, or significant steps have been taken—they likely cannot be mere plans.

Two Ocean is currently engaged in the activities set forth in Part II of this letter. Your letter noted that the discretion-based fiduciary activities set forth in Part II “are a substantial portion of Two Ocean’s business and critical to its competitive position.” Based on these representations, Two Ocean’s trust company charter application and other confidential information provided to the Division, a substantial majority of the services Two Ocean provides to its customers are fiduciary (and discretionary) in nature. Consequently, this element appears to be satisfied.

4. Supervision by a State/Federal Regulator

The fourth element requires that a bank/trust company be supervised by a state or federal banking regulator. This element is closely related to the fifth element below, which considers whether an entity is being operated for the purpose of evasion.

The Division is the chartering authority and prudential regulator/supervisor of banks and trust companies in Wyoming.⁷² Two Ocean, as a Wyoming-chartered public trust company, is subject

⁶⁹ *Substantial*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/substantial> (last visited 20 October 2020). See *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034–35 (9th Cir. 2004); *Ryan v. Flowserv Corp.*, 444 F. Supp. 2d 718, 724 (N.D. Tex. 2006) (“In the end, ‘substantial’ means just that—significantly great.”) (citation omitted); *Carson v. Linley*, 292 So.3d 212, 220 (Miss. 2020) (Griffis, J., dissenting) (“Merriam-Webster defines ‘substantial’ as ‘consisting of or relating to substance’; ‘important, essential’; or ‘significantly great.’”); *Commonwealth v. Ryan*, 105 N.E.3d 1231, 1233 (Mass. Ct. App. 2018) (“We give ‘substantial’ its usual and accepted meaning, which is ‘considerable in quantity’ or ‘significantly great.’”); *State v. Torres*, 262 P.3d 1006, 1019 fn. 21 (Haw. 2011) (“In plain language, ‘substantial’ means ‘significantly great’ and ‘considerable in quantity.’”).

⁷⁰ *Id.*

⁷¹ *Substantial*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=substantial> (last visited 20 October 2020). See also *United States v. Chong Lam*, 677 F.3d 190, 202 (4th Cir. 2012); *State v. Culver*, 941 N.W. 2d 134, 142 (Minn. 2020) (“[The parties] agree that the common and accepted usage of the word ‘substantial’ is ‘[c]onsiderable in importance, value, degree, amount or extent.’”).

⁷² See Wyo. Stat. §§ 13-1-603, 13-5-410, 13-5-521.

to the Division's comprehensive scheme of regulation and supervision for public trust companies, based on nationally-adopted standards for fiduciary, custody and related incidental activities.

The Division is required to conduct an examination of each public trust company on a regular basis based on the risk profile of the company.⁷³ Additionally, public trust companies like Two Ocean are required to submit regular reports of condition,⁷⁴ extensive recordkeeping in line with fiduciary and custodial services principles⁷⁵ and maintain regular dialogue with the Division. Two Ocean will be required to maintain a strong capital position vis-à-vis the complexity of its activities. These expectations will only increase as Two Ocean moves into the digital asset space.

Consequently, Two Ocean satisfies this element.

5. Not Operated for the Purpose of Evasion

This fifth, and final, element requires that a facts-and-circumstances inquiry⁷⁶ occur into whether or not the entity “is [] operated for the purpose of evading the provisions of this title [federal securities laws].”

A primary consideration under this element is the scheme of regulation/supervision that the bank or trust company is subject to. Two Ocean, as a trust company engaged in digital asset activities, will be subject to bank-grade supervisory expectations from the Division.

Two Ocean was subject to comprehensive review by the Division prior to the granting of a charter by the State Banking Board and the Division closely supervises Two Ocean today. Most importantly, Wyoming is the only state in the U.S. with a comprehensive scheme of both regulation and supervision for bank and trust company digital asset activities, including custodial services.

In 2019, the Wyoming Legislature enacted strong standards surrounding digital asset custody which are highly transferrable to trust companies. Throughout 2019–20, the Division has also been building out a legal framework for digital asset custody.⁷⁷ This framework includes digital asset specific-standards relating to commercial law/Uniform Commercial Code, the custodian/client legal relationship, customer protection/disclosures, capital standards and operational risk.

The Division is also nearing completion of the first supervisory materials for bank and trust company digital asset activities in the United States. These materials will be fully completed before the Division permits banks and trust companies under our supervision to begin conducting digital asset activities. These materials include digital asset specific standards around AML/BSA/KYC/sanctions compliance, custody and fiduciary activities, capital markets, information security, payment system risk and practical checklists/guidelines for Division examiners to use in conducting examinations. The Division has also commenced digital asset-specific examiner training relating to these supervisory materials, the fundamentals of digital assets and analytics/monitoring. The Division has developed expertise in the digital asset space and will hold financial institutions engaged in these activities to a high supervisory standard that enables customer protection and integration into existing markets.

