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District courts refuse to order Federal Reserve to grant master accounts to Custodia and PayServices

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The courts rejected arguments that the Federal Reserve Banks are required to grant master accounts to all legally eligible depository institutions. We analyze the rulings and their broader implications for the dual banking system.

Two federal district courts recently upheld decisions by the Federal Reserve Bank of Kansas City (FRBKC) and the Federal Reserve Bank of San Francisco (FRBSF) to deny master account applications from Custodia Bank (Custodia) and PayServices Bank (PayServices). Custodia has a Special Purpose Depository Institution (SPDI) charter from the State of Wyoming that allows it to take deposits but does not require it to obtain insurance from the Federal Deposit Insurance Corporation (FDIC). While Custodia is subject to state prudential regulation, it is not FDIC-insured or subject to federal prudential regulation and does not have a holding company subject to Federal Reserve oversight. Its business model is to provide banking services to crypto-asset companies. Custodia filed an application for a master account in October 2020 with the FRBKC.

PayServices, an Idaho-chartered bank, submitted its master account application in August 2022 with the FRBSF, seeking to use the FRBSF's transaction-related services to provide payment processing to non-U.S. customers.

A master account at a Federal Reserve Bank is necessary for an institution to have direct access to the payment systems of the Federal Reserve System (Federal Reserve) and settle transactions in central bank money. A master account is also a necessary, but not sufficient, condition for an institution to have access to the Federal Reserve's discount window, to incur intraday or overnight overdrafts in any of the Federal Reserve's payment systems or to obtain direct membership in the major clearing networks that connect the U.S. payment system.

Both applications were ultimately denied. Custodia and PayServices each brought suit against the applicable Federal Reserve Bank, challenging the denials and arguing that they were entitled to master accounts as a matter of law by virtue of being depository institutions that are legally eligible for such master accounts.

The U.S. District Court for the District of Wyoming (Wyoming District Court) upheld the FRBKC's denial of Custodia's application, reasoning that the FRBKC had the discretion to deny Custodia a master account even though Custodia was legally eligible to have one. A magistrate from the Idaho District Court reached a similar conclusion in the case involving PayServices. The magistrate also held that the FRBSF is not an agency of the U.S. government and thus cannot be compelled to open a master account under the Administrative Procedure Act (APA) or through a writ of mandamus.

The two decisions mark the second and third times a federal district court has held that a Federal Reserve Bank has the discretion to deny master accounts to legally eligible depository institutions. The decisions allow Federal Reserve Banks to continue to implement the master account access guidelines (the Guidelines) issued by the Board of Governors of the Federal Reserve (Federal Reserve Board). The Guidelines, in turn, effectively call for Federal Reserve Banks to apply strict scrutiny to master account applications from uninsured state-chartered depository institutions that are not subject to federal prudential regulation and do not have a holding company subject to Federal Reserve oversight, at least if they have "novel charters."

The term “novel charters” appears to mean depository institutions with novel business models, such as providing banking services to lawful but politically controversial businesses like crypto-asset companies[1] or attempting to provide retail depositors with the economic equivalent of demand deposit claims directly against a Federal Reserve Bank.[2] Just as a 10% tax imposed on paper currency issued by state-chartered banks in the 19th century made them less efficient than national banks, so too will the denial of master accounts to uninsured depository institutions with novel business models increase these banks’ operating costs by forcing them to use intermediaries to obtain indirect access to the Federal Reserve’s payment services.

There is a substantial possibility that the *Custodia* decision will be appealed to the U.S. Court of Appeals for the Tenth Circuit and possibly the U.S. Supreme Court. One Tenth Circuit judge has already held that Fourth Corner Credit Union (Fourth Corner), which was legally eligible for a master account and proposed to provide payment services to marijuana businesses, was entitled to a master account as a matter of law. But that opinion was not the opinion of the court and thus is not binding precedent.

Given the protracted and high-profile nature of Custodia’s lawsuit, and the possibility that Custodia could appeal the decision all the way to the U.S. Supreme Court, this client update focuses on the *Custodia* court’s decision that Federal Reserve Banks have discretion to reject master account applications. We also discuss the additional ruling in the *PayServices* case that the FRBSF is not an agency of the U.S. government.

