

Insights

REG E WOULD APPLY TO STABLECOINS, GAMING ASSETS, CREDIT CARD REWARDS POINTS

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The Federal Consumer Financial Protection Board (“CFPB”) has proposed interpretive rulemaking clarifying how consumer protections provided by the Electronic Funds Transfer Act (“EFTA”) as implemented by Regulation E (“Reg E”)^[1] apply to transfers of funds and purchases using digital assets, including stablecoins, gaming assets and certain credit card rewards points (“NPR”).

^[2]Seeking to provide a “consistent framework” for the applicability of Reg E to the range of emerging payment mechanisms, the CFPB expressed concerns that “consumers making electronic fund transfers using accounts established primarily for personal, family, or household purposes might face challenges in vindicating their rights in the event of unauthorized transfers and other errors ...” and that “inconsistent application of EFTA and Regulation E might put certain providers at an unfair, competitive disadvantage.”^[3]

Without a word of guidance, the CFPB would require compliance with the detailed prescriptive disclosures, error correction procedures and limitations of liability to products, services and organizations not previously subject to such compliance burdens and who may not be capable of such compliance even if the specific requirements are understood. Market participants, including issuers, service providers and consumers, will find many subjects for substantive comments regarding this proposal.

COVERAGE UNDER REGULATION E

The NPR does not propose changes or additions to the wording of Reg E. The CFPB bases its proposed application of Reg E on its broadened interpretations, respectively, of Reg E’s existing terms (a) “funds” to include “stablecoins, as well as any other similarly situated fungible assets that either operate as a medium of exchange or as a means of paying for goods and services”^[4] and (b) “other consumer asset account” to include, depending on the facts and circumstances:

- certain video game accounts used to purchase virtual items from multiple game developers or players,

- virtual currency wallets that can be used to buy goods and services or make person-to-person transfers, and
- credit card rewards points accounts that allow consumers to buy points that can be used to purchase goods from multiple merchants.

The CFPB acknowledges the express exceptions in the EFTA and Reg E for securities and commodities.^[5] Those exceptions include any transfer for the purpose of purchasing or selling a security or commodity that is regulated by the Securities and Exchange Commission (“SEC”) or the Commodity Futures Trading Commission (“CFTC”) or purchased through a broker-dealer regulated by the SEC or futures commission merchant regulated by the CFTC. Or as the NPR explains, “EFTA does not apply to the purchase or sale of a stock or bond.”^[6] However, purchases of other goods or services, or other transfers of such assets through a consumer brokerage account are within the coverage of the EFTA and Reg E.^[7] Similarly, although credit card accounts are generally covered by Regulation Z implementing the Truth in Lending Act, the merchant providing reward points arising from use of the card might separately be subject to Reg E compliance if the points account meets the other qualifications set forth in the proposed rule. Further, the CFPB would leave intact the exclusions for certain gift cards recognized in the Gift Card Rule^[8] with respect to assets and accounts as defined in the proposed interpretive rule.^[9]

REQUIREMENTS OF REGULATION E

The consumer protection obligations of Regulation E fall on “financial institutions” which, directly or indirectly, hold the consumer’s account from which the covered assets can be used for transfers or purchases or sales. The CFPB explains that “It is well-established that financial institutions include 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.”^[10] The NPR would require any organization that holds the types of consumer accounts as newly interpreted, i. e., accounts used primarily for personal, family or household purposes, to comply with the requirements of Regulation E. These would potentially include custodians or exchanges that facilitate transfers or payments denominated in crypto currencies or stablecoins, computer games providers and credit card issuers that provide rewards that fall within the definitions proposed in the NPR. The NPR recognizes that “In sum, market participants offering new types of payment mechanisms to facilitate electronic fund transfers should understand whether their account meets the definition of ‘other consumer asset account,’ including whether it is established for ‘personal, family, or household purposes.’^[11]

The most important compliance obligations require certain initial and ongoing disclosures, provision of error correction procedures and remedies, and limits on consumers’ liability for unauthorized transfers or payments. A financial institution must provide initial disclosures of the terms and conditions of electronic fund transfer (“EFT”) services before the first EFT is made or at

the time the consumer contracts for an EFT service.^[12] The disclosures must include a summary of various consumer rights under Regulation E, including the consumer's liability for unauthorized EFTs, the types of EFTs the consumer may make, limits on the frequency or dollar amount, fees charged by the financial institution, and the error-resolution procedures. Regulation E also requires a financial institution to provide regular, periodic statements, and change-in-terms notices.

