EFTA COVERAGE OF MODERN CONSUMER WIRE TRANSFERS: CONSUMER FINANCIAL REGULATION IN THE WAKE OF *LOPER BRIGHT*

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The rise of online banking has led to a proliferation of consumer fraud. Schemes aimed at stealing consumer funds using wire transfers executed through online banking portals have proven particularly devastating to consumers because of a perceived loophole in the Electronic Fund Transfer Act (EFTA) that leaves consumers with full liability for funds stolen through wire transfers. Consumer advocacy groups, and most notably the New York Attorney General, have recently argued that this loophole does not really exist; they claim that the EFTA's text conclusively covers certain parts of modern wire transfer processes initiated through online banking portals. Considering the U.S. Supreme Court's recent jurisprudence purporting to end deference to agency interpretations of statutes, determining the scope of the EFTA wire transfer exemption seems to exclusively require scrutinizing the EFTA's text. However, the Supreme Court in Loper Bright Enterprises v. Raimondo *described multiple scenarios where deferring to agency interpretations of statutes may still be appropriate. Given the EFTA's explicit delegation of authority to the Consumer Financial Protection Bureau (CFPB) to determine the scope of the statute's exemptions, the CFPB's official view that the EFTA covers non-wire transfer portions of multipart wire transfer processes should be considered binding.*

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INTRODUCTION

Imagine receiving a text message alerting you to a potentially fraudulent transfer from your bank account.[1] After responding that you did not authorize the transfer, you receive a call from your bank using the same customer service phone number found on the back of your debit card.[2] The caller, who knows your account number, address, and balance, urgently informs you that you need to change your personal identification number (PIN) immediately to prevent further fraud.[3] Suspicious of this caller, you attempt to contact your bank via another method, perhaps via their online chat feature.[4] However, they are slow in responding, and you are eager to prevent fraudulent transfers.[5] Reluctantly, you provide the caller with your PIN.[6]

This is the story of Betsy Rich, a Colorado woman who lost 10,700 dollars in a wire fraud scam.[7] Despite discovering the fraudulent transfer and notifying her bank just fifteen minutes later, her bank agreed to reimburse only 1,700 dollars of the total amount stolen.[8] The bank's license to refuse to refund her likely stemmed from the type of financial transaction that the scammers initiated, not from the nature of the fraud or the difficulty in identifying the scammers.[9] If the scammers had transferred Rich's money using an electronic fund transfer (EFT)—for example, through a direct deposit function or an ATM withdrawal—her liability for the fraudulent transfer would have been capped at fifty dollars under the Electronic Fund Transfer Act[10] (EFTA); her bank would have been required to reimburse her

1. This vignette is based on a news story. *See* Jaclyn Allen, *Imposter Bank Scammers Steal $10,000 from Evergreen Woman*, DENVER7 (Jan. 1, 2024, 8:17 PM), https://www.denver7.com/news/investigations/imposter-bank-scammers-steal-10-000-from-evergreen-woman [https://perma.cc/GR2Z-ZG35].
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *Id.*
8. *Id.*
9. *See id.* (attributing Chase Bank's refusal to refund the money to loopholes in federal banking laws).
10. 15 U.S.C. §§ 1693–1693r.

the remaining amount.[11] However, wire transfers, which are processes used to transfer money more quickly between financial institutions,[12] are not covered under the EFTA,[13] so fraud victims like Rich have traditionally been left without any recourse if scammers use wire transfers to steal their funds.[14]

Still, because of the rise in electronic banking, consumer advocates argue that the EFTA wire transfer exemption may not actually shield transfers like those used by Rich's scammers from coverage under the EFTA. Consumers may now request wire transfers from online banking portals without the intervention of a banking employee, and wire fraud can commence during this interaction with an online portal.[15] When a consumer uses an online portal to initiate a wire transfer, funds are first transferred from their account to their financial institution in preparation for the bank-to-bank transfer.[16] In a recent lawsuit filed against Citibank in the U.S. District Court for the Southern District of New York, the New York Attorney General (NYAG) has argued that this type of initial transfer is an EFT covered by the EFTA, even if it occurs during a transaction that includes a wire transfer that is not covered.[17] Under this theory, if the initial transfer was fraudulent, financial institutions must reimburse the victim pursuant to the EFTA's limitations on consumer liability.[18] Citibank and other banking industry members hotly contest the proposition that the EFTA covers any part of a process involving a wire transfer.[19] Likewise, although the district court presiding over the

11. *Id.* § 1693g; *see infra* notes 74–76 and accompanying text.

12. *See* Julia Kagan, *What Is a Wire Transfer?: How It Works, Safety, and Fees*, INVESTOPEDIA (Feb. 20, 2024), https://www.investopedia.com/terms/w/wiretransfer.asp [https://perma.cc/R3FW-D8M8] (overviewing wire transfer processes and comparing them with other common transfer types).

13. 15 U.S.C. § 1693a(7)(B).

14. *See* Mary Norkol & Stephanie Zimmermann, *Federal Law Protects You from Many Financial Scams but Not This One—and Scam Artists Have Figured That Out*, CHICAGO SUN-TIMES (Aug. 25, 2023, 7:45 AM), https://chicago.suntimes.com/2023/8/25/23844451/scam-wire-transfer-fraud-chase-bank-citibank [https://perma.cc/BYK6-WHGU].

15. *See* Matt Gephardt & Sloan Schrage, *Get Gephardt: Loophole in Federal Banking Law Leaves South Jordan Woman Out $20,000*, KSLTV (Jan. 8, 2024, 10:54 PM), https://ksltv.com/613144/get-gephardt-loophole-in-federal-banking-law-leaves-south-jordan-woman-out-20000/ [https://perma.cc/N5YQ-G9HS]; Norkol & Zimmerman, *supra* note 14.

16. *See* Complaint at 11–16, New York v. Citibank, N.A., No. 24-CV-0659 (S.D.N.Y. Jan. 21, 2025), ECF No. 1; *see also* Melanie Cherdack, *Gone Phishing: Bank and Broker-Dealer Liability for Electronic Wire Fraud Scams*, 31 PIABA BAR J. 1, 3–4 (2024) (explaining this process as outlined by the New York Attorney General).

17. *See* Complaint, *supra* note 16, at 15–16; *see also* Proposed Statement of Interest for the Consumer Financial Protection Bureau in Support of Plaintiff at 8–9, New York v. Citibank, N.A., No. 24-CV-0659 (S.D.N.Y. Jan. 21, 2025), ECF No. 28-1.

18. *See* Complaint, *supra* note 16, at 19.