Background

Custodia filed its application for a master account with the FRBKC in October 2020. After the application languished for 19 months, Custodia filed a complaint with the Wyoming District Court seeking an order to compel the Federal Reserve Board and the FRBKC to grant Custodia a master account. We covered Custodia’s initial complaint in a previous client update.

While Custodia’s application was pending, the Federal Reserve Board issued the Guidelines, which we also covered in a previous client update. The Guidelines have two sections. Section 1 requires all applicants to be depository institutions that are legally eligible to have master accounts. Section 2 requires legally eligible depository institutions to meet certain additional safety and soundness standards and created three tiers of scrutiny. Tier 1 applies to federally insured depository institutions, which would generally be subject to “a less intensive and more streamlined review.” Tier 2 applies to uninsured state or federally chartered depository institutions that are subject to federal prudential regulation and have holding company parents that are subject to Federal Reserve oversight. Tier 2 institutions would be subject to “an intermediate level of review.” Tier 3 consists of uninsured state or federally chartered depository institutions that are not subject to federal prudential supervision or do not have holding companies subject to Federal Reserve oversight, or both. Tier 3 institutions would “generally receive the strictest level of review.”

On January 27, 2023—more than two years after Custodia filed its application for a master account—the FRBKC denied Custodia’s application. In its decision letter, the FRBKC classified Custodia as a Tier 3 institution subject to the strictest level of review. It characterized Custodia’s business model as focusing “almost exclusively on offering products and services related to novel crypto-asset asset activities … an unprecedented business model that presents heightened risks involving activities that do not currently have clarity at the federal level.” The FRBKC described Custodia’s business model as “highly likely” to be “inconsistent with safe and sound banking practices.” As a result, the FRBKC concluded that “accepting deposits from Custodia into a master account would introduce undue risk to the [FRBKC], risk to the overall economy due to potential illicit activities, and potential risk to the payments system that cannot be effectively mitigated at this time.”

Custodia reacted to this decision by amending its initial complaint with the Wyoming District Court to seek an order that would overturn the denial.

While the Custodia case was pending, then-Senator Pat Toomey proposed legislation on master account access. One proposal—part of Toomey’s proposed Stablecoin TRUST Act—would have required Federal Reserve Banks to grant master accounts to state-chartered depository institutions acting as issuers of payment stablecoins, a type of cryptocurrency pegged to the U.S. dollar that would be 100% backed by cash or cash equivalents. Another Toomey proposal, which was enacted into law as part of the 2023 National Defense Authorization Act and later codified as 12 U.S.C. § 248c, amended the Federal Reserve Act to require the Federal Reserve Board to “create and maintain a public, online, and searchable database that contains … a list of every entity that submits an access request for a reserve bank master account and services,” including whether the request was “approved, rejected, pending, or withdrawn.” The database was first published by the Federal Reserve Board in June 2023.

Reflecting the importance of master account access and its implications for the dual banking system, several third parties, including former Senator Toomey, weighed in on the *Custodia* case, either as expert witnesses for one of the

parties or as interested persons. Those third parties included Senator Cynthia Lummis (R-WY), the Blockchain Association, Katie Cox and Professors Peter Conti-Brown, Morgan Ricks,[3] Julie Andersen Hill and David Zaring.[4]

In his amicus brief, former Senator Toomey stated that the purpose for his amendment requiring the Federal Reserve Board to maintain a database was to increase the transparency and public accountability of the Federal Reserve Banks' master account approval process, which otherwise had been conducted in secret. He said he proposed the amendment in reaction to the refusal by the FRBKC to provide Congress with any information about its decision to deny, then approve and then revoke a master account for the Reserve Trust, a financial technology company. The controversy around those actions involved accusations that former Federal Reserve Governor Sarah Bloom Raskin had intervened in Reserve Trust's master account approval process and ultimately resulted in Raskin withdrawing from her nomination as Federal Reserve Vice Chair for Supervision. Former Senator Toomey stated that the purpose of the amendment was clearly **not to suggest** that Federal Reserve Banks had any discretion to deny master account applications by legally eligible depository institutions.

