DeFi Education Fund

March 31, 2025

[Submitted via the Federal eRulemaking Portal]

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Comment on the Proposed Rule on Electronic Fund Transfers Through Accounts Established Primarily for Personal, Family, or Household Purposes Using Emerging Payment Mechanisms, CFPB-2025-0003

The DeFi Education Fund submits this comment letter in response to the Consumer Financial Protection Bureau's ("CFPB") proposed regulations under the Electronic Fund Transfer Act ("EFTA"), addressing electronic fund transfers through accounts established primarily for personal, family, or household purposes using emerging payment mechanisms, as outlined in the Proposed Rule published on January 15, 2025.[1] If finalized, the Proposed Rule would unreasonably expand Regulation E beyond the EFTA statutory scope and legislative purpose, imposing vague and overly broad requirements that stifle innovation, infringe on First Amendment rights, and create legal uncertainty. Extending EFTA as proposed potentially imposes liability—including criminal liability and private rights of action, including class actions—and compliance obligations, on the entirety of the digital asset industry without the necessary analysis, foundational rulemaking or legislative authority to do so.

The DeFi Education Fund is a non-partisan research and advocacy group. DEF's mission is to advocate for sound policy for decentralized finance ("DeFi"), educate lawmakers about the technical workings and benefits of DeFi, achieve regulatory clarity for the future of the global digital economy, and advocate for individual users and developers in the DeFi space.

The Proposed Rule is ambiguous as to whether it is attempting to apply EFTA to software providers (i.e., developers) of self-custody wallets and digital assets, and fundamentally misunderstands the technology at issue.

Part I summarizes why self-custody wallets, for which users control their own private keys, should not be subject to Regulation E. It highlights the significance of self-custody, which

[1] CFPB, *Proposed Rule: Electronic Fund Transfers Through Accounts Established Primarily for Personal, Family, or Household Purposes Using Emerging Payment Mechanisms,* 90 Fed. Reg. 3723 (Jan. 15, 2025).

is fundamentally consistent—not in tension—with consumer protection interests and the CFPB's own priorities.

Part II presents the legal arguments against the CFPB's Proposed Rule, and explains that expanding Regulation E to cover developers of self-custody wallets exceeds the agency's authority and conflicts with existing financial regulations, potentially frustrating proposed regulations regarding the digital asset ecosystem. At the outset, any rule with such an expansion of EFTA should be done–if at all–by legislation or notice-and-comment rulemaking; in other words, the Bureau's proposal cannot be accomplished by an interpretive rule. Furthermore, the section explains that developers of self-custody wallets do not qualify as financial institutions, and the self-custody wallets themselves are not "accounts" under EFTA, as users control their private keys, retain custody of their assets, and perform their own transactions, without intermediaries. The proposal's broad, over-elastic definition of "funds" lacks judicial or statutory support; it also lacks clear parameters, failing to clarify the status of various digital assets and whether they would fall within or outside the regulatory perimeter that the CFPB proposes. Additionally, the rule raises First Amendment concerns by restricting the publication of wallet software that does not include mandated fraud-prevention mechanisms.

Part III explains the unintended consequences of the CFPB's overreach, including stifling innovation, exposing open-source developers to liability, and creating an inconsistent and counterproductive landscape by attempting to map a preexisting regulatory framework onto a set of technologies for financial services that are not contemplated by EFTA.

Part IV outlines the argument that the CFPB should refrain from rulemaking under EFTA until broader legislative and regulatory clarity on digital assets is established, to avoid premature, fragmented, and potentially conflicting oversight.

Table of Contents

I. Introduction

Self-custody wallets, also known as self-hosted, unhosted, or non-custodial wallets, are software tools hosted on a person's computer, phone, or other device that allow users to store and manage their own digital assets private keys *without* reliance on a third-party intermediary.[2] Self-custody wallet services ensure that individuals have full control over their digital assets,[3] enabling transactions without intermediaries or centralized control.

Technically, each self-custody wallet is associated with a unique pair of cryptographic keys: a public key, which serves as an address for the self-custody wallet (e.g., receiving digital assets), and a private key, which grants exclusive control over the assets within the wallet.[4] Because the private key is never shared with any third party, including the self-custody wallet's software provider, only the wallet owner controls the private key and thus can authorize transactions, significantly reducing counterparty risk.[5] Transactions are signed[6] locally using the private key and broadcasted to the blockchain network, where they are verified and recorded in a decentralized ledger.[7] In other words, in contrast to traditional financial institutions, the self-custody wallet provider does not control the private keys on behalf of users nor process transactions—this is all completely left to the user.[8]

Ensuring access to self-custody wallets is a critical policy goal, particularly as the CFPB considers expansion of regulatory oversight under EFTA. The CFPB's enforcement priorities focus on consumer protection in electronic transactions, particularly regarding fraud liability and error resolution.[9] However, EFTA was designed to regulate financial institutions that provide electronic fund transfer services, ensuring consumer rights when transactions involve intermediaries that hold user funds.[10] EFTA requires financial institutions to disclose transfer terms, provide transaction records, and promptly investigate and correct errors, including

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[2] *See* Keep Your Coins Act of 2023, H.R. 4841, 118th Cong. (2023), available at https://www.congress.gov/bill/118th-congress/house-bill/4841/text.

[3] *See* U.S. Gov't Accountability Off., GAO-23-105346, *Blockchain in Finance: Legislative and Regulatory Actions Are Needed to Ensure Comprehensive Oversight of Crypto Assets*, at 6 (2023), available at https://www.gao.gov/assets/gao-23-105346.pdf. *See also* Financial Crimes Enforcement Network ("FinCEN"), *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FIN-2019-G001, at 16 (May 9, 2019), available at https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf..

