



July 27, 2020

Albert L. Forkner
State Banking Commissioner
Wyoming Division of Banking
2300 Capitol Avenue, 2nd Floor
Cheyenne, Wyoming 82002

Re: *Two Ocean Trust LLC Request for No Action Letter*

Dear Mr. Forkner:

I write on behalf of Two Ocean Trust LLC (“Two Ocean”), a chartered public trust company organized under the laws of Wyoming. We write to request a letter specifying whether the Wyoming Division of Banking (“Division”) would pursue an enforcement action against Two Ocean if it provided custodial services of digital assets¹ in Wyoming in the manner described below. We respectfully submit that since Two Ocean is subject to substantial oversight by the Division and it provides fiduciary services to its clients, Two Ocean should be permitted to custody digital assets in Wyoming. Two Ocean also seeks the Division’s position on whether Two Ocean would be considered a qualified custodian of its clients’ assets, including digital assets, under the Investment Advisers Act of 1940 and the Securities and Exchange Commission’s (“SEC”) Customer Protection Rule.

Preliminary Statement

Wyoming is a trailblazer for digital asset regulations. While most jurisdictions have been silent concerning the custody of digital assets, Wyoming issued digital asset custody statutes, regulations, and designed a special purpose depository institution (“SPDI”), which is an entity that is considered a “bank” and may custody digital assets. Wyoming’s current digital asset custody regulatory regime only applies to “banks” and is explicitly “optional,” “non-exclusive,” and “opt-in.” See Wyo. Stat. § 34-29-104; Wyo. Admin. 021.0002.19 § 1. The regulatory framework clearly indicates that entities other than banks may custody digital assets in Wyoming. Two Ocean is a public trust company that provides substantial fiduciary services to its clients and is subject to comprehensive regulatory oversight. It should be permitted to custody digital assets in Wyoming. Two Ocean also seeks guidance on whether the Division believes Two Ocean can act as a qualified custodian of its clients’ assets under the Investment Advisers Act of 1940 and the SEC Customer Protection Rule.

¹ For purposes of this request, we incorporate the definition of “digital assets” defined in Wyo. Stat. § 34-29-101(a)(i).

A. Two Ocean is a Highly Regulated Public Trust Company that Provides Fiduciary Services

Two Ocean is a chartered public trust company based in Jackson Hole, Wyoming. Two Ocean is a local, independent, employee-owned trust company in which all decision making, account administration, offices, employees, and board members are based in Wyoming. Two Ocean provides its current customers, which include registered investment advisers, with a series of services including custody, investment advice, and trustee services. Two Ocean desires to expand its offerings to include custodial services for its clients' digital assets.

1. Two Ocean is Already Subject to Significant Regulatory Oversight

Two Ocean is already subject to significant regulatory oversight. To obtain its trust charter, Two Ocean successfully completed a rigorous application and due diligence process. Two Ocean is also subject to ongoing Division examinations and strict capital and recordkeeping requirements.

Two Ocean was subject to an extensive review by the Division in connection with the issuance of its public trust charter. *See* Wyo. Stat. § 13-5-502(b). The Division conducted a “careful investigation and examination” of the following characteristics of Two Ocean:

- (i) The character, reputation, financial standing and ability of the organizers and those proposed as directors, managers, members, stockholders or owners of the public trust company;
- (ii) The character, financial responsibility, trust administration or other financial experience and business qualifications of those proposed as officers or managers; and
- (iii) Such other facts and circumstances bearing on the proposed public trust company as the commissioner may deem relevant.

See Wyo. Stat. § 13-5-506(a)(i)-(iii). The Division conducted this investigation and presented its findings at a public hearing. *See* Wyo. Stat. § 13-5-506(b). Following the public hearing, the Division determined that Two Ocean met certain criteria, including that: it was “only being formed for legitimate objects contemplated by the laws of the state,” “the proposed capital and surplus [were] not less than the required minimum established in Wyo. Stat. § 13-5-511² and [were] adequate in light of current and prospective conditions;” “the proposed officers and directors or managers [had] sufficient experience, ability and professional reputation to afford reasonable promise of successful operation,” and “the applicants [had] complied with all applicable provisions of law.” *See* Wyo. Stat. § 13-5-507. After the Division conducted its investigation, presented its findings at a public hearing, and decided that Two Ocean fit the specified criteria for approval, the Division issued Two Ocean a public trust charter.

