Updates
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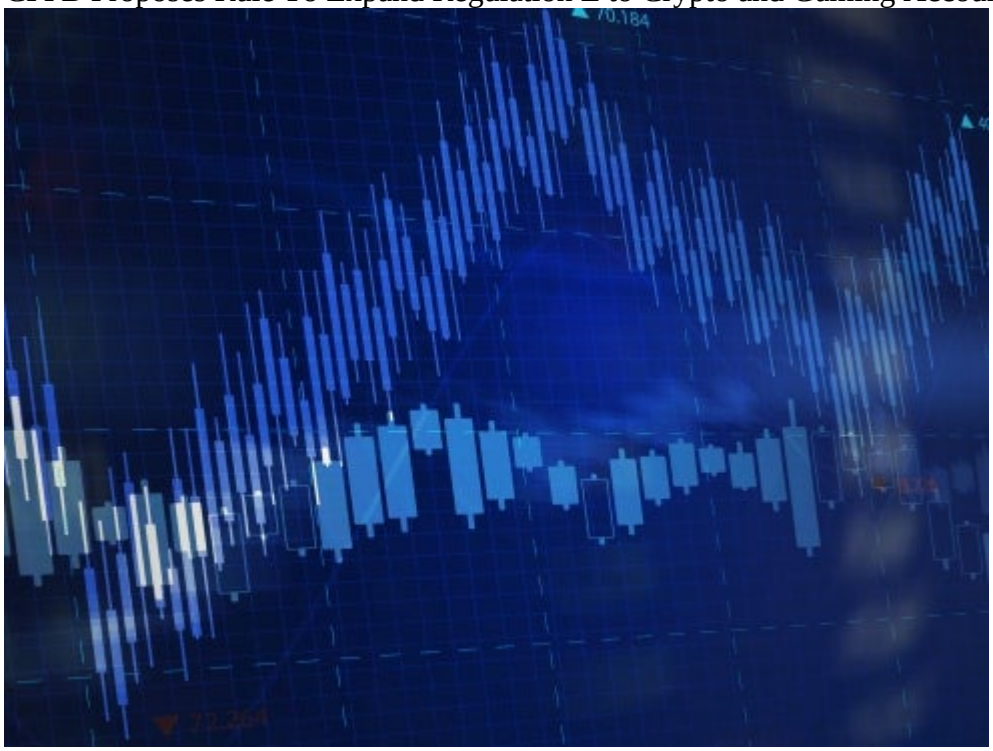
CFPB Proposes Rule To Expand Regulation E to Crypto and Gaming Accounts



With 10 days left in the Biden administration, the Consumer Financial Protection Bureau (CFPB) proposed a new interpretive rule on the applicability of the Electronic Fund Transfer Act (EFTA) and Regulation E to "new and emerging digital payment mechanisms."[1]

The proposed rule would interpret the scope of the EFTA and Regulation E expansively to cover certain nontraditional payment mechanisms, including (1) virtual currency wallets used to purchase goods or services or to make P2P transfers of digital assets, including stablecoins and at least some other cryptocurrencies; (2) video game accounts allowing users to purchase virtual items from game developers or players; and (3) other emerging digital payment mechanisms.

The EFTA establishes a framework of rights, liabilities, and responsibilities for participants in electronic funds systems. Regulation E implements the EFTA and provides protections for consumers using electronic funds transfers (EFTs) by imposing obligations on financial institutions to, among other things, provide certain disclosures to consumers, implement procedures for resolving errors with consumers' accounts, and define liability for unauthorized EFTs from consumers' accounts depending on when the transfer is notified to the financial institution.

If the interpretive rule is finalized in its current form, it could impose significantly expanded liability on emerging digital payment mechanisms, as well as new obligations to investigate, prevent, and remediate fraudulent transfers of assets from consumer accounts. However, given the Trump administration's emphasis on the reduction of regulatory burdens, the prospects for the CFPB's proposed rule are far from certain.