[4] *See* FinCEN*, supra* note 3, at 16*. See also* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, at 2 (2008), available at https://bitcoin.org/bitcoin.pdf.

[5] *See* FinCEN, *supra* note 3, at 16.

[6] "Signing" a transaction is the cryptographic process for authenticating the sender's identity and the transaction's information by producing a "digital signature." The blockchain network uses this digital signature to verify the transaction's authenticity and that it was created by the rightful owner of the associated private key before adding it to the ledger.

[7] *See id*.

[8] *See* Kraken, *What are custodial and non-custodial crypto wallets?* (2024), available at https://www.kraken.com/learn/custodial-non-custodial-crypto-wallet.

[9] *See* Proposed Rule, *supra* note 1, at 16.

[10] *See id*.

unauthorized transactions, to ensure consumer protection.[11] Applying EFTA to self-custody wallet software providers would be inconsistent with the law's letter and purpose, as these wallets do not involve a financial institution or any third party that holds private keys or manages transfers.[12] Restricting self-custody could undermine financial autonomy, innovation, and privacy while exposing self-custody software providers to burdensome regulations designed for traditional banking services.[13]

Finally, as a group that advocates for providers of self-custodial software, we have focused our commentary on the application of the Proposed Rule to such software and its developers. We have not commented on the multiplicity of ways in which the Proposed Rule is deficient to the extent it purports to apply to the digital asset industry generally, including providers of custodial, or hosted, wallet services. That is of course the threshold question that should be considered before an examination of its application to self-custody wallets is even reached. It is clear that the application of Reg E to all digital assets per se exceeds the letter, intent, and historical interpretation of EFTA. The following arguments are merely one example of why that is the case.

II. Legal Argument

A. The Current Proposal May Not Be Promulgated by Interpretive Rule

At the outset, we note that the CFPB has taken the unusual posture that this significant expansion of Regulation E be conducted by interpretive rule. Pursuant to the Administrative Procedure Act (the "APA") and applicable precedent, an agency may issue interpretive rules without formal process. However, where, as here, a rule creates "new law, rights, or duties," or establishes binding norms or obligations, the Proposed Rule would be a legislative rule, requiring that it be promulgated under formal notice-and-comment process under 5 U.S.C. § 553(b).[14] Because the CFPB has not done so, a finalization of this Proposed Rule would violate the APA.

The CFPB's proposal goes far beyond mere clarification or explanation. As outlined below, the Proposed Rule does not simply offer a new interpretation, but imposes a set of obligations upon entire new industries, business models, and types of assets.[15] And it provides a new set of rights to a new set of users—among them, users of self-custody wallets—simply by

[11] *See* 15 U.S.C. §§ 1693(b), 1693c(a), 1693d, 1693f. Also, if a financial institution fails to recredit an account in ten days without a good faith investigation or valid reason, the consumer may recover triple damages. *See* 15 U.S.C. § 1693f(e).
[12] *See infra* Part II.
[13] *See infra* Part III.
[14] *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) ("On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.").
[15] *See, e.g., Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

"interpretation."[16] Further, this proposed expansion of Regulation E cannot occur by agency action at all. As detailed below, the Proposed Rule goes beyond the reach of EFTA itself, resulting in an impermissible overreach of the regulation beyond the enabling statute (and, by extension, beyond the jurisdiction of the CFPB). As such, if passed, the rule would violate the APA and would not survive judicial review.

Even if the CFPB were able to proceed by rulemaking, there are ample reasons why it should choose not to do so. Various pieces of legislation have been proposed which would address many of the concerns raised by the CFPB and apply to the digital assets ecosystem generally. For example, a bipartisan Senate bill which was recently advanced out of the Senate Banking Committee 18-6,[17] Guiding and Establishing National Innovation for U.S. Stablecoins of 2025 Act (GENIUS Act), establishes a comprehensive regulatory framework for stablecoin issuers, establishing bank-like regulation and oversight.[18] Similarly, the Stablecoin Transparency and Accountability for a Better Ledger Economy Act of 2025 (STABLE Act) proposes regulatory requirements for stablecoin issuers, including reserve backing, transparency, and oversight measures to ensure financial stability and consumer protection.[19] Another proposal, the Financial Innovation and Technology for the 21st Century Act (FIT21) passed by the House in mid-2024, creates a broader framework for regulating various digital assets. Among other things, it updates the securities and commodities statutes to establish clear jurisdictional lines, requires certain actors to register with the appropriate regulatory authority, and puts in place a disclosure regime—mandating developers to disclose information about their projects and requiring institutions to disclose certain information to their customers.[20]

Indeed, regardless of the ultimate regulatory framework that is established, Congress clearly intends to fashion the legal and regulatory landscape for these types of assets, businesses, and users.[21] Notably, the recent disapproval of the IRS's "Gross Proceeds Reporting by Brokers That Regularly Provide Services Effectuating Digital Asset Sales" rule under the Congressional Review Act underscores the legislative branch's recognition of the need for more balanced and tailored regulation in the digital assets space.[22] Similarly, the

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[16] *See Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 96-97 (2015) ("[T]he critical feature of interpretive rules is that they are "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."). The Proposed Rule goes beyond the scope of "interpretive rules" discussed in *Perez*, as it not only advises the public of the CFPB's construction of EFTA and Regulation E, but also imposes various legal liabilities, including criminal liabilities, on new types of services and such service providers.

[17] *See* Press Release, Office of Senator Bill Hagerty, Hagerty, Colleagues Applaud Committee Passage of the GENIUS Act (Mar. 13, 2025), available at https://www.hagerty.senate.gov/press-releases/2025/03/13/hagerty-colleagues-applaud-committee-passage-of-the-genius-act/.