19. *See* Citibank, N.A.'s Memorandum of Law in Support of its Motion To Dismiss at 13–14, New York v. Citibank, N.A., No. 24-CV-0659 (S.D.N.Y. Jan. 21, 2025), ECF No. 12; Press Release, Am. Bankers Ass'n, Correcting the Record on the Electronic Fund Transfer Act (May 30, 2024), https://www.aba.com/about-us/press-room/press-releases/correcting-the-record-on-the-electronic-fund-transfer-act [https://perma.cc/YNU9-4PJZ]. *See generally* Brief of Amici Curiae The Clearing House Association L.L.C., The Bank Policy Institute, The New York Bankers Association, and The American Bankers Association in Support of Defendant's Motion to Dismiss at 16–18, New York v. Citibank, N.A., No. 24-CV-0659

New York v. Citibank[20] litigation sided with the NYAG's position when ruling on a motion to dismiss in 2025,[21] courts had generally construed the EFTA wire transfer exemption broadly prior to that ruling, often dismissing consumers' claims involving wire transfers.[22]

For its part, the Consumer Financial Protection Bureau (CFPB), which implements most of the provisions in the EFTA through Regulation E ("Reg. E"),[23] claimed in an amicus brief that it concurs with the NYAG's argument that the EFTA applies to EFT portions of a wire transfer process and that this reflects its long-held interpretation of the EFTA wire transfer exemption.[24] The CFPB argues that Reg. E has contained text outlining this view since 1996, when the Federal Reserve Board ("Federal Reserve") had implementation authority over the EFTA.[25] However, following *Loper Bright Enterprises v. Raimondo*,[26] the U.S. Supreme Court's recent groundbreaking decision on agency deference, it remains unclear to what extent agency interpretations should influence courts' conclusions regarding questions of statutory interpretation.[27]

This Note will assess whether the EFTA and Reg. E cover any portion of a multipart transfer process that includes a wire transfer and, in doing so, will analyze the role of the agency interpretations in resolving this question. Part I will overview the laws governing EFTs and wire transfers, particularly the EFTA and Reg. E, the development of the wire transfer exemption, and the Supreme Court's jurisprudence on agency deference and interpretive authority. Part II will then introduce the theory that the EFTA may cover certain portions of modern multipart wire transfer processes and outline the arguments raised in opposition to that legal theory. It will also discuss arguments that the CFPB's interpretations of the EFTA should control the scope of the EFTA wire transfer exemption and contrast them with the Supreme Court's recent reluctance to defer to agency interpretations. Finally, Part III will argue that, in accordance with the CFPB's authoritative interpretations on the matter, the EFTA does cover initial EFTs occurring

(S.D.N.Y. Jan. 21, 2025), ECF No. 20-1 (supporting Citibank's argument that multipart wire transfer processes are fully exempted from EFTA coverage).

20. No. 24-CV-0659, 2025 WL 251302 (S.D.N.Y. Jan. 21, 2025).

21. *Id.* at *5–9.

22. *See, e.g.*, Nazimuddin v. Wells Fargo Bank, N.A., No. 23-CV-4717, 2024 U.S. Dist. LEXIS 128274, at *5 (S.D. Tex. June 24, 2024), *aff'd*, 2025 U.S. App. LEXIS 204 (5th Cir. Jan. 6, 2025); Stepakoff v. IberiaBank Corp., 637 F. Supp. 3d 1309, 1311–13 (S.D. Fla. 2022); McClellon v. Bank of Am., N.A., No. C18-0829, 2018 U.S. Dist. LEXIS 172700, at *14 (W.D. Wash. Oct. 5, 2018); Fischer & Mandell LLP v. Citibank, N.A., No. 09 Civ. 1160, 2009 U.S. Dist. LEXIS 54184, at *12–13 (S.D.N.Y June 22, 2009).

23. Electronic Fund Transfers (Regulation E), 12 C.F.R § 1005 (2024). For a discussion on the authority delegated to agencies to implement the EFTA, see *infra* notes 57–70 and accompanying text.

24. Proposed Statement of Interest for the CFPB, *supra* note 17, at 8–9.

25. *See id.* at 8–9.

26. 144 S. Ct. 2244 (2024).

27. *See* Joshua D. Dunlap, *Overruling Chevron Changes Everything. Or Not.*, NAT'L L. REV. (July 11, 2024), https://natlawreview.com/article/overruling-chevron-changes-everything-or-not [https://perma.cc/FBU7-MJGE].

during multipart wire transfer processes, and that banks should be required to reimburse consumers who promptly report stolen funds through electronically-initiated multipart wire transfer processes.

I. ELECTRONIC PAYMENT REGULATION AND MODERN DEFERENCE JURISPRUDENCE

Evaluating the proper regulatory framework for modern multipart wire transfer processes requires an understanding of the general regulatory framework for electronic transfers, as well as the recent explosion of wire transfer fraud that impacts consumers using modern multipart wire transfers. Part I.A will introduce the new developments in consumer wire transfer fraud that have called into question which portions of a wire transfer process are exempt from coverage under the EFTA and Reg. E. Part I.B will then overview the statutory regimes governing EFTs and wire transfers, namely the EFTA, Reg. E, Article 4A of the Uniform Commercial Code ("UCC Article 4A")[28], and Regulation J ("Reg. J")[29].

The agencies implementing these regulatory regimes have weighed in more specifically on potential EFTA coverage of portions of multipart wire transfer processes.[30] Part I.C details the agency interpretations that have discussed the EFTA wire transfer exemption, and Part I.D will overview the Supreme Court's recent jurisprudence regarding the role agency interpretations should play in deciding questions of statutory interpretation.

A. Explosion of Consumer Wire Transfer Fraud

Over the past decade, and particularly since the onset of the COVID-19 pandemic, identity theft has skyrocketed, with reports of identity theft more than tripling between 2010 and 2023.[31] Wire transfer fraud, which involves the stealing of money by wire transferring money from a consumer's account

28. U.C.C. art. 4A (AM. L. INST. & UNIF. L. COMM'N 2024).

29. Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through the Fedwire Funds Service and the Fednow Service (Regulation J), 12 C.F.R. § 210 (2024).

30. *See, e.g.*, Authority, Purpose and Scope, Definitions, Exemptions, Issuance of Access Devices, Liability of Consumer for Unauthorized Transfers, and Model Disclosure Clauses, 44 Fed. Reg. 18468, 18481 (Mar. 28, 1979) (to be codified at 12 C.F.R. pt. 205); Electronic Fund Transfers; Official Staff Commentary, 46 Fed. Reg. 46876, 46879 (Sept. 23, 1981) (to be codified at 12 C.F.R. pt. 205); Electronic Fund Transfers, 61 Fed. Reg. 19662, 19670 (May 2, 1996) (to be codified at 12 C.F.R. pt. 205); Electronic Fund Transfers (Regulation E), 76 Fed. Reg. 81020 (Dec. 27, 2011) (to be codified at 12 C.F.R. pt. 1005).

31. *See* FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK, DATA BOOK 2023, at 6 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Annual-Data-Book-2023.pdf [https://perma.cc/4YGQ-5943]; *Reset with Sasha-Ann Simons: A Loophole in Consumer Protection Law Allows for Unchecked Wire Transfer Fraud*, WEBZ CHICAGO, at 2:10 (Aug. 28, 2023, 4:51 PM), https://www.wbez.org/reset-with-sasha-ann-simons/2023/08/28/a-loophole-in-consumer-protection-law-allows-for-unchecked-wire-transfer-fraud [https://perma.cc/6DKW-MALW] (claiming a correlation between the rise in wire fund transfer and the COVID-19 pandemic).

to an account at a different bank,[32] also increased sharply in the last few years.[33] In 2023 alone, scammers stole more than 344 million dollars through wire transfer scams, with more money stolen through wire transfers than all but two other types of payment methods.[34]

Scams that have been carried out during this "meteoric" rise in wire transfer fraud[35] have often relied on new technological tools that have come into mainstream use in recent decades, particularly text messages, emails, mobile authentication alerts, and remote desktop software.[36] The rise of digital banking, and the ability to authorize wire transfers through consumer portals without speaking with a banking employee,[37] have particularly contributed to the increased prevalence of wire transfer fraud.[38] Because of this, legislators and consumer advocates have suggested that the regulatory framework meant to protect consumer banking transactions, centered around the EFTA, which was first passed in 1978,[39] is out of date.[40] Others posit that the existing regulatory framework is expansive enough to cover some victims of wire transfer scams, even without an update.[41]

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32. *See* Norkol & Zimmermann, *supra* note 14.