Key Components of the Proposed Rule

The proposed rule[2] expounds on the definitions of three key terms in the EFTA and Regulation E: "financial institution," "funds," and "account."

- **Financial institution.** The CFPB's proposed rule clarifies that a "financial institution" includes "nonbank entities that directly or indirectly hold an account belonging to a consumer, or that issue an access device and agree with a consumer to provide EFT services." The agency reasons that this clarification maps the existing definition of "financial institution" under current regulation.[3]
- **Funds.** The proposed rule's interpretation of the term "funds" is more controversial. Relying on prior court decisions interpreting the term in non-EFTA contexts as well as dictionary definitions, the CFPB interprets "funds" to extend to "assets that act or are used like money, in the sense that they are accepted as a medium of exchange, a measure of value, or a means of payment."[4] The proposed rule explicitly states that stablecoins would be "funds" under this interpretation, while explaining that the analysis for other digital assets would be fact-specific and depend on whether the asset can be used to make payments or readily exchanged for fiat currency.[5] This constitutes a significant departure from prior statements by the CFPB in which it explicitly avoided taking a position on whether cryptocurrencies constituted "funds" under the EFTA.[6] It also departs from guidance issued by other agencies on the treatment of virtual currencies. For example, the Financial Crimes Enforcement Network (FinCEN) has previously excluded virtual currencies from the definition of "funds" under some of its regulations, restricting the application of this term to value with legal tender status.[7]
    - The CFPB also tellingly noted that "the fact that the asset may fluctuate in value does not exempt it from this definition," leaving room for other cryptocurrencies such as bitcoin to meet the statutory definition despite their price volatility.[8]
    - The CFPB's interpretation of "funds" in the proposed rule closely tracks the analysis in the 2023 decision of the U.S. District Court for the Southern District of New York (SDNY) Judge Denise Cote in *Rider v. Uphold HQ Inc.*,[9] in which the court found that cryptocurrencies were "funds" under the EFTA. The court's decision was cited approvingly by the CFPB in the text of the proposed rule.[10]
- **Account.** Most meaningfully, the proposed interpretive rule interprets "account" under the EFTA and Regulation E—specifically the phrase "other consumer asset account" under the formal statutory definition—to extend to "asset accounts established primarily for a consumer's individual, family, or household use, that are not checking accounts or savings accounts, but into which funds can be deposited by the consumer or on their behalf and which have features of deposit or savings accounts."[11] As to what these "features" include, the CFPB specifically points to "paying for goods or services from multiple merchants, [the] ability to withdraw funds or obtain cash, or conducting person-to-person transfers" as examples of features of deposit or savings accounts.[12] The CFPB clarifies that it is possible that "video game accounts used to purchase virtual items from multiple game developers or players" and "virtual currency wallets that can be used to buy goods and services or make person-to-person transfers" could be "accounts" under this interpretation.
    - The CFPB clarifies in a footnote that "[w]hether a particular account sufficiently resembles a checking or savings account and thus qualifies as an 'other consumer asset account' for purposes of Regulation E, will depend on the account's specific features."[13] Therefore, it ultimately remains unclear what factors may meaningfully differentiate many digital asset offerings from the definition of "account" under the proposed rule. For example, the noncustodial nature of many digital asset wallets as well as the decentralized structure of many digital asset exchanges may make it difficult or virtually impossible to comply with the obligations imposed by the EFTA or Regulation E, but it is not clear if those facts would be sufficient to remove those offerings from the CFPB's interpretation.
    - The CFPB also did not offer further clarity on when an account qualifies as one "established primarily for a consumers' individual, family, or household use." However, a 2023 SDNY decision rejected the application of the EFTA and Regulation E to an account on a cryptocurrency exchange, finding that the consumer's account on the exchange was not an "account" for purposes of the