[18] *See* Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025, S. 394, 119th Cong. (2025).

[19] *See* Stablecoin Transparency and Accountability for a Better Ledger Economy Act of 2025, H.R. ____, 119th Cong. (2025).

[20] *See* Financial Innovation and Technology for the 21st Century Act, H.R. 4763, 118th Cong. (2024).

[21] *See id*.

[22] *See* H.R.J. Res. 25, 119th Cong. (2025), available at https://www.congress.gov/bill/119th-congress/house-joint-resolution/25. The IRS's "Gross Proceeds

Administration has issued Executive Order 14178, titled "Strengthening American Leadership in Digital Financial Technology," (January 23, 2025), which among other things establishes a Presidential Working Group on Digital Asset Markets. If the CFPB were to move forward with a rulemaking in advance of Congressional action, it would frustrate these efforts and prevent, rather than further, regulatory clarity.

This concern is not hypothetical. Although formally a consumer protection rule, EFTA and the regulations promulgated pursuant to EFTA implicate other regulatory regimes and agencies, the missions of those agencies, and other important interests—including the public interest. For example, on its face, Regulation E contains various exemptions from its scope, sometimes dependent upon whether the transfer in question is subject to the purview of another regulator.[23] The scope of that exemption–changed by the ostensibly "interpretive rule"—affects those regulated by the U.S. Securities and Exchange Commission (the "SEC") or the Commodity Futures Trading Commission (the "CFTC"); and the U.S. Department of the Treasury.[24]

In fact, previous amendments to Regulation E have caused similar disruptions and unintended consequences relating to other regulatory regimes and their agencies. In 2012, the CFPB issued proposed rules in connection with remittances. The anti-money laundering regulations promulgated pursuant to the Bank Secrecy Act contained pre-existing exceptions for transactions funds covered under EFTA.[25] The CFPB's rulemaking would have effectively removed certain remittances from the scope of the anti-money laundering regulations,[26] requiring a last-minute revision from both FinCEN and the Federal Reserve to navigate around the unintended consequence.[27]

As explained below, the Proposed Rule is not a modest revision or clarification of existing, well-known rules that require further interpretation from the CFPB. Rather—or perhaps more accurately—while the existing rules are well-known, the Proposed Rule establishes significant revisions to Regulation E as it is currently understood and practiced. If such changes should be made, they should be made (1) by Congress; (2) in consideration of the broader regulatory framework; and (3) considering the consequences to other statutes, rules, and agencies. Moreover, as detailed in Section IV, even the CFPB has acknowledged that implementing such changes would require digital payment providers to redesign their products

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Reporting by Brokers That Regularly Provide Services Effectuating Digital Asset Sales" rule requires digital asset brokers to report gross proceeds from sales to the IRS, aiming to enhance tax compliance but facing criticism for its broad scope and potential burdens on the digital asset industry.

[23] *See, e.g.*, 12 C.F.R. § 1005.3(c)(4) (noting that transfers for the sale pursuant to the SEC or CFTC, or held in book entry form by the Federal Reserve or another federal agency, are excluded from the definition of "electronic fund transfer" within Regulation E).

[24] Indeed, the Proposed Rule notes that it expects to change this exception, effectively narrowing it—but without considering the actual effects it has to the existing SEC or CFTC rules, or proposed changes to them. *See* Proposed Rule, *supra* note 1, at 15-16.

[25] *See* 31 C.F.R. §§ 1010.100(w), (ddd) (defining, respectively, "funds transfer" and "transmittal of funds").

[26] *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6193, 6213 (Feb. 7, 2012).

[27] *See* Notice of Proposed Rulemaking: Definitions of Transmittal of Funds and Funds Transfer, 77 Fed. Reg. 72783 (Dec. 6, 2012).

to capture data necessary for compliance.[28] The CFPB also noted that, "given the evolving market for digital currencies, [it] limited the [federal oversight of popular digital payment apps] rule's scope to count only transactions conducted in U.S. dollars."[29] Such statements underscore the potential premature and disruptive effects of the Proposed Rule. Therefore, implementing such sweeping revisions without clear legislative guidance or a well-developed regulatory framework risks creating uncertainty and inefficiencies in the evolving digital assets landscape.

B. EFTA Should Not Be Read to Include Providers of Self-Custody Wallets

1. EFTA's Definition of "Financial Institution" Does Not Apply to Self-Custody Wallet Providers

EFTA defines a "financial institution" as "a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer."[30] This definition presumes that a financial institution exercises some degree of custody or control over consumer funds. Regulation E echoes this language, presupposing that a "financial institution" has custody or control over consumer funds.[31] In practice, courts and agencies interpreting this definition have consistently required that the entity in question have a direct role in holding consumer funds.[32] Legislative history supports this interpretation, underscoring that the law was intended to cover entities with direct financial relationships with consumers—those capable of affecting the movement of consumer funds.[33] The CFPB itself has emphasized in its compliance guidance that "financial institution" status presupposes custody or control over consumer