The ruling: The FRBKC was not required by statute to grant Custodia a master account

On March 29, 2024, the Wyoming District Court held that the FRBKC was **not required** to grant Custodia's request for a master account even though Custodia was legally eligible for a master account.

Custodia had argued that 12 U.S.C. § 248a—which was added by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA)—required the Federal Reserve Banks to open a master account for all legally eligible depository institutions upon request. Section 248a(c)(2) states, in relevant part, that "[a]ll Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks." Because a master account is necessary to access Federal Reserve Bank services, and Custodia is an eligible nonmember depository institution, Custodia contended that the FRBKC was required to grant it a master account in order to have access to these services. Several prominent academics supported Custodia's position.

- Professor Conti-Brown submitted an expert report on behalf of Custodia that argued that Federal Reserve Banks do not have discretion over master account access for legally eligible banks. He observed that for nearly 40 years, Federal Reserve Banks have routinely granted access to their payment services. He claimed that this routine ended when the FRBKC denied Fourth Corner's master account application in 2015. He further argued that Federal Reserve Banks' newly discovered discretion over master account applications would upset the delicate balance of the U.S. dual banking system.
- Professor Hill, who will become the Dean of the University of Wyoming College of Law in June 2024, similarly argued in a 2023 Iowa Law Review article that "the law requires that the Federal Reserve provide accounts and payment services to all member banks and depository institutions."

The Wyoming District Court rejected Custodia's arguments, holding that the FRBKC was not required by statute to grant Custodia a master account solely by virtue of being legally eligible for a master account. Instead, it held that the FRBKC had the discretion to grant or deny master accounts to otherwise legally eligible depository institutions. The court provided seven reasons for its decision.

- **No express requirement**. Section 248a does not expressly require the Federal Reserve Banks to grant master accounts to all legally eligible depository institutions that ask for one. Instead, the statute merely directs the Federal Reserve Board to "publish for public comment a set of pricing principles in accordance with this section and a proposed schedule of fees based upon these principles." The statute then provides that the "schedule of fees prescribed pursuant to this section shall be based on the following principles: (1) All Federal Reserve bank services covered by the fee schedule shall be priced explicitly. (2) All Federal Reserve bank services covered by the fee schedule **shall** be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks [with certain exceptions]." (emphasis added). The Wyoming District Court dismissed the language in clause (2) as merely being one of the "pricing principles" applicable to the Federal Reserve Board rather than a requirement imposed on Federal Reserve Banks to grant all legally eligible depository institutions a master account.
- **248a does not apply to the Federal Reserve Banks**. Section 248a only applies to the Federal Reserve **Board**, and not the Federal Reserve **Banks**, since it was codified in a subchapter of the U.S. Code entitled "Board of Governors of the Federal Reserve System." The court cited a book written by the late Justice Antonin Scalia and Bryan Garner for the proposition that the title and headings of legal texts are permissible indicators of meaning.[5]

- **Omission of the word "all"**. Section 248a does not expressly require the Federal Reserve Banks to make their payment services available to **all** legally eligible depository institutions. Indeed, citing *Banco San Juan Internacional, Inc. v. Federal Reserve Bank of New York* and a passage from an amicus brief filed in support of the Federal Reserve Board and FRBKC by Professor David Zaring, the court reasoned that Congress appears to have deliberately omitted the adjective "all" before "nonmember depository institutions" because it had inserted the word "all" before "Federal Reserve bank services."
- **Toomey amendment**. Section 248c—i.e., the amendment to the Federal Reserve Act proposed by former Senator Toomey—implies that Congress believed that the Federal Reserve Banks had the discretion to grant or deny applications for master accounts.
- **Section 342**. 12 U.S.C. § 342 supports the conclusion that the DIDMCA, by adding Section 248a to the Federal Reserve Act, did not strip the Federal Reserve Banks of their discretion to grant or deny master account applications from legally eligible nonmember depository institutions like Custodia. Section 342 provides that "any Federal Reserve Bank **may** receive from any of its member banks, or other depository institutions, … deposits of current funds in lawful money … ." (emphasis added). The court reasoned that "[t]his discretion to receive or reject deposits necessarily carries with it the discretion to grant or deny master accounts."
- **No elephants in mouseholes**. The court observed that the Federal Reserve Banks had the discretion to grant or deny master accounts to eligible depository institutions before 1980. A decision to strip that discretion out of the statute in 1980 would have been a significant policy change. Citing what it described as a canon of statutory construction that Congress "does not … hide elephants in mouseholes," the court reasoned that if Congress had intended to make such a significant change through the DIDMCA, it would have done so clearly and unmistakably, which it did not do.
- **Threats to the Federal Reserve**. The court stated that if the Federal Reserve Banks did not have the discretion to deny applications for master accounts from otherwise legally eligible depository institutions, they could be forced to grant master accounts to state-chartered depository institutions that are not "soundly crafted." The court explained:

> "[U]nless the Federal Reserve Banks possess discretion to deny or reject a master account application, state chartering laws would be the only layer of insulation for the U.S. financial system. And in that scenario, one can readily foresee a 'race to the bottom' among states and politicians to attract business by reducing state chartering burdens through lax legislation, allowing minimally regulated institutions to gain ready access to the central bank's balance sheet and Federal Reserve services. As [the FRBKC] accurately notes, '[t]he Wyoming Division of Banking … has many purposes and aims, but protecting the national financial system and implementing national monetary policy are not among them… . States lack not only the mission but also the resources to protect national interests.' The potential negative consequences associated with Custodia's proffered interpretation do not suggest Congress intended DIDMCA to remove the discretion of Federal Reserve Banks when considering master account applications."

The court also explained that it was "respectfully deviat[ing] from Judge Bacharach's opinion in *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*," the Tenth Circuit decision that reviewed an order granting a motion to dismiss Fourth Corner's complaint against the FRBKC. Fourth Corner's complaint had challenged the FRBKC's denial of its master account application. While noting that the opinion was "well-reasoned and insightful," the Wyoming District Court stated that it was "not controlling authority because [it] was a three-way decision between a three-judge panel," where "Judge Bacharach was the odd man out as he voted to reverse the dismissal of the complaint." The court stated that it was deviating from Judge Bacharach's opinion "based in large part on" former Senator Toomey's legislation requiring the Federal Reserve to maintain a database of master account applications, including data about approvals and denials. That legislation had not been "available for Judge Bacharach's consideration in 2017."

Legal analysis of the *Custodia* decision on appeal

If Custodia appeals the Wyoming District Court's decision to the Tenth Circuit, the standard of review of the district court's decision will be *de novo* because there was no genuine issue of material fact in dispute, and the district court's decision was exclusively an interpretation of law. In other words, the Tenth Circuit would make its own independent determination of the law without any deference to the district court. Custodia will likely argue that the Tenth Circuit should reverse the district court's decision for at least the following reasons:

- **Express requirement**. Section 248a(c)(2) provides that "[a]ll Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions." Because those services cannot be made available to a depository institution unless it has a master account, the most reasonable interpretation of this mandate is that it includes a requirement that the Federal Reserve Banks must open master accounts for all legally eligible depository

institutions that request one. Custodia can argue that the district court's dismissal of this plain language as a mere pricing principle is unpersuasive and should be reversed on appeal.