As a public trust company, Two Ocean is “subject to inspection” by the Division. *See* Wyo. Stat. § 13-5-521(a). The Division “shall visit and examine” Two Ocean “as often as the commissioner deems necessary and at least once every two (2) years, with or without previous notice.” *See id.* These examinations must be “complete and careful” and include a comprehensive review of the following: “the

² As of the date of this letter, public trust companies in Wyoming are required to maintain “capital stock or membership interests” exceeding \$1,000,000. *See* Wyo. Stat. § 13-5-511(a).

condition and resources of [Two Ocean], the mode of managing [Two Ocean's] affairs and conducting its business, all records, transactions and other data or documents pertaining to the actions of [Two Ocean], the action of its officers and directors or managers in the investment and disposition of trust funds, the safety and prudence of [Two Ocean's] management, the security afforded to those by whom [Two Ocean's] engagements are held, whether the requirements of this chapter are being complied with and such other matters as the commissioner may prescribe." *See* Wyo. Stat. § 13-5-521(a).

Two Ocean is also subject to strict record-keeping and reporting requirements. Two Ocean must retain and preserve a variety of records for substantial minimum retention periods. *See* Wyo. Admin. 021.0002.4 § 3. Two Ocean is also required to hold quarterly meetings, in which a "detailed report showing all trust business" shall be submitted, the "board of directors or managers shall review the report and make it a part of the record of the meeting," the "record shall show their approval or disapproval of the report," and a "record of the proceedings and business of all meetings shall be included in the public trust company's minutes." *See* Wyo. Stat. § 13-5-520(a)-(b).

2. Two Ocean Provides Substantial Discretionary Fiduciary Services

Two Ocean is permitted to act as a fiduciary and to "purchase, invest in and sell stocks, bonds, mutual funds, mortgages and securities for the account of trusts." *See* Wyo. Stat. § 13-5-510. Unlike many public trust companies in Wyoming, Two Ocean exercises that authority. It currently acts as a fiduciary by providing investment advice and other trust services to its clients.

Two Ocean provides discretionary investment services to accredited investors and qualified purchaser clients and assumes a fiduciary role. The agreements between Two Ocean and its clients specifically state that Two Ocean may exercise its discretion to execute transactions and conduct other discretionary services. Two Ocean provides discretionary services relating to investment management, custody, trade execution, and investment account reporting. Specifically, Two Ocean advises on the following investment strategies: (1) cash management; (2) core fixed income; (3) domestic equity investments; (4) international equity investments; (5) real estate investments; and (6) private equity and venture capital investments. Two Ocean also offers discretionary corporate trustee services.

Two Ocean is uniquely positioned to provide significant investment and other discretionary fiduciary services (including trust and non-trust services) to its clients. These fiduciary activities are a substantial portion of Two Ocean's business and are critical to its competitive position in the Wyoming trust company marketplace.

3. Two Ocean Maintains a Robust Compliance Program Focused on Safekeeping its Clients' Assets

Two Ocean maintains a robust compliance program which is specifically focused on safeguarding its client's assets. While Two Ocean currently does not custody digital assets, it has a plan in place to ensure that its clients' digital assets will remain secure.

Two Ocean's Chief Compliance Officer ("CCO") "has ultimate responsibility for the compliance program

of Two Ocean.” *See* Two Ocean’s Policies and Procedures Manual (“Compliance Manual”) at 7. The CCO is also responsible for the annual review and updating of the Compliance Manual. *See id.*³

Two Ocean currently uses Northern Trust, one of the largest banks in the United States, to sub-custody its clients’ assets. Two Ocean maintains a comprehensive compliance program designed to oversee the custodial activities of Northern Trust. *See id.* ¶¶ 1.8, 3.3, 3.5, 3.6, 3.8. This includes specific reporting, investigative, and other procedures aimed at detecting “unauthorized or inappropriate activity in Client accounts.” *See id.* ¶ 1.8. Before contracting with any outside vendors, including outside custodians, Two Ocean conducts substantial due diligence and considers a number of specified criteria. *See id.* ¶ 5.2

Two Ocean plans on executing a similar business plan for storing digital assets. Two Ocean will use outside vendors with blockchain and digital asset expertise to safely sub-custody digital assets and to store the unique cryptographic keys associated with digital assets. In addition to the reporting, oversight, and due diligence procedures Two Ocean already uses concerning its current outside custodian for traditional assets, Northern Trust, Two Ocean will be conducting additional due diligence and testing on its digital asset sub-custodian.