^[13] Regulation E contains model forms and clauses with respect to the required disclosures.^[14]

COMMENTS

Although it may not surprise some market participants that the CFPB would seek to bring transfers and payments denominated in stablecoins within the coverage of Regulation E, the proposal would extend coverage to classes of assets, such as gaming currencies and credit card rewards points, that may not have been anticipated. Accordingly, financial services compliance obligations would be imposed on new classes of organizations that have not been regulated as “financial institutions” without any changes in the statutory or regulatory provisions. Since the proposal offers no guidance on how existing regulations would be applied to these novel funds transfers, compliance will be challenging. This may not be too hard for stablecoins, which by definition have their value pegged to U.S. dollars. For example, application of dollar denominated limitations of consumer liability may not be too difficult to apply. How do those requirements apply to gaming assets or to rewards points that are redeemable for goods or services? Also, it is not clear that game providers have the means to track and correct errors in awarding or redeeming game assets. There are likely many other instances where the highly prescriptive compliance measures (and model forms) promulgated with reference to USD denominated transactions and certain procedures of conventional banks do not clearly fit the operations and capabilities of the financial institutions and “funds” proposed to be covered by the interpretations announced in the NPR.

The CFPB notes that it is soliciting comments on the proposed interpretive rule even though not required by the Administrative Procedure Act. Comments must be received by the CFPB by March 31, 2025. The CFPB notes that actions taken in good faith compliance with the final rule would avoid liability even if the rule is subsequently amended or is invalidated by a court.^[15]

The CFPB explains that it is promulgating the interpretive ruling in part to mitigate disparate applications of Reg E to these various forms of “funds” and newly included “financial institutions” that might result if such interpretation is left to courts, which frequently disagree among themselves as to interpretation of statutes.^[16] Even if the proposed interpretations are pursued under the new federal administration taking office in January 2025, it is not clear that the CFPB will be successful in heading off disparate court interpretations of the statutory terms of the Electronic Funds Transfer Act. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*^[17] ended application of the former judicial practice of deferring to an administrative agency's reasonable interpretation of ambiguous federal laws, known as the “Chevron Doctrine.”^[18] Instead, in the *Loper Bright* decision,

the Court empowered federal courts to use their own independent reasoned judgment in determining how a federal law applies to the facts and circumstances presented by a certain case.

[19] The administrative interpretation is not necessarily afforded deference unless the statute expressly confers rulemaking authority upon the agency with respect to the subject of the dispute, although a court may adopt an agency’s interpretation where the court finds it persuasive.^[20] In this light, it is unlikely that the proposed interpretive ruling will avoid extensive disagreement among courts where the various implications of the interpretive ruling may be challenged.

[1] Regulation E, 12 CFR part 1005. Regulation E implements the Electronic Funds Transfer Act, Pub. L. 95-630, tit. XX, section 2001, 92 Stat. 3728 (1978).

[2] https://files.consumerfinance.gov/f/documents/cfpb_efta-proposed-interpretive-rule_2025-01.pdf

[3] NPR at 9.

[4] NPR at 10-13.

[5] NPR at 15, citing EFTA section 903(7); 15 U.S.C. 1693a(7); 12 CFR 1005.3(c).

[6] 12 CFR 1005.3(c)(4).

[7] NPR at 15, citing *1 Nero v. Uphold HQ Inc.*, 688 F. Supp. 3d 134, 144 (S.D.N.Y. 2023). (“[P]ersonal asset accounts that are investment accounts like the money market mutual fund accounts identified in the Senate Report or [certain] cryptocurrency accounts . . . , are accounts covered by the EFTA. This is true even though a transaction from those accounts may not be subject to the EFTA in the event it is a transaction for the purchase or sale of a security regulated by the SEC.”)

[8] 12 CFR 1005.20.

[9] NPR at 17, *citing* 81 FR 83934 at 83977 (discussing interaction of the Gift Card Rule and the Prepaid Rule).

[10] NPR at 10, citing precedent as follows: “*See, e.g.*, S. Rept. 95-1273 at 26 (“The term ‘financial institution’ is defined to mean traditional depository institutions as well as any other person who directly or indirectly holds a consumer’s account.”); Electronic Fund Transfer Act, H. Rept. 95-1315, at 5 (1978) (“Section 903(h) of the bill defines the term ‘financial institution’ to include not only traditional depository institutions that are normally considered to be financial institutions but also ‘. . . any other person who, . . . indirectly, holds a consumer account belonging to an individual;’ This language is intended by the Committee to assure that the legislation remains sufficiently flexible to accommodate the continued evolution of electronic fund transfer services.”); *see also* 81 FR 83934 at 83964 (noting that the prepaid rule’s “requirements apply equally to depositories and non-depositories alike”).”

[11] NPR at 17.

[12] EFTA section 905; 15 U.S.C. 1693c; *see generally* 12 CFR 1005.7.

[13] 12 CFR 1005.8 and 9(b).

[14] *See generally* 12 CFR part 1005, app. A.

[15] NPR at 18, *citing* EFTA section 916(d).

[16] *See* NPR at 9.

[17] 603 U.S. 369 (2024).

[18] *Chevron USA v. National Resources Defense Council* 467 U.S. 837 (1984).

[19] Loper Bright at 412-413.

[20] *Id.* at 387-393, 395.

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