

ALSTON & BIRD

Regulation E: Regulatory, Enforcement, and Litigation Risks

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Fraud and Scams

- Under Regulation E, a “unauthorized” EFT is an “electronic fund transfer from a consumer’s account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit”
- Fraud: an unauthorized third-party gains access to the consumer’s account and initiates transfers
- Scam: a fraudster tricks the consumer into initiating a transfer
- Increasing use of credit transfers (such as Zelle and P2P platforms) and growth of instant payments (such as RTP and FedNow) have changed the risk profile of consumer payments
- Congressional pressure on regulators and financial institutions to be responsible for scams
 - Proposed amendments to the EFTA
 - Investigations of payment platforms
 - Requests for CFPB action

Protecting Consumers from Payment Scams Act

- New defined term “unauthorized or fraudulently induced electronic fund transfer” would include transfers initiated by “the consumer, if the consumer’s authorization or initiation of the electronic fund transfer was fraudulently induced”
 - Would not cover a transfer “initiated by a natural person other than the consumer who was furnished with the card, code, or other means of access to such consumer’s account by such consumer, unless [...] the consumer was fraudulently or coercively induced to furnish the card, code, or other means of access”
 - Does not define “fraudulently induced” or “coercively induced”
 - Allocates liability between the account holding financial institution and the receiving financial institution
- Expands the definition of “financial institution” to include a person that “issues an accepted card or other means of access or provides other means to facilitate an electronic fund transfer; and agrees, directly or indirectly, with a consumer to provide electronic fund transfer services”
- Eliminates the exclusion for wire transfers
- Expands definition of “error” to include “the consumer’s inability to access funds in a frozen, closed, or otherwise inaccessible account” and “a reflection on a periodic statement of goods or services not accepted by the consumer or the designee of the consumer or not delivered to the consumer or the designee of the consumer”

Error Resolution

- Information Requests
 - Regulation E requires financial institutions to promptly investigate upon receiving a timely notice of error
 - To assist with investigations or to return or chargeback a transaction, financial institutions may ask the consumer to provide documentation
 - Financial institutions cannot deny an error claim based solely on the fact that the consumer did not provide the documentation
- Notice of Error and Supporting Documentation
 - When an investigation reveals that no error occurred or a different error occurred, Regulation E requires financial institutions to provide a written explanation of the findings and inform the consumer of their right to request the documentation that the institution relied on in making its determination
 - The “explanation” must be more than a conclusory determination
 - If the consumer makes a request for the documentation, the financial institution must promptly provide it

Error Resolution

- Token Errors

- CFPB stated that transfers initiated by a consumer via a P2P service that are misdirected to an unintended recipient due to a token error are “incorrect” EFTs
- Token errors occur when the consumer provides correct identifying token information (such as mobile phone number or email address) for the intended recipient but, due to inaccurate or outdated information in the payment network directory, the token is associated with someone other than the current owner of the token

- Provisional Credit

- If a financial institution needs more than 10 days to complete its investigation, Regulation E requires the financial institution to provisionally credit the consumer’s account in the amount of the alleged error and give the consumer full use of the provisionally credited funds during the investigation
- If the investigation reveals that no error occurred or a different error occurred and the provisional credit will be debited from the consumer’s account, Regulation E requires financial institutions to notify the consumer of the date and amount of the debit and honor certain transactions
- The amount of provisional credit must include interest and fees, if applicable
- The notice requirement applies in situations where only a portion of the provisional credit will be debited

Account Freezes

- CFPB Supervisory Highlights, July 2024
 - CFPB found that many financial institutions freeze accounts when suspicious or fraudulent activity is detected
 - CFPB determined that institutions engaged in unfair practices regarding consumer communications related to such account freezes
 - Failing to notify consumers after freezing the account
 - Failing to provide clear guidance on how the consumer can unfreeze the account
 - Impeding the consumer's ability to contact the financial institution regarding the account freeze
- Financial institutions must balance fraud prevention with consumer communication
- Financial institution cannot deny Regulation E protections in the name of fraud prevention
 - Providing full use of provisional credit
 - Providing documentation in connection with an error investigation

Overdraft Practices

- Regulation E prohibits financial institutions from charging a fee for paying an ATM or one-time debit card transaction under an overdraft service unless the consumer affirmatively opts in
- For an opt in to be effective, the financial institution must:
 - Provide the consumer with a written notice describing the institution's overdraft service,
 - Provide a reasonable opportunity for the consumer to affirmatively consent,
 - Obtain the consumer's affirmative consent, and
 - Provide the consumer with written confirmation of the consent including a statement informing the consumer of the right to revoke such consent
- Consumers must be allowed to revoke consent in the same manner available for providing consent
- Evidence of compliance with Regulation E's requirements must be retained for two years from the date disclosures are required to be made or action is required to be taken

Overdraft Practices

- Overdraft practices have been the subject of regulations, enforcement, and litigation in recent years
- In addition to Regulation E, overdraft practices must comply with agreements and UDAAP principles
- Litigation focuses mainly on contract claims regarding inconsistent or unclear agreements and practices
- Enforcement
 - TD Bank: CFPB alleged violations of Regulation E and UDAAP for opt in and marketing practices
 - Regions Bank: CFPB alleged violations of UDAAP for APSN practices
- Supervision
 - CFPB Circular 2022-06: CFPB determined that assessing overdraft fees for APSN transactions is an unfair practice
 - CFPB Circular 2024-05: CFPB stated that financial institutions must retain evidence of a consumer's affirmative consent
 - Junk Fees: CFPB targeted fees related to APSN transactions and represented transactions
- Regulation
 - Rulemaking on Fees for Instantaneously Declined Transactions: CFPB prohibits assessing fees for transactions that are instantaneously declined and determines that assessing such fees is an abusive practice

Consumer Contracts

- Consumers cannot waive EFTA/Regulation E rights
- Provisions in agreements that waive rights are not enforceable
 - Blanket authorizations for third party transfers
 - Error resolution procedures inconsistent with EFTA/Regulation E
- CFPB Circular 2024-03
 - CFPB asserted that including unlawful or unenforceable terms in consumer contract may be a deceptive practice
 - CFPB claimed that qualifiers such as “subject to applicable law” and “except where unenforceable” would not cure an otherwise deceptive contract term



Questions