Two Ocean will conduct significant due diligence on the sub-custody vendor and keep the Division regularly informed in accordance with governing law. Two Ocean will provide further information about the sub-custody vendor that the Division requests. Two Ocean will also provide the Division with the final executed contracts between Two Ocean and its sub-custody vendor.⁴

Two Ocean is an experienced chartered public trust company in Wyoming that has managed a sub-custody relationship for traditional assets without incident. It is confident that it will be able to do the same with storing digital assets and the unique cryptographic keys associated with such assets.⁵

³ Cassie Hoffman is the CCO. Ms. Hoffman has fifteen years of experience in the financial services industry. Ms. Hoffman served as a compliance officer at Teton Capital Advisors and was heavily involved in compliance and regulatory matters at Jackson Hole Trust Company. Ms. Hoffman is a licensed Trust and Estate Practitioner and a Certified Trust and Financial Advisor.

⁴ Two Ocean would be willing to provide the Division with additional information about its sub-custody relationships.

⁵ Two Ocean’s Chief Executive Officer Joel Revill was appointed by Governor Gordon to the Select Committee on Blockchain, Financial Technology and Digital Innovation Technology Committee (“Select Committee”) as a liaison to “aid, assist and advise the select committee on issues pertaining to blockchain, financial technology and digital innovation.” *See* Wyo. Stat. § 28-11-601(c). Mr. Revill has attended Select Committee meetings and has discussed Two Ocean and the custody of digital assets with members of the Division.

B. Wyoming's Current Digital Asset Custody Regime

Wyoming has enacted statutes and regulations that allow “banks,” including SPDIs to custody digital assets. These statutes and regulations are expressly “optional,” “opt-in,” and not “exclusive.” The Wyoming laws and regulations clearly leave open the opportunity for other entities to custody digital assets in Wyoming. Two Ocean should be one of those entities.

Wyoming's existing regulatory framework concerning digital asset custody does not apply to Two Ocean. Wyoming's “optional framework” for the custody of digital assets only applies to “banks.” *See* Wyo. Stat. § 34-29-104; Wyo. Admin. 021.0002.19 § 1. Under Wyo. Stat. § 34-29-104(a), “a bank may provide custodial services consistent with this section upon providing sixty (60) days written notice to the commissioner.” However, the Wyoming legislature explicitly states that “the provisions of this section are *cumulative* and *not exclusive* as an *optional framework* for enhanced supervision of digital asset custody.” Wyo. Stat. § 34-29-104(a) (emphasis added). The Session Laws make clear that this statutory regime merely establishes an “*opt-in* framework for *banks* to provide custodial services.” *See* Session Laws of Wyoming, Chapter 91, at 323, Digital Assets-Existing Law, Original Senate File No. 125 (emphasis added).⁶

The Division also issued related “opt in” regulations. *See* Wyo. Admin. 021.0002.19 § 1(b). Those regulations are explicitly “opt in” and only applicable to “banks.” *See id.* (“this chapter governs *banks that elect to opt into* enhanced regulatory requirements for digital asset custodial services under Wyo. Stat. § 34-29-104.”) (emphasis added).

Since Two Ocean is not a “bank” under Wyoming law and has not “opted in” to the enhanced digital custody regime, Wyo. Stat. § 34-29-104 and Wyo. Admin. Code 021.0002.19, *et seq.*, do not apply. The plain language of the statutes, associated legislative materials, and regulations are clear: it is not mandatory that an entity meet the requirements of Wyo. Stat. § 34-29-103(a) and Wyo. Admin. 021.0002.19 § 1(b) to custody digital assets.