33. *See id.*

34. *See* FED. TRADE COMM'N, *supra* note 31, at 11.

35. Michael J. Tiffany, *Wire Transfer Fraud on the Rise and the Legal Fallout*, N.Y.L.J. (Aug. 18, 2023, 12:00 PM), https://www.law.com/newyorklawjournal/2023/08/18/wire-transfer-fraud-on-the-rise-and-the-legal-fallout/?slreturn=20240810111845 [https://perma.cc/358S-G4T4].

36. *See, e.g.*, Norkol & Zimmermann, *supra* note 14 (describing fraud schemes carried out using email, text messages, and tools allowing for remote control of a computer); WEBZ CHICAGO, *supra* note 31, at 1:45 (describing fraud schemes involving two-factor authorization codes and fraud alerts delivered via email or over text message); Press Release, FBI Boston, FBI Warns Public to Beware of Tech Support Scammers Targeting Financial Accounts Using Remote Desktop Software (Oct. 18, 2022), https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-public-to-beware-of-tech-support-scammers-targeting-financial-accounts-using-remote-desktop-software [https://perma.cc/VS8H-RQXD].

37. *See, e.g.*, Gephardt & Schrage, *supra* note 15; Norkol & Zimmermann, *supra* note 14 (describing schemes in which consumers and scammers initiated wire transfers without speaking with banking employees).

38. *See Examining Scams and Fraud in the Banking System and Their Impact on Consumers Before the S. Comm. on Banking, Housing, and Urban Affairs*, 118th Cong. 19–20 (2024) (testimony of Carla Sanchez-Adams); Wesley Grant, *Rising Cases of Wire Transfer Fraud Targeting U.S. Consumers*, PAYMENTS J. (Apr. 19, 2024), https://www.paymentsjournal.com/rising-cases-of-wire-transfer-fraud-targeting-u-s-consumers/ [https://perma.cc/9VGX-YHFK].

39. Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

40. *See Examining Scams and Fraud in the Banking System*, *supra* note 38, at 20–22 (testimony of Carla Sanchez-Adams); Alana Semuels, *Defrauded?: Banks May Not Give Your Money Back*, TIME (June 13, 2023, 7:00 AM), https://time.com/6987981/banks-check-fraud/ [https://perma.cc/CBD2-XHBJ].

41. *See* Cherdack, *supra* note 16, at 15; *see also infra* Part II.A.2.

B. Regulation of Electronic Fund and Wire Transfers

A complicated regulatory landscape provides protections for consumers and commercial entities using financial transfer services.[42] The EFTA covers many electronic transfers initiated from consumer accounts.[43] Covered transfers must comply with provisions outlined by the EFTA's implementing regulation, Reg. E,[44] which contains relatively robust protections for consumer victims of fraud.[45] Wire transfers have traditionally not been covered by the EFTA and Reg. E and, instead, are typically governed by UCC Article 4A.[46] Whether the EFTA and Reg. E govern a particular transfer greatly impacts the consumer requesting the transfer and financial entity overseeing the transfer, because the EFTA and Reg. E place hard limits on a consumer's liability for a fraudulent transfer,[47] whereas UCC Article 4A places liability entirely on consumers if a financial institution utilized "commercially reasonable security procedure[s]."[48] Both regulatory schemes are discussed in detail below.

1. EFTA and Reg. E Protections and Wire Transfer Exemption

Many electronic financial services that are now commonplace in the American economy, like direct deposits and ATM transactions, first became available to the public during the decade preceding the passage of the EFTA.[49] These services, known as EFTs, offered consumers new flexibility

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42. *See* Matthew W. Swinehart, *Modeling Payments Regulation and Financial Change*, 67 U. KAN. L. REV. 83, 114–19 (2018); Linda J. Rusch, *Reimagining Payment Systems: Allocation of Risk for Unauthorized Payment Inception*, 83 CHI.-KENT L. REV. 561, 581–87 (2008).

43. *See* Swinehart, *supra* note 42, at 115 n.175; Rusch, *supra* note 42, at 585.

44. *See* Swinehart, *supra* note 42, at 115; Rusch, *supra* note 42, at 585.

45. *See infra* notes 74–76 and accompanying text.

46. *See infra* Part I.C.2; Carleton R. Burch and Mark J. Krone, *Common Issues for Financial Institutions and Fidelity Insurers Under Articles 3, 4 and 4A of the Uniform Commercial Code*, 22 FIDELITY L.J. 103, 137 (2016); *cf.* Alvin C. Harrell, *UCC Article 4A*, 25 OKLA. CITY U. L. REV. 293, 294 (2000) (discussing UCC Article 4A as it applies to wire transfers). Of note, all fifty states have enacted UCC Article 4A. *Id.*

47. Electronic Fund Transfers (Regulation E), 12 C.F.R § 1005.6(b) (2013); 15 U.S.C. § 1693g; *see infra* notes 74–76 and accompanying text.

48. U.C.C. § 4A-202 (AM. L. INST. & UNIF. L. COMM'N 2024); *see* Harrell, *supra* note 46, at 301–04; Cherdack, *supra* note 16, at 11–12.

49. *See, e.g.*, Amelia Murray, *The Story Behind the World's First Cashpoint*, TELEGRAPH (June 25, 2017, 7:21 AM), https://www.telegraph.co.uk/money/banking/current-accounts/story-behind-worlds-first-cashpoint/?ICID=continue_without_subscribing_reg_first [https://perma.cc/TAT2-TNEE]; SOC. SEC. ADMIN., SOCIAL SECURITY BENEFICIARIES ENROLLED IN THE DIRECT DEPOSIT PROGRAM, DECEMBER 1996, 61 SOC. SEC. BULL., no. 1, 1998, at 52, 53 (outlining the Social Security Administration's introduction of direct deposits for payments of benefits in 1975); *see also* FED. RSRV., *Automated Clearing House Payments*, FED. RSRV. HIST. (Sep. 28, 2023), https://www.federalreservehistory.org/essays/automated-clearing-house#:~:text=Automated%20clearing%20houses%20apply%20an,a%20number%20of%20California%20banks [https://perma.cc/N2AF-P8HN] (outlining the invention and rise to prevalence of ACH networks in the 1970s, which facilitated the growth of noncash consumer transactions).

in how to conduct financial transactions.[50] However, their creation also presented "a wide range of questions of public policy," including whether new safeguards would be needed to protect consumers using the services.[51] As described by Professor Melanie S. Cherdack, Congress passed the EFTA in 1978 with the purpose of defining the rights and liabilities of consumers and financial institutions utilizing EFTs,[52] and it posited in the text of the EFTA that the statute's "primary objective" was to outline "individual consumer rights."[53]

The EFTA defines "electronic fund transfer[s]" covered under the statute as any "transfer of funds" initiated through electronic means, including by computer or magnetic tape,[54] that requests or authorizes a financial institution to debit or credit an account.[55] The statute restricts coverage to consumer accounts used primarily for personal, family, or household purposes.[56] The EFTA grants agency authority to "prescribe rules to carry out the purposes" of the EFTA.[57] It also delegates power to establish regulations further defining which "account[s]" and "electronic fund transfer[s]" are covered by the statute by including the phrase "as described in regulations of the Bureau" in its definition of "account,"[58] and the phrase "as determined under regulations of the Bureau" following the definition of "Electronic Fund Transfer" and its exemptions.[59]

Courts have commented on the breadth of this delegation of authority to the EFTA's implementing agency.[60] In *Nero v. Uphold HQ Inc.*,[61] for example, the U.S. District Court for the Southern District of New York held that the EFTA's definition of a covered EFT is "both broad and flexible" and that the breadth of the definition "was intended to give the law's administrator 'flexibility in determining whether new or developing electronic services should be covered.'"[62] Decades earlier, in *Kashanchi v.*

50. *See* NAT'L COMM'N ON ELEC. FUND TRANSFERS, EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST: THE FINAL REPORT OF THE NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS 1–2 (1977).