- **Title and heading vs. surplusage canon**. Although statutory titles and headings are permissible indicators of meaning, they cannot override contradictory language in the body of the statute. Otherwise, they would violate the surplusage canon of statutory construction, which is also discussed in the book by former Justice Scalia and Mr. Garner that was cited by the court.[6]
- **Omission of the word "all" insufficient to imply discretion.** Under the general words canon of statutory construction, general words in a statute are supposed to be given their full and fair meaning, unless some limit is expressly included or fairly implied by the text, structure or legislative history of a statute.[7] Thus, in *Ogden v. Saunders* , Chief Justice John Marshall stated that the "provisions [of a statute] are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."[8] Similarly, in *Oncale v. Sundowner Offshore Services*, the Supreme Court unanimously upheld that the prohibition of discrimination "because of … sex" in Title VII of the Civil Rights Act of 1964 applies to male-on-male sexual harassment in addition to male-on-female sexual harassment.[9] Neither the text nor structure of the mandate to provide all payment services to nonmember depository institutions expressly limits the mandate to any subset of all such institutions.
  - The Wyoming District Court cited to *Loughrin v. United States*[10] for the principle that "'when Congress includes particular language in one section of a statute but omits it in another'—let alone the next provision—this Court 'presume[s]' that Congress intended a difference in meaning." The court then noted that 12 U.S.C. § 248a(c)(2) uses the word "all" before "Federal Reserve bank services" but does not use "all" before "nonmember depository institutions." Applying the principle, the court held that the omission of the word "all" before "nonmember depository institutions" fairly implied that Congress intended the statutory mandate to apply only to a subset of eligible depository institutions as determined by the Federal Reserve Banks. However, Custodia can argue that the use of the adjective "all" before "Federal Reserve bank services" and the failure to repeat that adjective before nonmember depository institutions is not sufficient to fairly imply that Congress intended for the Federal Reserve Banks to have the discretion to make such a limitation.
- **Misuse of Toomey amendment.** The district court incorrectly used Section 248c as support for the argument that Federal Reserve Banks have discretion to grant or deny master account applications. It is clear that former Senator Toomey's purpose in adding Section 248c was to increase the transparency and public accountability of the master account approval process, and not to imply that the Federal Reserve Banks had such discretion, as argued in his amicus brief and in public statements to the press after the district court's decision was announced.
  - In addition, as others have noted, the court did not reconcile its decision with its June 2023 order in which it had cast doubt on this same argument.
- **No threat to the Federal Reserve**. One of the reasons given for rejecting Custodia's argument was that the Federal Reserve Banks need the discretion to reject master account applications to protect themselves against exposures to state-chartered banks that are not "soundly crafted." Custodia can argue that the Tenth Circuit should not accept this argument for at least three reasons:
  - **First**, if Section 248a expressly requires the Federal Reserve Banks to open master accounts for all legally eligible depository institutions, it does not matter whether that was a good idea or not. A federal court cannot override a law duly enacted by Congress solely because the court believes it is bad policy.
  - **Second**, the view reflects a level of distrust of state banking regulators that the Tenth Circuit may not consider to be justified.
  - **Third**, the FRBKC would not be exposed to any material risk merely by opening a master account for Custodia and providing Custodia access to the covered services listed in Section 248a(b). Those covered services consist of currency and coin services, check clearing and collection services, wire transfer services, automated clearinghouse services, settlement services, securities safekeeping services, Federal Reserve float and any new services which the Federal Reserve offers, including but not limited to payment services to effectuate electronic transfer of funds.
    - All of those services can be provided by the FRBKC without creating any risk of loss to the FRBKC even if Custodia is an unsafe and unsound bank if the FRBKC (1) requires Custodia to preposition any funds to be transferred instead of allowing Custodia's master account to go into overdraft and (2) does not give Custodia access to the Federal Reserve's discount window or any other lender of last resort facility, which are not services included in the list of covered services in Section 248a(b).
    - For example, assume that the FRBKC were required to open a master account for Custodia and Custodia deposited $100 million into that account. Would that deposit expose the FRBKC to any material risk if Custodia

is an unsafe and unsound institution? No, Custodia would effectively be lending $100 million to the Reserve Bank, not the other way around. Conversely, the FRBKC would effectively be borrowing that amount from Custodia. Custodia would be exposed to the risk that the FRBKC might default on its obligation to repay the deposit. But the FRBKC would have no exposure to a default by Custodia.

- Assume further that Custodia instructs the FRBKC to transfer $1 million from its master account to the master account of another bank through Fedwire or the ACH payment service. Would executing this transaction expose the FRBKC to any risk of loss? No, effecting the transfer by debiting $1 million from Custodia's master account and crediting it to the master account of the other bank would not expose the FRBKC to any risk of loss, other than a risk arising from its own negligence in effecting those debits and credits.
- Assume that Custodia asks the FRBKC to deliver an amount of currency or coins to it or a third party by debiting Custodia's master account for that amount and delivering the currency or coins as instructed. Again, providing this service would not expose the FRBKC to any risk of loss other than from its own negligence as long as it requires Custodia to preposition sufficient funds in its master account.
- The same conclusions would apply to the Federal Reserve's check clearing and collection services, its settlement services, its securities safekeeping services and any Federal Reserve float arising for checks in the process of being collected.
- As a result, the policy argument that the FRBKC needs the discretion to deny master account applications to protect itself against any risk of losses does not appear to be persuasive.

