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SDNY Accepts Argument That Crypto Is Subject to Electronic Fund Transfer Act/Regulation E



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In an Opinion and Order issued on February 22, 2023, Judge Denise Cote of the Southern District of New York (“SDNY”) permitted class action plaintiffs to survive a motion to dismiss and proceed against Uphold HQ, Inc. on a variety of claims, including that cryptocurrency is subject to the Electronic Fund Transfer Act (“EFTA”) and Uphold failed to comply with the disclosure and other requirements of the EFTA.

The EFTA, which is implemented by Regulation E, 12 CFR 1005, is a consumer financial services law that applies to “electronic fund transfers.” Generally speaking, electronic fund transfers include every transaction that occurs electronically other than wires, from debit card transactions and credit card transactions to loading prepaid cards and sending funds internationally. Judge Cote surmises that because Uphold could be viewed as a financial institution under the EFTA and holds cryptocurrency funds on behalf of customers in accounts, the transfer of cryptocurrency therefore could be viewed as an electronic fund transfer. To date, as noted by Judge Cote, the Consumer Financial Protection Bureau (which is the agency responsible for interpreting the EFTA) (“CFPB”) has not taken a position regarding whether the EFTA applies to cryptocurrency transfers, because it “continues to analyze the nature of products or services tied to virtual currencies.” 81 Fed. Reg. 83934, 83978-79 (Nov. 22, 2016). Cryptocurrency exchanges to date have not attempted compliance with the EFTA and its provisions in part because the law and Regulation E fits imperfectly with the way cryptocurrency works. For example, the requirement that a financial institution reverse and refund a transaction upon finding that an unauthorized person caused transfers to occur from a consumer’s account would not be possible with cryptocurrency because transactions cannot be reversed on the blockchain.

While the Opinion and Order’s conclusion that cryptocurrency transfers are subject to the EFTA does not carry the force of law, should the SDNY eventually conclude in

this case that cryptocurrency transfers are electronic fund transfers for purposes of the EFTA, then an entire raft of disclosures, error resolution protocols and other requirements would apply to all exchanges facilitating cryptocurrency transfers. Crypto and consumer protection enthusiasts alike will be watching this case carefully.