[28] *See* CFPB, *CFPB Finalizes Rule on Federal Oversight of Popular Digital Payment Apps to Protect Personal Data, Reduce Fraud, and Stop Illegal "Debanking"* (Nov. 21, 2024), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-on-federal-oversight-of-popular-digital-payment-apps-to-protect-personal-data-reduce-fraud-and-stop-illegal-debanking/.
[29] *See id*.
[30] *See* 15 U.S.C. § 1693a(9).
[31] *See* 12 C.F.R. § 1005.2(i) ("Financial institution" means a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376.").
[32] *See, e.g., McFarland v. Wells Fargo Home Mortgage, Inc.*, Case No. 1:05-CV-673, at 6-7* (W.D. Mich. Sep. 29, 2006) ("Here, defendant is not a financial institution with respect to plaintiff because it did not hold "a demand deposit, savings deposit, or other asset account" belonging to plaintiff. Accordingly, defendant is not liable to plaintiff in the role of a financial institution under EFTA.").
[33] *See Wachter v. Denver National Bank*, 751 F. Supp. 906, 908 (D. Colo. 1990) ("The Act was designed to create rights for consumers in an era in which banking could be conducted almost exclusively through machines. The absence of personal contact was seen as a disadvantage in an automated system that is much more vulnerable to fraud, embezzlement and unauthorized use than traditional payment methods.") (internal citation omitted). Note that EFTA was designed and enacted with the understanding that financial institutions, as distinct entities, are responsible for holding and processing transactions beyond the machine interface. It was not intended to regulate systems like self-custody wallets, where users retain full control over their funds without reliance on a third-party institution.

funds.[34] It further notes that non-bank entities, such as P2P payment providers, are considered financial institutions "when [they] directly or indirectly hold an account belonging to a consumer" or issue an access device and agree to provide EFT services.[35]

Self-custody wallet providers do not meet these criteria.[36] The role of self-custody wallet providers is limited to supplying software that enables users to interact with blockchain networks; they do not hold funds, intermediate transfers of funds, or manage transactions, nor do they have control over or ownership of user accounts.[37] Self-custody wallets do not involve granting any form of custody or control, direct or otherwise, to any third-party. The user retains full control over their assets, with private keys stored locally rather than entrusted to a third party.[38] Unlike financial institutions, which are capable of debiting or crediting funds, wallet providers lack the ability to initiate or reverse transactions.[39] This distinction is fundamental to the statutory definition and aligns with prior regulatory interpretations that require a financial institution to have a fiduciary or custodial role.

Another key element of the definition of "financial institution" is the existence of an agreement between the service provider and consumers. Because EFTA defines financial institutions as "nonbank entities that [...] issue an access device and agree with a consumer to provide EFT services," it presumes that the regulation should apply when there is an "agreement" for actual account management services needed to effect EFT services—meaning the entity directly or indirectly holds the consumer's account as defined by the statute.[40] And, in fact, the Official Commentary to Section 1005.3 makes clear that the requirements of the rule "apply only to an account for which an agreement for EFT services to or from the account has been entered into" between the consumer and the financial institution, or (where the institution

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[34] *See* CFPB, *Electronic Fund Transfers FAQs: Can non-bank P2P payment providers be considered financial institutions under Regulation E?* (Jan. 2025), available at https://www.consumerfinance.gov/compliance/compliance-resources/deposit-accounts-resources/electronic-fund-transfers/electronic-fund-transfers-faqs ("Thus, if a P2P payment provider directly or indirectly holds an account belonging to a consumer, they are considered a financial institution under Regulation E. 12 C.F.R. § 1005.2(i). An example of an account that a non-bank P2P payment provider may directly or indirectly hold is a prepaid or mobile account whose primary function is to conduct P2P transfers.").
[35] *See id.*
[36] The Proposed Rule also appears to presume the expansion of the definition of "financial institution" under Reg E to providers of custodial cryptocurrency wallet services. This expansion—devoid of analysis—exceeds the letter, intent, and historical application of EFTA and Reg E.
[37] *See* Ledger, *What Is Self-Custody in Crypto?* (Jul. 2024), available at https://www.ledger.com/academy/topics/security/what-is-unhosted-in-crypto. *See also* Jai Ramaswamy, *How I Learned to Stop Worrying and Love Self-Custody Wallets*, Coin Center (Nov. 18, 2020), available at https://www.coincenter.org/how-i-learned-to-stop-worrying-and-love-unhosted-wallets/; Rebecca Rettig, *Written Testimony of Rebecca Rettig, Chief Legal & Policy Officer of Polygon Labs, "Decoding DeFi: Breaking Down the Future of Decentralized Finance,"* Before the U.S. House Financial Services Committee Subcommittee on Digital Assets, Financial Technology, and Inclusion, 118th Cong. (Sept. 10, 2024), available at https://docs.house.gov/meetings/BA/BA21/20240910/117620/HHRG-118-BA21-Wstate-RettigR-20240910.pdf.
[38] *See id.*
[39] *See id.*
[40] *See* Proposed Rule, *supra* note 1, at 10. *See also* 12 C.F.R. § 1005.2(a)(1).

has received notice) between the consumer and a third party.[41] In the context of self-custody wallets, and other forms of multi-signature wallets, the access code that "may be used by the consumer to initiate electronic fund transfer" is not issued by the self-custody wallet providers.[42] Private keys to self-custody wallets are generated by the encryption algorithm of a blockchain network instead of the self-custody wallet software, and function as a cryptographic signature for transactions rather than an access code issued by a financial institution as defined under EFTA.[43]

Self-custody wallet services are mere licensing agreements for software, where the user retains control of their digital assets without triggering these regulatory obligations.[44] Applying the Proposed Rule to self-custody wallets would, in effect, assume the existence of an agreement to provide EFT services between software providers and users, even though no such agreement exists.[45] This raises significant concerns. First, enforcement would be impractical, as self-custody wallet software merely enables users to control their private keys without intermediating or processing transactions.[46] Without a third-party entity maintaining accounts or executing transfers, traditional regulatory oversight would be difficult to implement.[47]