51. *Id.* at 2–3, 56; Cherdack, *supra* note 16, at 5–6 (providing a more extensive account of the purpose behind the passage of the EFTA through legislative materials).

52. Cherdack, *supra* note 16, at 5–6; *see* 15 U.S.C. § 1693.

53. Cherdack, *supra* note 16, at 5 (quoting 15 U.S.C. § 1693).

54. This refers to the black stripe on the back of credit and debit cards. *See* Julia Kagan, *Magnetic Stripe Card: Definition, How It Works, vs. Chip Card*, INVESTOPEDIA (July 27, 2023), https://www.investopedia.com/terms/m/magnetic-stripe-card.asp [https://perma.cc/62Q9-AV2S].

55. 15 U.S.C. § 1693a.

56. *Id.* § 1693a(2).

57. *Id.* § 1693b(a)(1).

58. *Id.* § 1693a(2).

59. *Id.* § 1693a(7).

60. *See, e.g.*, Nero v. Uphold HQ Inc., 688 F. Supp. 3d 134, 141 (S.D.N.Y 2023); Kashanchi v. Texas Com. Med. Bank, N.A., 703 F.2d 936, 939–40 (5th Cir. 1983).

61. 688 F. Supp. 3d 134 (S.D.N.Y 2023).

62. *Id.* at 141 (quoting S. REP. NO. 95-915, at 9 (1978)). In that portion of the decision, the court held that the flexible definition of EFT in the EFTA allowed the CFPB to determine that fund transfers of nonfiat currencies, and specifically cryptocurrencies, are covered by Reg. E. *Id.* at 141–42.

Texas Commerce Medical Bank, N.A.,[63] the U.S. Court of Appeals for the Fifth Circuit called the EFTA's definition of EFT "broad," even if "not all-inclusive," stating that the EFTA's language permitted coverage of "future and as yet undeveloped systems," while excluding coverage of certain existing systems explicitly or implicitly.[64] Citing this language from *Nero* and *Kashanchi* along with the EFTA's legislative history, Professor Cherdack also reconciles the EFTA's definition of EFT as both "broad and flexible" and designed to "apply to new and developing technology."[65]

Congress originally granted regulatory power over the EFTA singularly to the Federal Reserve.[66] However, as part of the large financial overhaul referred to as the Dodd-Frank Wall Street Reform and Consumer Protection Act[67] ("Dodd-Frank") in 2010, Congress transferred authority to the CFPB to implement most of the EFTA, with the Federal Reserve retaining rulemaking authority over two subsections.[68] The Federal Reserve had initially promulgated Reg. E to implement the EFTA in 1979,[69] and the CFPB adopted much of the Federal Reserve's version of Reg. E as it existed in 2011 after it gained rulemaking authority over the EFTA.[70] Through Reg. E, the CFPB currently includes point-of-sale transfers[71], ATM transfers, direct deposits, transfers initiated by telephone, transfers involving debit cards,[72] and transfers using prepaid cards in its definition of EFTs covered by the EFTA.[73]

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63. 703 F.2d 939 (5th Cir. 1983).

64. *Id.* at 939–40; *see also* Geoffroy v. Wash. Mut. Bank, No. 06cv1732, 2008 U.S. Dist. LEXIS 132534, at *8–12 (S.D. Cal. Mar. 26, 2008) (citing this text from *Kashanchi* and ultimately deferring to the Federal Reserve regarding the Reg. E coverage of a particular technology).

65. *See* Cherdack, *supra* note 16, at 8–10.

66. Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 904, 92 Stat. 3641, 3730 (1978).

67. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

68. *Id.* § 1084 (codified as amended at 15 U.S.C. § 1693b(a)) (granting CFPB rulemaking authority to implement the EFTA except for provisions related to exceptions auto dealers and fees for payment card transactions); *see also* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 344–45 (2013) (describing the authority of the CFPB to implement "enumerated consumer laws," including the EFTA).

69. Authority, Purpose and Scope, Definitions, Exemptions, Issuance of Access Devices, Liability of Consumer for Unauthorized Transfers, and Model Disclosure Clauses, 44 Fed. Reg. 18468 (Mar. 28, 1979) (to be codified at 12 C.F.R. pt. 205).

70. Electronic Fund Transfers (Regulation E), 76 Fed. Reg. 81020 (Dec. 27, 2011) (to be codified at 12 C.F.R. pt. 1005).

71. A point-of-sale transfer describes a technological process that facilitates the transfer of funds from a consumer to a merchant. *See* Adam Hayes, *What Is Point of Sale (POS)?*, INVESTOPEDIA (Sept. 24, 2024), https://www.investopedia.com/terms/p/point-of-sale.asp [https://perma.cc/5XPS-BRMS]. A consumer's money might be transferred using point-of-sale transfer when they use a debit card to pay for a product bought online or at a checkout counter. *See id.*

72. Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(b)(1) (2013).

73. *Id.* § 1005.2(b)(3) (defining prepaid accounts as accounts covered by the regulation); *see* Lauren Sanders, *New CFPB Rule Provides Enforceable Protections for Prepaid Cards*, DIGIT. LIBR.: NAT'L CONSUMER L. CTR. (Apr. 16, 2019), https://library.nclc.org/article/new-cfpb-rule-provides-enforceable-protections-prepaid-cards [https://perma.cc/39U7-8DPE].

The EFTA and Reg. E cap consumer liability for covered unauthorized EFTs at fifty dollars if the consumer reports the fraudulent transfer to their financial institution within two business days, or 500 dollars if the consumer reports to their financial institution more than two business days but less than sixty days after the fraudulent transfer.[74] The burden also lies on the financial institution to prove that the consumer authorized the transfer and that the financial institution followed Reg. E's guidance.[75] If they fail to do so, the consumer assumes no liability for an unauthorized EFT.[76]

Importantly, though, the EFTA excludes various electronic transfer services from its definition of EFT.[77] One such exemption applies to "any transfer . . . made by a financial institution on behalf of a consumer" through a service that "transfers funds held at either Federal Reserve banks or other depository institutions" and which is not primarily meant to "transfer funds on behalf of a consumer."[78] Transfers through the Automated Clearing House (ACH) are explicitly excluded from this exemption.[79] Regulators have interpreted this EFTA provision as excluding "wire transfer[s]" from coverage by the EFTA.[80] The EFTA also exempts "transaction[s]" which are "originated by check[s]"[81] or have the "primary purpose" of buying or selling securities,[82] transfers "initiated by a telephone conversation" with a bank employee,[83] and "automatic transfer[s]" between a consumer account