Wyoming's statutory regime concerning “Special Purpose Depository Institutions” does not apply to Two Ocean either. Under Wyo. Stat. § 34-29-104(a), Wyoming created a “Special Purpose Depository Institution” or SPDI. Under that statute, an entity may apply to the Division to become a SPDI. Under Wyoming law, a SPDI is included in the definition of “bank.” *See* Wyo. Stat. § 13-1-101(a)(i) (“‘Bank’ means any corporation, excluding national banks, having a place of business within this state which engages in banking business, *and includes a special purpose depository institution*, subject to the limitations set forth in W.S. 13-12-101 through 13-12-126.”) (emphasis added). “Banks” are permitted to custody digital assets in Wyoming under the optional framework in Wyo. Stat. § 34-29-104(a). However, Two Ocean is a public trust company and not a SPDI. Therefore, the SPDI statutes and related regulations also do not apply to Two Ocean. *See* Wyo. Stat. § 34-29-104(a); Wyo. Admin. 021.0002.20 § 1(b) (“This Chapter governs special purpose depository institutions, as defined in Wyo. Stat. 13-1-101(z)(xvi).”).

⁶ <https://pluto.wyo.gov/awweb/main.jsp?flag=browse&smd=1&awdid=10>

Two Ocean is a Wyoming public trust company that is not covered by the existing statutory or regulatory regime concerning the custody of digital assets. As described above, Two Ocean is a highly regulated entity with a compliance program in place that will safeguard its clients' traditional and digital assets. Furthermore, unlike many trust companies in Wyoming, Two Ocean is uniquely situated to custody digital assets because it already provides significant discretionary services to its clients. Therefore, Two Ocean should be permitted to custody digital assets in Wyoming.

C. Qualified Custody Guidance

Two Ocean also seeks guidance on the Division's position concerning whether it would be considered a qualified custodian under the Investment Advisors Act of 1940 and the SEC's Customer Protection Rule.

Investment advisers and registered investment companies are required to custody client funds or securities with a qualified custodian. *See* 17 C.F.R. § 275.206(4)-2(a)(1); 15 U.S.C. § 80a-17(f)(1).⁷ A "bank" qualifies as an appropriate custodian. Included in the definition of "bank" is a "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 subchapter . . ." *See* 15 U.S.C. § 80b-(a)(2)(C) (emphasis added) (incorporated by reference by 17 C.F.R. § 275.206(4)-2(d)(6)(i)); 15 U.S.C. § 80a-2(a)(5) (emphasis added) (incorporated by reference by 15 U.S.C. § 80a-17(f)(1)).

Unlike most jurisdictions, Wyoming issued a comprehensive regulatory regime concerning digital assets. This included appending Wyoming's Uniform Commercial Code to make clear that it covers digital assets. Wyoming's regulatory regime is largely focused on consumer protection and digital asset-related property rights. Wyoming's digital asset regulatory framework provides owners of digital assets in Wyoming with much-needed clarity of their property rights. Wyoming has been ahead of most jurisdictions in issuing digital asset-related laws and regulations and owners of digital assets are better protected in Wyoming.

Two Ocean is seeking guidance on the Division's position on whether Two Ocean may serve as a qualified custodian for its clients' assets, including digital assets. While Two Ocean is not a "bank" under Wyoming law,⁸ it is seeking the Division's position on whether Two Ocean would be considered a "bank" under the

⁷ The SEC issued a "Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities" confirming its position that "a broker-dealer seeking to custody digital asset securities must comply with the Customer Protection Rule." *See* SEC, *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (July 8, 2019), <https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities>.

⁸ The definition of "bank" is different under Wyoming law. Under Wyoming law, there is no reference to a trust company that demonstrates fiduciary responsibilities in the definition of "bank." *See* Wyo. Stat. § 13-1-101(a)(1).

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Investment Advisers Act of 1940 and the SEC's Customer Protection Rule, given the Division's comprehensive supervision over Two Ocean and the substantial fiduciary services that it provides. With respect to digital assets, Two Ocean would also like the Division to consider the fact that, unlike many jurisdictions, Wyoming's current statutory and regulatory regime concerning digital assets provides robust legal protections to owners of digital assets in Wyoming.

Two Ocean is willing to provide the Division with any additional information and will promptly respond to all requests from the Division. Thank you for your consideration.

Sincerely,

/s/ *James H. Cundiff, David L. Taub, Elise J. McGee, and Joseph B. Evans*

James H. Cundiff, David L. Taub, Elise J. McGee, and Joseph B. Evans

CC: Chris Land, General Counsel, Wyoming Division of Banking