Moreover, treating self-custody wallet providers as financial institutions would redefine their role, imposing obligations extending far beyond the capabilities of a software provider. EFTA establishes the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfers to protect consumer rights.[48] It mandates disclosure of transfer terms,[49] requires financial institutions to provide transaction documentation,[50] and obligates them to promptly investigate and correct errors, including unauthorized transfers.[51] If a financial institution fails to provisionally recredit a consumer's account within ten days and either neglects a good faith investigation or lacks a reasonable basis for denying the error, the consumer may recover triple actual damages.[52]

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[41] *See* 12 C.F.R. § 1005, supp. I, § 1005.3(a)(1).
[42] *See* Gemini, *What Are Public and Private Keys?* (Jun, 28, 2022), available at https://www.gemini.com/cryptopedia/public-private-keys-cryptography#section-what-is-public-key-cryptography.
[43] *See id*.
[44] *See* Ledger**,** *supra* note 37.
[45] *See* Proposed Rule, *supra* note 1, at 10.
[46] *See* Kraken, *supra* note 8.
[47] Of course, we do not concede that if the Proposed Rule were adopted as initially promulgated, it would include non-custodial wallets into the perimeter of EFTA and Regulation E. Indeed, for the reasons discussed in this Comment (among other reasons), such a reading would not survive judicial review. However, because the Proposed Rule does not make this clear, it leaves open an unwarranted ambiguity—and therefore invites potential misinterpretation and misuse. Thus, the CFPB should correct this ambiguity by making clear that non-custodial wallets are certainly outside EFTA's scope.
[48] *See* 15 U.S.C. § 1693(b).
[49] *See* 15 U.S.C. § 1693c(a).
[50] *See* 15 U.S.C. § 1693d.
[51] *See* 15 U.S.C. § 1693f.
[52] *See id.*

Self-custody wallets lack the ability to block, freeze, or recover user funds, as they do not have access to users' private keys or their non-public transaction data.[53] On a technical level, decentralized blockchains are immutable, meaning their data cannot be altered.[54] And this is a feature, not a bug: this "finality" of a blockchain ensures that once a transaction is validated, it is then permanently recorded and added to the next block in the ledger.[55] Such immutability assists both consumers (who, like merchants receiving funds, would like to know that their transactions have occurred) and the digital asset ecosystem at large.

If the Proposed Rule is applied to the providers of self-custody wallets, it would create obligations—and liabilities—that rewrite the fundamental expectations of such providers (which are not financial institutions) and users (i.e., consumers). What is fundamentally a licensing arrangement that allows users to manage their own assets would be reinterpreted to create a fiduciary responsibility for software providers to oversee funds and assume obligations to resolve errors in transactions.[56] Expanding regulatory obligations in this manner would set a concerning precedent, compelling self-custody technology providers to assume financial responsibilities and legal obligations they were never designed to handle as well as prompting wallet users to furnish a much wider array of personal identifying information to entities that are not involved directly in a transaction. This shift would not only impose new regulatory burdens but also blur the distinction between software providers and traditional financial institutions. Developers who previously focused on building secure, user-controlled systems might now face compliance costs and legal risks that alter the economics of service development. Such a reinterpretation would stifle innovation, limit user autonomy, and reshape the landscape of decentralized financial tools.

Finally, the constraints may not only be of cost and resources, but of possibility. Because self-custody wallet providers do not control transactions, they cannot reverse them. And because blockchains are immutable, they cannot be made "mutable" by regulatory fiat. The Proposed Rule, if enacted, imposes expectations which would be nearly impossible to meet.

Other regulatory regimes—concerned with different problems, but addressing the same technologies—come to the same conclusion and resist the temptation to overlay financial-institution expectations upon self-custody wallet providers. For instance, FinCEN, the primary anti-money laundering regulator and administrator of the Bank Secrecy Act, issued seminal guidance regarding virtual assets in 2019.[57] In determining whether certain technologies and business models would fall within the regulatory perimeter of the Bank Secrecy Act, the guidance assessed self-custody (unhosted) wallet provider technology in the context of

[53] *See* Metamask, *Can I reverse an already confirmed transaction?,* available at https://support.metamask.io/manage-crypto/transactions/can-i-reverse-an-already-confirmed-transaction/.
[54] *See* Bradley Peak, *What is finality in blockchain, and why does it matter?*, Coindesk (Jan. 25, 2025), available at http://cointelegraph.com/explained/what-is-finality-in-blockchain-and-why-does-it-matter.
[55] *See id.*
[56] *See, e.g.*, Robinhood, *Self-Custody Wallet Licensing and User Agreement* (Sep. 2022), available at https://cdn.robinhood.com/assets/self_custody/unhosted-wallet-agreement.pdf.
[57] *See* FinCEN, *supra* note 3.

FinCEN's regulations concerning money transmission.[58] Per the FinCEN 2019 Guidance, "[u]nhosted wallets are software hosted on a person's computer, phone, or other device that allow the person to store and conduct transactions in [convertible virtual currency].[59] In the case of self-custody, single-signature wallets, (a) the value (by definition) is the property of the owner and is stored in a wallet, while (b) the owner interacts with the payment system directly *and has total independent control over the value.* In so far as the person conducting a transaction through the unhosted wallet is doing so to purchase goods or services on the user's own behalf, they are not a money transmitter."[60]

2. Self-Custody Wallets Do Not Meet the Definition of an "Account"

EFTA and Regulation E define an "account" as "a demand deposit, savings deposit, or other asset account held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes."[61] The definition of an "account" under EFTA is closely tied to whether the entity providing the service qualifies as a financial institution. As highlighted in *Yuille*, a key factor in determining whether a wallet constitutes an "account" under EFTA and Regulation E is whether the assets are directly or indirectly held by a financial institution.[62] The court in *Yullie* recognized that "[t]he definition of account is also relevant to whether [defendant] is a financial institution."[63] Self-custody wallets, however, do not meet this standard because their providers neither directly nor indirectly hold user assets. As discussed in *supra* Part II.B.1., self-custody wallets operate as self-managed tools that allow users to retain full control of their funds without intermediary involvement.[64] Since these providers do not exercise custody or facilitate fund transfers as financial institutions do, self-custody wallets do not qualify as "accounts" under EFTA.