74. 15 U.S.C. § 1693g(a); 12 C.F.R § 1005.6(b).
75. 15 U.S.C. § 1693g(b).
76. *Id.* § 1693g(e).
77. *Id.* § 1693a(7)(A–E) (listing the transfer types excluded from EFTA coverage).
78. *Id.* § 1693a(7)(B). Although the EFTA here uses the term "transfers" to describe the processes exempted from coverage, some of its other exclusions apply to types of "transaction[s]," *id.* (excluding "transactions" regulated by the Securities and Exchange Commission from the definition of EFT), or "service[s]," *id.* § 1693a(7)(A) (excluding some types of check "authorization service[s]" from the definition of EFT).
79. *Id.* § 1693a(7)(B) (excluding transfers of funds "processed by automated clearinghouse" from exemption clause). An ACH transfer is a type of electronic transfer that passes through a Federal Reserve network called the Automated Clearing House. *What Is an ACH Transaction?*, CONSUMER FIN. PROT. BUREAU (May 14, 2024), https://www.consumerfinance.gov/ask-cfpb/what-is-an-ach-transaction-en-1065/ [https://perma.cc/7LYP-FBQM]. ACH transfers differ from wire transfers in that each financial institution offering these services transmits sets of consumer ACH transfers in batches at predetermined times every day. *See* D.M. Studler & Ronald G. Mund, *Electronic Payment Systems and the Issues They Generate*, 18 FIDELITY L.J. 293, 297 (2012). By contrast, every wire transfer is transmitted "individually . . . in real-time," not in batches. *Id.* at 301. A common form of ACH transfer utilized by consumers is the direct deposit, through which consumers can pay bills through online portals. *See* CONSUMER FIN. PROT. BUREAU, *supra*.
80. Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(c)(3) (2013); *see infra* Part I.B.1. Of note, as part of Dodd-Frank in 2010, Congress amended the EFTA to explicitly cover remittances, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1073(a)(4), 124 Stat. 1376, 2060 (2010) (codified as amended at 15 U.S.C. § 1693o-1), which are a type of international wire transfer. *See* Colin C. Richard, *Dodd-Frank, International Remittances, and Mobile Banking: The Federal Reserve's Role in Enabling International Economic Development*, 105 NW U. L. REV. COLLOQUY 248, 249–50, 256–60 (2010).
81. 15 U.S.C. § 1693a(7).
82. *Id.* § 1693a(7)(C).
83. *Id.* § 1693a(7)(E).

and their financial institution "pursuant to an agreement" to cover overdrafts or "maintain[] a[] . . . minimum balance."[84]

2. Reg. J and UCC Article 4A Protections for Wire Transfers

UCC Article 4A generally governs wire transfers that are exempted from the EFTA and Reg. E coverage.[85] UCC Article 4A was initially promulgated in reaction to the lack of a "comprehensive body of law" governing all wire transfers.[86] UCC Article 4A governs a broader set of transfers than the EFTA does, covering, for example, transfers initiated by commercial entities as well as consumers and wholesale wire transfers between financial institutions.[87]

However, UCC Article 4A is, in some ways, more restrictive than the EFTA, as it only covers fund transfers that transfer money out of an account; by contrast, the EFTA covers both credit and debit fund transfers, meaning that it extends to transfers in and out of accounts.[88] Additionally, UCC Article 4A does not require financial institutions to reimburse victims of wire fraud if the financial institution utilized "commercially reasonable" security procedures.[89] Because UCC Article 4A's framework places considerable liability for unauthorized transfers on consumers,[90] it can be less effective as a consumer protection tool than the EFTA,[91] which places the burden on financial institutions to prove consumer liability.[92]

UCC Article 4A garners its authority from a variety of sources. First, all fifty states have enacted UCC Article 4A, so it operates as a state law authority, generally applying when a preemptive federal law does not cover a transfer in question.[93] Additionally, UCC Article 4A governs transfers

84. *Id.* § 1693a(7)(D).

85. *See* Burch and Krone, *supra* note 46, at 137–38 (noting that UCC Article 4A creates a "unified body of law relating to fund transfers" but that it does not apply where a transfer is covered by the EFTA).

86. *Id.* at 137–38 (quoting U.C.C. art. 4A, prefatory note (AM. L. INST. & UNIF. L. COMM'N 2024)).

87. *See* U.C.C. § 4A-104(a); *see also id.* § 4A-102 off. cmt.

88. *Compare* Rusch, *supra* note 42, at 581, *and* U.C.C. § 4A-103(a)(1), *and* U.C.C. § 4A-104 cmt. 4, *with* Rusch, *supra* note 42, at 584, *and* Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(a) (2013) (implementing the EFTA to apply to both debits and credits to a consumer account).

89. U.C.C. § 4A-202 (noting that UCC Article 4A does not allocate the risks associated with executing wire transfers to banks, despite strong arguments in favor of doing so).

90. *Cf.* Joseph G. McCarty, Note, *U.C.C. Article 4A—Wire or Wire Not?: Consequential Damages Under Article 4A and a Critical Analysis of* Evra v. Swiss Bank, 11 COMPUT. L.J. 341, 368 (1991) (claiming that UCC Article 4A "ignores strong arguments that would make the default risk of consequential damages" arising from wire transfers).

91. *See* Lauren Saunders, *Getting Money Back for Scammed Consumers*, DIGIT. LIBR., NAT'L CONSUMER L. CTR. (Dec. 15, 2020), https://library.nclc.org/article/getting-money-back-scammed-consumers [https://perma.cc/ZR2T-ZMWK] (referring to UCC Article 4A protections against unauthorized transfers as less robust than those in the EFTA).

92. *See supra* notes 75–76 and accompanying text; Cherdack, *supra* note 16, at 10–12.

93. *See* Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, 86 Fed. Reg. 31376, 31377 (June 11, 2021) (to be codified at 12 C.F.R. pt. 210).

processed by numerous wire transfer systems due to its incorporation into their rules.[94] In particular, UCC Article 4A applies to transfers through the Fedwire Funds Services ("Fedwire"), a major wire transfer service operated by the Federal Reserve,[95] as Article 4A's provisions are largely adopted by Reg. J,[96] the Federal Reserve's regulation governing transfers using Fedwire.[97]

UCC Article 4A was designed to defer to the EFTA when both frameworks could cover a particular transfer; if a transfer could be covered by both the EFTA and UCC Article 4A, then the EFTA and Reg. E govern.[98] Therefore, if a transfer constitutes an EFT under the EFTA's definition, it is regulated by the EFTA and Reg. E, not UCC Article 4A.[99]

C. Agency Interpretations over Time

Since the EFTA's passage, the Federal Reserve and CFPB have both issued official interpretations and other regulatory materials relating to the EFTA wire transfer exemption.[100] This section describes these materials and overviews the regulatory history of Reg. E and Reg. J.

1. Federal Reserve and CFPB Rules and Interpretations Discussing the EFTA Wire Transfer Exemption

The Federal Reserve and CFPB have promulgated many rules and official interpretations referencing the EFTA wire transfer exemption pursuant to authority granted by the EFTA.[101] When Reg. E was first promulgated by the Federal Reserve in 1979, under the authority then granted to it to

94. After a wire transfer is initiated by the party that wants to transfer money, that party's financial institution communicates to the bank of the intended recipient of the transfer through a "secure system" both its intention to transfer funds and how it intends to settle the transfer. Kagan, *supra* note 12. Many of the main systems that facilitate the transmission of this information have adopted UCC Article 4A to govern transfers that use their systems. *See* Harrell, *supra* note 46, at 294 nn.1–2.