Importantly, the FRBKC does not appear to have argued to the district court that its interpretation of the law was entitled to *Chevron* or *Skidmore* deference.[11] It is not clear whether FRBKC could raise that issue on appeal or, if it did, whether it could succeed assuming it continues to take the position that it is not a federal agency.

Implications of these rulings for Tier 3 banks and the dual banking system

Assuming the two decisions are not appealed or are affirmed on appeal, they would have several important implications for the future ability of state-chartered depository institutions with novel charters to obtain master accounts, as well as for the future of the dual banking system more generally.

- **Strict scrutiny of Tier 3 banks virtually precludes them from obtaining master accounts**. These decisions would allow the Federal Reserve Banks to continue to apply the Guidelines' strict scrutiny standard of review for applications from Tier 3 banks. While the Guidelines do not expressly preclude Tier 3 banks from obtaining master accounts, the strict scrutiny standard of review that it calls for would likely have the same effect as the strict scrutiny standard of review under the Equal Protection Clause of the 14th Amendment, making it virtually impossible for Tier 3 banks to obtain a master account. The decisions by the FRBKC and the FRBSF to deny master accounts to Custodia and PayServices, respectively, as well as the Federal Reserve Bank of New York's decision to deny a master account to TNB USA Inc. (TNB) strongly support this prediction.
- **Federal Reserve Banks are provided with the power to increase the operating costs of uninsured depository institutions with novel business models**.
  - Shortly after the Civil War, Congress attempted to drive state-chartered banks out of business because it considered them to be unsafe and unsound and a threat to the new national banking system. It attempted to do so by imposing a 10% excise tax on paper currency issued by state-chartered banks without imposing a tax on paper currency issued by the new national banks.[12] The result was that many state-chartered banks converted into national banks. Other state banks managed to survive despite the tax by convincing their customers to use checking accounts instead of paper currency to pay for goods and services.
  - Here, it is not Congress but instead the Federal Reserve that is imposing costs on uninsured state-chartered depository institutions with novel business models. But just as the tax on paper currency issued by state-chartered banks significantly increased their operating costs, so too will the denial of master accounts to state-chartered banks with novel business models increase these banks' operating costs by forcing them to pay intermediaries to give them indirect access to the Federal Reserve's payment services. Today, the term "novel charters" appears to refer to depository institutions with business models like Custodia's that provide traditional banking services to crypto-asset companies and other politically controversial groups. The term also appears to include business models like TNB's that are designed to provide retail depositors with the economic equivalent of demand deposit claims directly against a Federal Reserve Bank. Tomorrow, the term "novel charters" might be expanded to include

providing traditional banking services to other politically controversial groups, such as gun advocacy groups,[13] gun manufacturers, payday lenders, pro-choice or pro-life advocacy groups, LGBTQ+ groups, religious freedom or freedom from religion groups or even fossil fuel companies.

Whether Federal Reserve Banks are agencies of the federal government

The Idaho magistrate ruled in the *PayServices* case that even if PayServicers was entitled to a master account as a matter of law, the court did not have the authority to compel the FRBSF to open a master account for PayServices under the APA or through a writ of mandamus because the FRBSF is not an agency of the U.S. government. This part of the decision reflects a growing split among federal courts over whether the Federal Reserve Banks are agencies of the federal government.

APA

The APA allows courts to review "agency actions" and defines "agency" to mean an "authority of the Government of the United States." While accepting that Federal Reserve Banks are instrumentalities of the federal government, the Idaho magistrate ruled that Federal Reserve Banks are "more accurately described as private corporations, owned by their member commercial banks." The judge reasoned that:

- Federal Reserve Banks are governed by a board of directors elected by member commercial banks;
- Vesting the power to open master accounts in Federal Reserve Banks is insufficient to turn Federal Reserve Banks into federal agencies; and
- Despite the lack of controlling precedent, the Ninth Circuit has determined that, for purposes of the Federal Torts Claim Act, Federal Reserve Banks are not agencies of the federal government.