Furthermore, the Proposed Rule does not account for federal case law concluding that certain cryptocurrency transactions might not be covered by EFTA and Regulation E.[65] In *Yuille*, which the Proposed Rule does not cite once despite multiple references to an earlier decision from the same federal district court, the court concluded that an account established to hold digital assets is not an "account" and therefore not subject to EFTA and Regulation E because it is not "established for personal, family, or household purposes." This same reasoning applies to self-custody software providers, who have no way of determining whether a user will employ the software wallet for personal, family, or household purposes, or for some other purpose altogether. Thus, much like the deficiencies in the complaint in that case, the Proposed Rule's ambiguity fails to properly tailor the regulation to the letter and purpose of EFTA.

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[58] *See id.* at 15-16.
[59] *See id*.
[60] *See id.*
[61] *See* 15 U.S.C. § 1693a(9); 15 C.F.R. § 1005.2(i).
[62] *See Yuille v. Uphold HQ, Inc.*, 686 F. Supp. 3d 323 (S.D.N.Y. 2023).
[63] *See id*. at 340. *See* 15 U.S.C. § 1693a(9); 15 C.F.R. § 1005.2(i).
[64] *See supra* Part II.B.1.
[65] See *Yuille, supra* note 62.

C. The Proposed Rule Contains an Imprecise and Overbroad Description of "Funds"

The Proposed Rule is deficient substantively because it significantly broadens the definition of "funds" to include digital assets that function as a medium of exchange or means of paying for goods and services.[66] The Proposed Rule acknowledges that some digital assets, such as "most" non-fungible tokens ("NFTs"), *may* not meet the definition of "funds" and the determination of whether specific digital assets are "funds" for the purpose of EFTA and Regulation E is "fact specific."[67] Such an approach also lacks clear judicial precedent or statutory basis. No court or statute has established a blanket rule that all digital assets, including those stored in self-hosted wallets, automatically qualify as funds under EFTA.[68]

This absence of definitive legal interpretation raises concerns about the Proposed Rule's scope. The Proposed Rule establishes no further parameters and provides no additional analysis to support the concept that the term "funds" should include anything accepted as a medium of exchange, measure of value, or means of payment. This expansive and seemingly boundless interpretation is not required by—and is incongruent with—the text of EFTA and Regulation E. This interpretation penalizes technologies that were clearly not within scope of EFTA when it was enacted by Congress in 1978 and leads to the unconstitutional expansion of EFTA's requirements to digital assets, video game currencies, and loyalty programs. Indeed, the CFPB had previously excluded digital assets from the scope of its finalized "Defining Larger Participants of a Market for General-Use Digital Consumer Payment" rule, further highlighting the inconsistencies in regulatory treatment.[69]

The diverse purposes for which digital assets are held and used by consumers—such as governance participation, investment, and access to decentralized applications—demonstrate that not all digital assets function as consumer "funds."[70] Even the Proposed Rule itself offers little help in its "fact specific" litmus, noting that some digital assets are "likely" not funds because "they cannot be used to make payments or cannot be readily exchanged for fiat currency." But EFTA has never been read to apply so broadly, and almost all digital assets, including NFTs, can be "readily exchanged for fiat currency." Applying such an overbroad definition of "funds" without considering these distinct use cases would misclassify assets and

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[66] *See* Proposed Rule, *supra* note 1, at 12.
[67] *See id.* at 12 ("Whether a specific digital asset is included in the term "funds" for purposes of EFTA and Regulation E is fact specific, and there are likely some digital assets that are not "funds" because, for example, they cannot be used to make payments or cannot be readily exchanged for fiat currency.").
[68] Courts have not examined the types of digital assets in the relevant discussion, nor have they established a blanket rule that all digital assets—regardless of their primary purpose—are considered "funds" for the purposes of the EFTA. *See Yuille*, *supra* note 62, at 339; *Rider v. Uphold HQ Inc.*, 657 F.Supp.3d 491, 498-99 (S.D.N.Y. 2023); *Nero v. Uphold HQ Inc.*, 688 F. Supp. 3d 134, 141 (S.D.N.Y. 2023). But notably, in *Yuille*, the court expressly rejected the attempt to apply EFTA to every type of account that holds digital assets, noting that an account in that case was not held for "personal, family, or household" purposes, but for investments.
[69] *See* CFPB, *Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications*, 88 Fed. Reg. 80, 242 (Nov. 17, 2023).
[70] *See, e.g.,* Coinbase, *Utility tokens vs. security tokens: what are the differences?*, available at https://www.coinbase.com/learn/crypto-basics/utility-tokens-vs-security-tokens-what-are-the-differences.

contradict the ongoing movement toward a more detailed and functional taxonomy for digital assets.[71] Instead of imposing an overly broad standard, the CFPB should align its approach with the emerging distinctions that other federal agencies like the SEC are now attempting to advance.