95. *See* FED. RSRV., *Fedwire*, FED. RSRV. HIST. (Aug. 28, 2023), https://www.federalreservehistory.org/essays/fedwire [https://perma.cc/QXU4-LCVE].

96. *See* Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through the Fedwire Funds Service and the Fednow Service (Regulation J), 12 C.F.R. § 210 (2024).

97. *See* Harrell, *supra* note 46, at 325; 12 C.F.R. § 210.25.

98. *See* U.C.C. § 4A-108.

99. *See* Burch and Krone, *supra* note 46, at 137–38 n.128–29. Reg. J also defers to EFTA coverage, meaning that transfers covered by the EFTA are not covered by Reg. J. Regulation J, 12 C.F.R. § 210.25(b)(1) (2024).

100. *See infra* Parts I.C.1–2.

101. *See, e.g.*, Authority, Purpose and Scope, Definitions, Exemptions, Issuance of Access Devices, Liability of Consumer for Unauthorized Transfers, and Model Disclosure Clauses, 44 Fed. Reg. 18468, 18481 (Mar. 28, 1979) (to be codified at 12 C.F.R pt. 205); Electronic Fund Transfers; Official Staff Commentary, 46 Fed. Reg. 46876, 46879 (Sept. 23, 1981) (to be codified at 12 C.F.R. pt. 205); Electronic Fund Transfers, 61 Fed. Reg. 19662, 19670 (May 2, 1996) (to be codified at 12 C.F.R. pt. 205); Electronic Fund Transfers (Regulation E), 76 Fed. Reg. 81020, 81024, 81040 (Dec. 27, 2011) (to be codified at 12 C.F.R. pt. 1005).

implement the EFTA,[102] it posited that the EFTA did not apply to "[a]ny wire transfer of funds for a consumer through the Federal Reserve Communications System" or similar systems "used primarily for transfers between financial institutions or between businesses."[103] The agency explained in supplementary information with the final rule that this language was meant to clarify that "transfers for consumers by any network similar to Fedwire . . . are exempt" from the EFTA.[104]

In 1996, the Federal Reserve restyled the portion of Reg. E addressing transfers exempted from the EFTA's definition of EFT, including the exemption for wire transfers.[105] The 1996 final rule stated that the EFTA exempts "any transfer of funds through Fedwire" rather than the "Federal Reserve Communications System" as Reg. E had following its initial promulgation.[106] The agency explained that this adjustment was meant to reflect that the wire transfer exemption covered transfers through only Fedwire and related networks like the Clearing House Interbank Payments System (CHIPS),[107] not all transfers through the Federal Reserve Communications System, and specifically not ACH payments.[108] The language from the 1996 final rule regarding the EFTA wire transfer exemption was incorporated verbatim into the first promulgation of Reg. E by the CFPB in 2011,[109] and as the CFPB has not edited this language since then, it remains in the active version of Reg. E.[110]

Although it retained full rulemaking authority over the EFTA, the Federal Reserve issued official interpretations of EFTA provisions relating to the wire transfer exemptions, starting with the publication of an official staff

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102. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 904, 92 Stat. 3641, 3730 (1978).

103. Authority, Purpose and Scope, Definitions, Exemptions, Issuance of Access Devices, Liability of Consumer for Unauthorized Transfers, and Model Disclosure Clauses, 44 Fed. Reg. at 18481.

104. *Id.* at 18471.

105. Electronic Fund Transfers, 61 Fed. Reg. at 19670 (adjusting the format and language of the exemptions/exclusions from coverage portion of Reg. E).

106. *Id.* For the original promulgation of Reg. E using the phrase "Federal Reserve Communications System," see Authority, Purpose and Scope, Definitions, Exemptions, Issuance of Access Devices, Liability of Consumer for Unauthorized Transfers, and Model Disclosure Clauses, 44 Fed. Reg. at 18481.

107. CHIPS is a privately run, large-value payment system operated by The Clearing House (formerly the New York Clearing House Association). *See* FED. RSRV., *supra* note 95; *About CHIPS*, THE CLEARING HOUSE, https://www.theclearinghouse.org/payment-systems/CHIPS [https://perma.cc/SCY6-DE6J] (last visited Feb. 14, 2025).

108. Electronic Fund Transfers, 61 Fed. Reg. 19662, 19663 (May 2, 1996) (to be codified at 12 C.F.R. pt. 205). The EFTA explicitly excludes ACH transfers from its wire transfer exemption. *See supra* note 79 and accompanying text. For an additional primer on the differences between ACH transfers and those over large-volume systems like Fedwire and Chips, see Rebecca Lake, *ACH Transfers vs. Wire Transfers: What's the Difference?*, INVESTOPEDIA (Nov. 2, 2024), https://www.investopedia.com/ach-vs-wire-transfer-5208168#:~:text=Here%20are%20general%20key%20differences,used%20for%20international%20cash%20transfers [https://perma.cc/N6Z2-D7WS].

109. Electronic Fund Transfers (Regulation E), 76 Fed. Reg. 81020, 81024 (Dec. 27, 2011) (to be codified at 12 C.F.R. pt. 1005).

110. *See* Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(b)(1) (2013).

commentary in 1981.[111] In this commentary, the Federal Reserve addressed two scenarios regarding the EFTA's coverage of services, including wire transfers.[112] First, it stated that Fedwire or similar transfers were exempt, even if instructions for crediting a consumer account were "transmitted on magnetic tape."[113] However, the agency clarified that if funds were sent from one financial institution to another through Fedwire but then credited to consumer accounts at another institution using an ACH transaction, the ACH transfer would be subject to Reg. E, whereas the Fedwire transfer would not.[114]

In 1996, the Federal Reserve changed the format of its official interpretations[115] and adjusted the language of its interpretations regarding the exemption of wire transfers.[116] The new interpretation stated that "if a financial institution makes a fund transfer to a consumer's account after receiving funds through Fedwire, . . . the transfer by ACH is covered by [Reg. E] even though the Fedwire or network transfer is exempt."[117] Additionally, the new interpretation provided that "[t]he portion" of a transfer process including a wire transfer through Fedwire "that is governed by the EFTA is not governed by [Reg. J]."[118]

In its explanation for these changes, the Federal Reserve stated that it weighed the concern of financial institutions that this type of transfer would lose the "legal certainty offered by" needing to comply with just one legal framework—UCC Article 4A.[119] However, the agency decided on this interpretation after determining that this concern was outweighed by the risk of "subjecting consumers to full liability for unauthorized transfers" merely because part of an otherwise covered transfer "is made via Fedwire."[120] Notably, the 1996 official commentary did not incorporate the agency's discussion in the 1981 commentary regarding Fedwire transfers that had been requested using instructions on magnetic tape.[121]

The CFPB incorporated this language into a supplement in its first version of Reg. E in 2011,[122] and it remains in supplement I of the active regulation.[123]

111. Electronic Fund Transfers; Official Staff Commentary, 46 Fed. Reg. 46876 (Sept. 23, 1981) (to be codified at 12 C.F.R. pt. 205).
112. *Id.* at 46879.
113. *Id.* (3-2 question).
114. *Id.* (3-3 question).
115. Electronic Fund Transfers, 61 Fed. Reg. 19678, 19678 (May 2, 1996) (to be codified at 12 C.F.R. pt. 205).
116. *Id.* at 19679–80, 19687.
117. *Id.* at 19687.
118. *Id.*
119. *Id.* at 19679.
120. *Id.* at 19679–80.
121. *Id.* at 19679 (listing 3-2 question in its list of "comments deleted").
122. *See* Electronic Fund Transfers (Regulation E), 76 Fed. Reg. 81020 (Dec. 27, 2011) (to be codified at 12 C.F.R. pt. 1005).
123. *See* Electronic Fund Transfers (Regulation E), 12 C.F.R. pt. 1005, supp. I (2024).