⁷³ Wyo. Stat. § 13-5-521(a).

⁷⁴ *Id.*

⁷⁵ Wyo. Stat. §§ 13-5-402 through 13-5-408.

⁷⁶ See generally *supra* note 52.

⁷⁷ R. WYO. BANKING DIV., ch. 19.

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If Two Ocean were attempting to evade federal securities laws, Wyoming's legal and supervisory framework for both digital assets and trust companies would make it a poor choice.

Other factors may bear on whether an entity is being operated for the purpose of evasion, including registrations/licenses and disciplinary history of the officers and directors of the entity in regulated financial industries, whether current or in the past.⁷⁸ Many of Two Ocean's officers and directors have registrations/licenses in securities and banking, without known disciplinary or disclosure issues.⁷⁹ Furthermore, the Division conducted extensive investigations into the proposed officers and directors of Two Ocean prior to chartering, including a criminal history background/fingerprint check, credit report, financial disclosure, public records search and interview with the Commissioner regarding Two Ocean's business plan and strategic objectives.⁸⁰

The Division is satisfied that Two Ocean is not operating for the purpose of evading securities laws because of the character of Two Ocean's officers and directors and the strong, comprehensive scheme of regulation/supervision that it has subjected itself to.

V. A BRIEF NOTE ON THE COMMODITY EXCHANGE ACT

Many digital assets, including a number of virtual currencies, are commodities which are subject to the Commodity Exchange Act (CEA).⁸¹ Two Ocean, as a public trust company supervised by the Division, is likely a “financial institution”⁸² and a “bank”⁸³ under the CEA and applicable rules.⁸⁴ This enables Two Ocean to provide custodial services in commodities markets. Two Ocean should ensure it is operating in conformity with the CEA, as well as CFTC regulations and guidance. This includes guidance on the actual delivery exemption to the CEA for digital assets which was adopted by the CFTC in June 2020.⁸⁵

VI. CONCLUSIONS

Two Ocean, as a Wyoming-chartered public trust company, may provide custodial services for both digital and traditional asset classes. It is also the Division's opinion that Two Ocean meets the definition of “bank” under the Advisers Act and may serve as a “qualified custodian.”

Consequently, the Division will not pursue enforcement action against Two Ocean for holding itself out to the public as a “qualified custodian” if it operates in conformity with applicable laws and rules, including those governing asset safekeeping and customer protection. Also, the Division will not recommend an investigation or enforcement action to the SEC on these issues.

⁷⁸ *Id.*

⁷⁹ This is based on publicly available information and confidential data provided by Two Ocean to the Division as part of its charter investigation process.

⁸⁰ Wyo. Stat. § 13-5-506(a)(i), (ii).

⁸¹ The virtual currencies bitcoin and ethereum have been classified by the CFTC and courts as commodities. *See CFTC v. McDonnell*, 287 F. Supp. 3d 213, 224–226 (E.D.N.Y. 2018); Daniel Roberts, *CFTC Says Cryptocurrency Ether is a Commodity, and Ether Futures Are Next*, YAHOO FINANCE, 10 October 2019, <https://finance.yahoo.com/news/cftc-says-cryptocurrency-ether-is-a-commodity-and-is-open-to-ether-derivatives-133455545.html>.

⁸² 7 U.S.C. § 1a(21)(H).

⁸³ *See generally* 7 U.S.C. § 27(a)(6).

⁸⁴ *See, e.g.*, 17 C.F.R. § 1.20(b)(1).

⁸⁵ *Supra* note 37.

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The primary reasoning for the Division's findings is that Two Ocean is currently engaged, as a substantial portion of its business, in providing genuine fiduciary services to its clients which involves the exercise of discretion. Were Two Ocean not providing these discretionary services, or if Two Ocean's business model were to substantially change to custody-only or other non-discretionary services, it is probable that the Division would revisit this determination.

This letter is issued by the Division based on its role as the prudential trust company/bank regulator in Wyoming and primary supervisor of Two Ocean. This letter should not be construed to represent the views of the SEC or any other regulatory agency. This letter does not mean that all non-depository trust companies are legally authorized to provide qualified custody or hold themselves out to the public in Wyoming, or in other jurisdictions, that they are "qualified custodians."

The Division believes that sufficient willingness by regulators to engage with financial technology companies and to understand innovative business models is critical to the continued vibrancy of the U.S. financial system. The Division's expectation is that many SEC and CFTC standards can be made applicable to digital asset markets as well. The Division will proceed to supervise trust companies and banks in a commensurate manner that promotes responsible innovation.

The Division welcomes your inquiry on this matter and looks forward, with interest, as Two Ocean begins to provide digital asset and qualified custodian services.

Please contact me at (307) 777-7797 or chris.land@wyo.gov with questions or for further information.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Land".

Chris Land
General Counsel