D. The CFPB's Proposed Rule Violates the First Amendment

The First Amendment to the Constitution protects not only the right to free speech but also the right to be free from government-imposed speech.[72] This includes prohibitions against prior restraints—government actions that prevent speech before it occurs—and laws that compel individuals or businesses to express specific messages.[73] Courts have consistently held that regulatory measures restricting the publication of information, including software code, can constitute impermissible speech restrictions if they are content-based and not narrowly tailored to serve a compelling government interest.[74]

The Proposed Rule raises First Amendment concerns by effectively restricting the publication of wallet software unless it includes government-mandated fraud prevention mechanisms and consumer disclaimers, while also imposing criminal and civil liabilities that expose self-custody wallet providers to significant legal risks.[75] This requirement amounts to a content-based prior restraint on speech because it conditions the ability to communicate with clients about transaction errors and their resolution on government-mandated disclosures.[76] In essence, the Proposed Rule dictates how self-custody wallet providers must communicate with users, compelling them to include protections that they otherwise may not, and more importantly cannot, choose to implement. Under longstanding First Amendment jurisprudence, such content-based regulations are subject to strict scrutiny—the highest standard of judicial review—requiring the government to prove that the rule serves a compelling interest and is the

[71] For example, the SEC has recognized the need for a more precise classification of digital assets, moving away from broad, one-size-fits-all definitions. *See* Hester M. Peirce, T*here Must Be Some Way Out of Here* (Feb. 21, 2025), available at https://www.sec.gov/newsroom/speeches-statements/peirce-statement-rfi-022125. Commissioner Hester Peirce's recent statement underscores the importance of a regulatory framework that differentiates between various types of digital assets rather than treating them all as a uniform category.

[72] *See* U.S. Const. amend. I.

[73] *See id. See also Near v. Minnesota*, 283 U.S. 697 (1931) and *Wooley v. Maynard*, 430 U.S. 705 (1977).

[74] *See Bernstein v. U.S. Department of State*, 922 F. Supp. 1426, 1439 (N.D. Cal. 1996) ("[C]ryptographic source code is speech.").

[75] *See* 15 U.S.C. §§ 1693m–n.

[76] *See* Proposed Rule, *supra* note 1, at 16. *See also* 15 U.S.C. § 1693f(a); 12 C.F.R. § 1005.11(b); 12 C.F.R. § 1005.18(e). The Proposed Rule effectively restricts how self-custody wallet providers communicate with users by mandating specific procedures for addressing transaction errors and requiring government-prescribed disclosures. This constitutes a content-based restriction on speech, as it compels providers to convey information in a manner dictated by regulatory requirements rather than their own discretion.

least restrictive means of achieving that goal.[77] And where, as here, a violation carries potential criminal liability, the First Amendment inquiry becomes even more pronounced.[78]

While the CFPB has clear authority over consumer protection regulations over covered financial institutions, this authority does not extend to preemptively regulating how software is designed or to forcing software providers to include mandated security measures.[79] By imposing speech restrictions on wallet software providers, the CFPB's rule oversteps its regulatory bounds, shifting from consumer protection into unconstitutional compelled speech.

If finalized, the Proposed Rule would set a troubling precedent by allowing regulatory agencies to dictate not just business practices but also the form and substance of software-based communications. By forcing self-custody wallet providers to incorporate certain features and disclosures as a precondition for distributing their software, the CFPB would engage in compelled speech that is unlikely to survive strict scrutiny. Ultimately, the Proposed Rule represents an overreach of regulatory authority and an unconstitutional restriction on the rights of software developers and users alike.

III. Policy and Practical Concerns of the Proposed Rule

A. Application of the Proposed Rule to Self-Custody Wallets Would Undermine CFPB's Consumer Protection Goals

The consumer protection goals of the Proposed Rule center on ensuring that consumers have recourse in cases of fraud, errors, or unauthorized transactions.[80] By imposing obligations on self-custody wallet providers that they cannot fulfill without overhauling their product, the rule would create unrealistic expectations for consumers while offering no practical means of redress.[81] Wallet providers would be forced to either comply with unworkable requirements or shut down entirely. This would leave U.S. consumers without the option to use self-custody wallet services, limiting their ability to manage digital assets independently and driving innovation offshore. This misalignment could lead to confusion, reduced trust in digital assets, and would potentially drive users toward riskier alternatives that lack the security features of reputable self-custody wallets. Attempts to enforce the rule would likewise lead to the collection of significant amounts of personal identifying information by non-financial institutions, creating questions of financial privacy while not necessarily allowing the entities to meet the objectives of

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[77] *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (internal citations omitted).
[78] *See* 15 U.S.C. § 1693n.
[79] *See* 12 U.S.C. § 5511(a) ("The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.").
[80] *See id*.
[81] *See* Ledger, *supra* note 37.

the Proposed Rule. Consequently, rather than enhancing consumer protection, the Proposed Rule may inadvertently weaken it by restricting access to self-custody financial tools.

B. Application of the Proposed Rule to Self-Custody Wallets Would Stifle Digital Asset Industry and Innovation

Overregulation and mis-regulation of self-custody wallet services could have profound negative consequences for the digital asset industry, particularly by creating legal uncertainty for developers. By imposing compliance obligations designed for traditional financial institutions onto self-custody wallet providers, regulators risk stifling innovation. Service providers may hesitate to build or improve wallet software due to concerns over potential legal exposure, significantly slowing the pace of advancements in DeFi and digital asset industry while harming the competitiveness of the U.S. in the global market. This chilling effect could push innovation offshore, where jurisdictions with more favorable regulatory environments may attract the talent and investment that would otherwise benefit the U.S. economy.