EFTA and Regulation E because it was primarily established for "profit-making purposes" and not for activities like receiving direct deposits of paychecks or paying for personal expenses.[14] This decision contrasts with another SDNY decision that assumes without discussion that a consumer account allowing the consumer to "transfer, trade, hold, and sell various cryptocurrencies" is an "account" under the EFTA.[15]

- The proposed rule notes that depending on the facts and circumstances, video game accounts used to purchase virtual items from game developers or players could be considered "other consumer asset accounts" under the EFTA. Certain gaming platforms utilize wallets or in-game economies to accept U.S. dollars in exchange for virtual currency and enable payments on the platform or to transact among players. On some platforms, players can exchange virtual currencies back for U.S. dollars. Through the CFPB's review of gaming platform business practices, the agency found that these accounts that store virtual currencies have resulted in loss of assets for some users due to hacking, theft, scams, and other unauthorized transactions.[16]
- The proposed rule also suggests that credit card rewards points accounts may also be "other consumer asset accounts" under the EFTA, where those accounts allow a user to buy points that can then be used to purchase goods from multiple merchants.

Next Steps and Takeaways

Because it is an interpretive rule, the proposal is not subject to the notice-and-comment requirements under the Administrative Procedure Act (APA). However, the CFPB has still invited comments on the proposed rule, which must be received by March 31, 2025. Comments may be submitted at the Federal eRulemaking Portal here or by email.

While the future of the interpretive rule remains uncertain under the Trump administration, if the rule is eventually finalized in its current form would have significant implications for companies in the digital asset and gaming spaces as well as companies with rewards programs that allow points to be used to make purchases from multiple merchants, many of which may suddenly find themselves needing to consider whether their products and services fall under the ambit of the CFPB's expanded interpretations of the EFTA and Regulation E.

For companies operating in the digital asset space, given the expansive definition of "funds" in the proposed rule, which expressly captures stablecoins and likely captures many other widely used cryptocurrencies, particular attention should be given to whether any of a company's offerings may meet the CFPB's interpretation of "account." This analysis should look at whether (1) the offering includes many of the same features of a deposit or savings account and (2) consumers are using the offering for personal use rather than for investment or commercial purposes.

For gaming companies, similar concerns arise as those that exist for digital asset companies. Gaming platforms' account structures have considerable differences across that spectrum, and an untailored application of the EFTA to gaming platform accounts would likely be inappropriate or infeasible for many iterations of these accounts. Gaming platforms could offer comments on different industry practices and account functionalities, as well as the challenges in providing periodic statements or other notices. Moreover, a lack of clarity in applicability could result in an uneven playing field where some gaming platforms work to comply with the EFTA while others do not.

Endnotes

[1] *See* CFPB Seeks Input on Digital Payment Privacy and Consumer Protections.

[2] *See* Proposed Rule.

[3] *See* 12 C.F.R. § 1005.2(i).

[4] Proposed Rule at 12.

[5] Proposed Rule at 12, n.36.

[6] *See, e.g.*, 81 Fed. Reg. 83934, 83978-79 (Nov. 22, 2016) (stating that the CFPB takes no position with respect to the application of EFTA to virtual currencies).

[7] *See* Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (March 18, 2013).

[8] Proposed Rule at 12-13.

[9] 657 F. Supp. 3d 491 (S.D.N.Y. 2023).

[10] Proposed Rule at 13, n.38.

[11] *Id.* at 14.

[12] *Id.*

[13] *Id.* at n.42.

[14] *Yuille v. Uphold HQ Inc.*, 686 F. Supp. 3d 323, 341-42 (S.D.N.Y. 2023).

[15] *Rider v. Uphold HQ Inc.*, 657 F. Supp. 3d 491, 498 (S.D.N.Y. 2023).

[16] For more information, see our previous Update on the CFPB's report on "Banking in Video Games and Virtual Worlds" released in April 2024. Perkins Coie, *CFPB Issues New Report Examining Financial and Privacy Risks to Consumers in Video Gaming Marketplaces: What Now?* (April 17, 2024).

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