2. Federal Reserve Interpretation of EFT Wire Transfer Coverage in Reg. J

The Federal Reserve has also issued regulations, namely Reg. J, and official interpretations that contemplate the scope of the EFTA's coverage of wire transfers.[124] Reg. J has governed wire transfers through the Federal Reserve at least since 1917.[125]

In 1990, the Federal Reserve amended Reg. J to adopt many of UCC Article 4A's provisions to govern wire transfers through Fedwire.[126] When doing so, the agency also added language to the regulation providing that Reg. J applied to wire transfer processes where part of a transfer is "sent through Fedwire" even if a "portion of [a] funds transfer is governed by [the EFTA]."[127] This provision further stated that the "portion of such funds transfer that is governed by [the EFTA] is not governed by" Reg. J.[128] When explaining its rationale for including this language, the agency expressed concern that the EFTA does not cover Fedwire transfers.[129] Still, some transfer processes could include a "fund transfer sent through Fedwire" and another "transmitted in a way that made it subject to [the EFTA]."[130] It ultimately decided to adopt the language to ensure that the rules for all funds transfers through Fedwire were consistent.[131] The active version of Reg. J still includes the language described above contemplating that the EFTA could cover portions of wire transfers.[132]

D. Potential for Respect and Deference for Agency Interpretations

The weight courts give to any of the regulatory interpretations described above could depend on what deference framework they decide to employ. For interpretations of an agency's own regulations, the Supreme Court laid out a framework for judicial deference in *Kisor v. Wilkie*.[133] This scheme will be laid out in Part I.D.1. Meanwhile, the Supreme Court's recent decision in *Loper Bright*, which ended the more agency-deferential framework known as *Chevron*[134] deference, governs the weight courts

124. *See* Funds Transfers Through Fedwire, 55 Fed. Reg. 40791, 40792, 40801 (Oct. 5, 1990) (to be codified at 12 C.F.R. pt. 210); Regulation J, 12 C.F.R. § 210.25(b)(3) (2024).

125. *See generally*, FEDERAL RESERVE, REGULATION J, SERIES OF 1917, JULY 1917, 8 FED. RSRV. BULL., no. 7, 1917, at 549.

126. *See* Funds Transfers Through Fedwire, 55 Fed. Reg. 40791, 40791–93 (Oct. 5, 1990) (to be codified at 12 C.F.R. pt. 210).

127. *Id.* at 40801.

128. *Id.*

129. *Id.*

130. *Id.* at 40792.

131. *Id.*

132. Regulation J, 12 C.F.R. § 210.25(b)(3) (2024).

133. 139 S. Ct. 2400 (2019).

134. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

should give agency interpretations of statutes in conducting statutory interpretation.[135] This scheme will be discussed in Part I.D.2.

1. *Auer* and *Kisor*: Deference for Certain Interpretations of Regulations

Under a framework now known as *Auer*[136] deference, courts have historically afforded significant deference to an agency's interpretations of its own regulations.[137] In 2019, the Supreme Court detailed when an agency's interpretations of its own regulations should be granted binding deference, and when courts should interpret the agency's regulations independently.[138]

For an agency interpretation to receive *Auer* deference, a regulation must first be ambiguous, after exhausting all tools of statutory construction, and the agency's interpretation of the regulation must be considered reasonable.[139] Additionally, the interpretation must be of a character and quality to "entitle[] it to controlling weight."[140] Indicators for whether an interpretation meets this standard include whether the interpretation reflects the agency's "'authoritative' or 'official position,'"[141] whether it implicates the agency's "substantive expertise,"[142] and whether it reflects "fair and considered" judgment and was not merely a convenient litigation position on the part of the agency.[143] The Supreme Court has noted that, particularly because of this final requirement, courts generally should not grant *Auer* deference to interpretations presented for the first time in amicus curiae briefs, but that they may do so if the interpretation was clearly not a "*post hoc* rationalization" which merely reflected a "convenient litigating position."[144] In the years since *Kisor* was decided, lower courts have applied this framework unevenly, with some circuit courts deferring to agency interpretations more readily than others.[145]

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135. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

136. Auer v. Robbins, 519 U.S. 452, 462 (1997).

137. *See* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 48–49 (2015) (overviewing the historical deference by courts granted to agency interpretations of their own regulations and citing the case after which this doctrine is named, *Auer v. Robbins*, 519 U.S. 452 (1997)).

138. *Kisor*, 139 S. Ct. at 2414–18.

139. *See id.* at 2414–16.

140. *Id.* at 2415–16.

141. *Id.* at 2416 (quoting United States v. Mead Corp., 533 U.S. 218, 257–59 n.6 (2001) (Scalia, J., dissenting)).

142. *Id.* at 2416–17.

143. *Id.* at 2417–18 (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

144. *Id.* at 2417–18, n.6. The Supreme Court in *Kisor* cited the *Auer* case itself as an example where a court may defer to interpretations raised in legal briefs, because in that case the agency was not a party to the action, and there was no reason to suspect the interpretation "did not reflect the agency's fair and considered judgment." *Id.* (quoting *Auer*, 519 U.S. at 462).

145. *See generally* Daniel Lutfy, Note, Auer *2.0: The Disuniform Application of* Auer *Deference After* Kisor v. Wilkie, 88 FORDHAM L. REV. 2011 (2020).

2. *Loper Bright*: Modern Review of Statutory Questions

Prior to 2024, the framework for deference to agency interpretations of statutes centered around the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which led to a two-step test, known as *Chevron* deference, to determine whether an agency's statutory interpretation received binding deference.[146] Under *Chevron* deference, courts viewed an agency's statutory interpretation as binding if (1) the statute was ambiguous and (2) the agency's interpretation was reasonable.[147]

However, in June 2024 in its decision in *Loper Bright*, the Supreme Court ended *Chevron* deference and outlined a new framework for weighing agency statutory interpretations.[148] In *Loper Bright*, the Supreme Court called on courts to "use every tool at their disposal to determine the best reading of [a] statute," regardless of the statute's potential ambiguity.[149] In so doing, it emphasized that the Administrative Procedure Act[150] requires courts to "decide legal questions by applying their own judgment," and stated that agency interpretations of statutes "are *not* entitled to deference."[151]

Still, the Supreme Court suggested that agency interpretations would continue to play some role in statutory interpretation.[152] Indeed, when deciding how to weigh agency interpretations, *Loper Bright* directs courts to "exercise their independent judgment" when determining whether an agency "acted within its statutory authority" in interpreting a statute.[153] Thus, if a court finds that the "best reading of a statute is that it delegates discretionary authority to an agency," it must, under *Loper Bright*, recognize this delegation, provided the agency "engaged in 'reasoned decision-making'" within the boundaries of the statutory delegation.[154] *Loper Bright* further contemplates that judicial interpretations of statutes might be influenced by persuasive agency interpretations, holding that although "[a]n agency's interpretation of a statute 'cannot bind a court,'" it may be "especially informative" if "it rests on factual premises within the agency's expertise."[155]

146. *See* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 943–46 (2018).
147. *See id.* at 944–45.
148. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).
149. *Id.* at 2266.
150. 5 U.S.C. §§ 551–559.
151. *Loper Bright*, 144 S. Ct. at 2261.
152. *See id.* at 2263, 2267.
153. *Id.* at 2273.
154. *Id.* at 2263 (quoting Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 374 (1998)).
155. *Id.* at 2267 (quoting Bureau of Alcohol, Tobacco and Firearms v. Fed. Lab. Rel. Auth., 464 U.S. 89, 98 n.8 (1983)).