A particularly troubling aspect of overregulation is the impact on open-source development. Many self-custody wallets are maintained by decentralized teams of open-source contributors who do not control user funds but instead provide tools for individuals to manage their own assets.[82] If these developers face liability risks simply for creating wallet software, they may be discouraged from participating in digital assets projects altogether. The fear of legal repercussions could stifle collaborative development efforts and deter developers from contributing to privacy-enhancing financial technologies, ultimately weakening the security and accessibility of decentralized financial tools. Worse yet, the Proposed Rule would not simply undermine software services that support self-custody—it could eradicate them entirely. If the Proposed Rule were to come into effect, making compliance impossible for self-custody services, self-custody software may not just struggle but could cease to exist in the U.S. altogether, causing harm to both the industry and also to U.S. consumers. The exposure from private rights of action and class action lawsuits,[83] as well as the potential for criminal liability,[84] exacerbates these concerns. The accumulation of these unintended consequences could ultimately harm consumers by reducing the availability of secure, innovative financial solutions, pushing users toward unregulated alternatives that lack transparency and security measures.

C. Application of the Proposed Rule to Self-Custody Wallets Would Raise Financial Privacy Concerns and Cybersecurity Risks

Self-custody wallets empower individuals with self-sovereign financial control, shielding users from censorship, de-platforming, and undue interference. Unlike traditional financial institutions, self-custody wallets enable direct ownership and access to digital assets, preserving

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[82] *See, e.g.*, Kraken Wallet, *Kraken Wallet is a powerful self-custody wallet built for the decentralized web*, available at [GitHub - krakenfx/wallet: Kraken Wallet is a powerful self-custody wallet built for the decentralized web].
[83] *See* 15 U.S.C. § 1693m.
[84] *See* 15 U.S.C. § 1693n.

financial autonomy.[85] However, expanding EFTA to cover self-custody wallet providers would introduce significant risks that run counter to these benefits.

Indeed, the Proposed Rule is not just difficult for self-custody wallet providers; it would establish obligations with which it is impossible to comply. Self-custody wallet providers have no ability to intermediate funds, or to intercept them; so it would be impossible for them to reverse a transaction or otherwise correct an error occasioned in the transaction. A self-custody wallet user does not sign an account-holder agreement with the provider; thus, requiring such agreements would be inappropriate.

By attempting to regulate self-custody wallets as though they were traditional financial institutions, the Proposed Rule risks stifling technological progress and reducing financial autonomy. We urge policymakers to seek frameworks that uphold financial sovereignty, enhance security, and align with the broader national interest in protecting decentralized financial systems.

IV. Alternative Regulatory Approach

Regulatory action under EFTA should be paused until the broader legal and regulatory landscape for digital assets is fully developed, as the CFPB itself explicitly acknowledged just three months before releasing the Proposed Rule.[86] The digital asset space is currently the subject of significant policy discussions, with multiple federal agencies considering comprehensive frameworks under the new executive order.[87] Premature rulemaking by the CFPB risks creating uncertainty and regulatory inconsistencies for the digital assets industry. Prominent lawmakers have made digital asset legislation a central priority, as evidenced by recent efforts to establish clear regulatory guidelines. For example, Senate Banking Committee Chairman Scott conveyed optimism about the collaborative efforts for regulatory clarity in digital assets space between the White House, Congress, and regulatory agencies, supporting the need for a comprehensive federal framework instead of piecemeal regulations.[88] A coordinated, well-informed approach is necessary to ensure that any regulatory measures align with overarching federal policy goals.

Given ongoing executive and legislative efforts, advancing EFTA rulemaking now could lead to fragmented and conflicting regulatory interpretations. Jurisdictional debates between agencies like the SEC and CFTC—now being balanced in various congressional

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[85] *See* Blockchain Association, *Self-Hosted Wallets and the Future of Free Societies*, at 31 (Nov. 2020), available at https://theblockchainassociation.org/wp-content/uploads/2020/11/Self-Hosted-Wallets-and-the-Future-of-Free-Societies.pdf.

[86] *See* CFPB, *supra* note 28.

[87] *See* Executive Order No. 14178, 90 Fed. Reg. 8647 (Jan. 23, 2025).

[88] *See Scott: Congress, Trump Administration Committed to Securing U.S. Leadership in Digital Assets*, U.S. Senate Committee on Banking, Housing & Urban Affairs (Mar. 6, 2024), available at https://www.banking.senate.gov/newsroom/majority/scott-congress-trump-administration-committed-to-securing-us-leadership-in-digital-assets.

proposals—underscore the need for consensus on how digital assets should be classified and regulated.[89] By waiting for foundational policy decisions, the CFPB can ensure that amendments to EFTA and Regulation E, if any, are appropriately tailored and avoid extending oversight into areas that may be ultimately assigned elsewhere.

We respectfully submit that the CFPB should refrain from rulemaking under EFTA until greater regulatory and legislative clarity emerges.

V. Conclusion

We encourage the CFPB to reconsider its current approach and seek industry input in refining its regulatory framework. By engaging in open dialogue, regulators and industry participants can collaboratively design policies that ensure consumer safety without stifling technological advancement. The industry stands ready to provide expertise, share best practices, and explore alternative regulatory mechanisms that align with the principles of EFTA while respecting the unique characteristics of digital assets and decentralized technologies.

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We appreciate your consideration of our observations and recommendations. If you have any questions or comments regarding this letter, please feel free to contact us.

Sincerely,

/s/ Amanda Tuminelli
Amanda Tuminelli
Executive Director & Chief Legal Officer
DeFi Education Fund

/s/ Lizandro Pieper
Lizandro Pieper
Research Director
DeFi Education Fund

cc: Gregory C.J. Lisa, Hogan Lovells US LLP
Haebin Lee, Hogan Lovells US LLP

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[89] *See* Gary DeWaal, *This Is How the SEC and CFTC Should Regulate the Crypto Markets*, Bloomberg Law (Dec. 1, 2022), available at https://news.bloomberglaw.com/us-law-week/this-is-how-the-sec-and-cftc-should-regulate-the-crypto-markets.