Despite the Idaho magistrate's ruling, the law on this issue remains unsettled. In a November 2022 order, the Wyoming District Court held that Custodia could plausibly claim that the FRBKC was an agency subject to the APA. The court stated that the record had not been sufficiently developed for it to determine whether the FRBKC is an agency. The court also noted that "federal district courts are divided on the matter," pointing to decisions by the U.S. District Courts for the District of Maryland and the Northern District of Georgia that held that Federal Reserve Banks are agencies subject to the APA.[14] The Wyoming District Court ultimately did not rule on this issue because Custodia amended its APA claim to focus only on the Federal Reserve Board's actions and not those of the FRBKC.

Writ of mandamus

The Idaho magistrate also ruled that Federal Reserve Banks cannot be compelled to open master accounts by a writ of mandamus, reasoning that 28 U.S.C. § 1361 grants district courts the right to compel action only by "an officer or employee of the United States or any agency thereof" and that Federal Reserve Banks are not agencies of the federal government. The magistrate did not separately analyze whether Federal Reserve Banks are agencies for purposes of 28 U.S.C. § 1361; instead, the magistrate relied on its same analysis concluding Federal Reserve Banks are not agencies for purposes of the APA.

The FRBKC in the *Custodia* litigation did not contest this issue even though Custodia had asked the court to issue a writ of mandamus compelling the FRBKC to grant Custodia a master account. Moreover, in its November 2022 order, the Wyoming District Court found that "Custodia's claim for mandamus relief plausibly functions as an alternative claim to its APA claim … if the Court ultimately determines [the FRBKC] is not an agency for APA purposes." As a result, the Wyoming District Court appeared to conclude that an entity can be compelled by a writ of mandamus even if it is not an agency for purposes of the APA.

As a result, it remains an open question whether a court has the authority to compel action by a Federal Reserve Bank through a writ of mandamus even if the court holds that the Federal Reserve Bank is not an agency for purposes of the APA. Moreover, even if a court determines that a Federal Reserve Bank is not an agency for purposes of 28 U.S.C. § 1361, it could still hold that the president of a Federal Reserve Bank is an officer of the United States—as Custodia and PayServices had claimed—and compel the president to grant a master account.

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1 *See, e.g.*, FRBKC, Letter to Caitlin Long, CEO, Custodia Bank (Jan. 27, 2023) (characterizing the Wyoming SPDI charter as novel).

2 *See, e.g.*, FRBNY, Letter to James McAndrews, Chairman and CEO, TNB USA Inc. (Dec. 13, 2023) (characterizing TNB USA Inc. as a novel type of financial intermediary).

3 Exhibit CM to Plaintiff's Omnibus Brief in Support of Its Petition for Review on its APA Claim and Its Motion for Judgment on Its Statutory Mandamus Claim, *Custodia Bank, Inc. v. Fed. Reserve Bd. of Governors, Fed. Reserve Bank of Kansas City* (D. Wyo. December 22, 2023) (Case 1:22-cv-00125-SWS).

4 David Zaring's Amicus Brief in Support of Defendants, *Custodia Bank, Inc. v. Fed. Reserve Bd. of Governors, Fed. Reserve Bank of Kansas City* (D. Wyo. February 15, 2024) (Case 1:22-cv-00125-SWS).

5 Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 221 (2012).

6 *Id.* at 174-176.

7 *Id*. at 101-106.

8 25 U.S. (12 Wheat.) 273 (1827).

9 523 U.S. 75, 79-80 (1998) (Scalia, J., writing the Opinion of the Court).

[10] 573 U.S. 351 (2014).

[11] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[12] Act of July 13, 1886, ch. 173, 14 Stat. 98, 146.

[13] *See National Rifle Association v. Vullo*, 49 F. 4th 700 (2022), cert. granted, Nov. 23, 2023.

[14] *Lee Const. Co. v. Fed. Rsrv. Bank of Richmond*, 558 F. Supp. 165, 179 (D. Md. 1982); *Flight Int'l Grp, Inc. v. Fed. Rsrv. Bank of Chicago*, 583 F. Supp. 674, 678 (N.D. Ga.), *vacated sub nom. Flight Int'l Inc. v. Fed. Rsrv. Bank of Chicago*, 597 F. Supp. 462 (N.D. Ga. 1984).