II. DEBATES OVER THE SCOPE OF THE EFTA WIRE TRANSFER EXEMPTION AND THE AUTHORITY OF CFPB INTERPRETATIONS

Given the explosion of wire transfer fraud and its impact on consumers and financial institutions, whether the EFTA covers portions of multipart wire transfer processes is a pressing question.[156] In addition, the Supreme Court's recent upheaval of its agency deference jurisprudence has made it less clear what role relevant agency interpretations of the EFTA should play in evaluating the breadth of the EFTA wire transfer exemption. Part II.A will discuss two frameworks for understanding the scope of the EFTA wire transfer exemption. Then, Part II.B will identify the possible roles agency regulations and interpretations could play in deciding this question following the Supreme Court's decisions in *Kisor* and *Loper Bright*.

A. Extent of Coverage of the EFTA and Reg. E over Multipart Wire Transfer Processes

The debate over the scope of the EFTA wire transfer exemption is exemplified by the litigation in *New York v. Citibank*.[157] In that case, the NYAG is suing Citibank for failing to adequately respond to consumer wire fraud schemes that have targeted consumers using Citibank's online wire transfer systems.[158] The focus of the NYAG's complaint is on schemes that steal money from consumers using unauthorized wire transfers executed through online portals.[159] One of the NYAG's causes of action claims that the EFTA requires that Citibank reimburse consumers whose money is stolen through these schemes.[160]

In support of this claim, the NYAG argues that these electronically-initiated consumer wire transfer processes include EFT transfers which are covered by the EFTA.[161] The CFPB endorses this view,[162] and the district court presiding over the case ultimately ruled in favor of the NYAG's position, holding that certain portions of wire transfer processes can be covered by the EFTA.[163] By contrast, Citibank, along with others in the banking industry, advocated for a broad construction of the EFTA wire exemption under which EFTA does not cover any portion of a transfer process that includes a wire transfer.[164] These positions are outlined in Parts II.A.2 and II.A.1, respectively.

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156. *See supra* Part I.A.
157. No. 24-CV-0659, 2025 WL 251302 (S.D.N.Y. Jan. 21, 2025).
158. Complaint, *supra* note 16, at 1–5.
159. *Id.* at 1–2.
160. *Id.* at 54.
161. *Id.* at 16, 54–56.
162. Proposed Statement of Interest for the CFPB, *supra* note 17, at 8–9.
163. New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *9 (S.D.N.Y. Jan. 21, 2025).
164. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14; Press Release, Am. Bankers Ass'n, *supra* note 19.

1. Full Exemption of Multipart Wire Transfer Processes

Citibank and banking groups advocate for a framework where the EFTA exempts all parts of a transfer process that includes a bank-to-bank wire transfer, including an EFT that precedes the bank-to-bank transfer.[165] Under this framework, financial institutions are not presumed liable to consumers for funds lost through fraud schemes using transfers that, at any point, include a bank-to-bank wire transfer.[166] The legal arguments in favor of this proposition are rooted in the EFTA's text and overall structure, and its advocates propose that this framework best reflects the current mainstream understanding of payments regulation.[167]

Proponents of a complete exemption of all wire transfer processes first point to the text of the EFTA's exemption for certain transfers between financial institutions, which explicitly excludes from coverage any non-ACH transfer of funds through a service like Fedwire that are made "on behalf of a consumer."[168] Citibank argues that the statute's clarification that the exemption applies to transfers made "on behalf of a consumer" implies that consumer transfers that include a wire transfer are fully exempted from its terms.[169] It argues that for this clarification to have any effect, the statute must be read to fully exempt consumer-initiated transfer processes that include a wire transfer.[170]

More broadly, advocates for this framework highlight that the purpose of the EFTA, which Congress laid out in the statute's text, is to articulate "consumer rights" associated with participation in electronic transfers.[171] Indeed, the statute makes clear that its provisions only apply to transfers to or from accounts used for "personal, family, or household purposes" and not those held by financial institutions.[172] Citibank argues that the bank-to-bank portion of a wire transfer does not, on its own, involve a consumer account, so it would not be the type of transfer covered by the EFTA, even without being explicitly exempted.[173] Given this, members of the banking community argue, interpreting the EFTA's statutory exemption for wire transfers to only cover the bank-to-bank portion of a transfer would be

165. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14; Press Release, Am. Bankers Ass'n, *supra* note 19.

166. Brief of Amici Curiae, *supra* note 19, at 4–6, 16–18 (arguing that the EFTA does not apply to any portion of a transfer process that includes a wire transfer and that, because of this, financial institutions "do not have an obligation to reimburse customers for unauthorized wire transfers").

167. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 19–20; Brief of Amici Curiae, *supra* note 19, at 8.

168. 15 U.S.C. § 1693a(7)(B); *see supra* notes 78–84 and accompanying text.

169. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14.

170. *See id.*

171. 15 U.S.C. § 1693.

172. *Id.* § 1693a(2).

173. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14–15.

redundant, and thus surplusage,[174] as the goal of the EFTA is to cover only consumer transfers.[175]

Citibank also cites regulatory materials during its advocacy for full exemption of multipart wire transfer processes.[176] For example, it points to instances when the Federal Reserve, when it had rulemaking authority over Reg. E, confirmed through official interpretations that wire transfers are still exempted from coverage, even if they are initiated "from consumer accounts."[177] Active commentary in Reg. J, promulgated by the Federal Reserve, uses similar language, stating that "Fedwire funds transfers to or from consumer accounts are exempt from . . . EFTA and [Reg.] E."[178] It further contends that, although CFPB and Federal Reserve interpretations of EFTA posit that ACH transfers following a wire transfer are exempt, this is distinguishable from EFTs preceding bank-to-bank transfers that are a part of internal transfer mechanisms.[179]

The core of the argument for exempting the entirety of a transfer process including a wire transfer, however, relies not on detailed statutory or regulatory analysis or a deduction of the EFTA's purpose, but on a claim, somewhat based on judicial precedent, that the EFTA and Reg. E's wire transfer exemptions should be read expansively as a matter of course.[180] Historically, courts have generally dismissed cases brought by victims of wire transfer fraud without scrutinizing whether an EFT preceded or followed the requested bank-to-bank transfer.[181] For example, in 2009, the

174. The modern Supreme Court generally does not interpret statutes to contain superfluous language. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 299, n.1 (2006); Fischer v. United States, 144 S. Ct. 2176, 2190 (2024). However, the Supreme Court has made clear that the canon of surplusage "is not an absolute rule" and recognizes that it is not uncommon for statutes to include redundant language. Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013).

175. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14–15; Brief of Amici Curiae, *supra* note 19, at 12–13.

176. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 15–16. Of note, the district court presiding over the *New York v. Citibank* litigation disagreed with Citibank's logic regarding surplusage when ruling on Citibank's motion to dismiss; the court reasoned, in part, that the EFTA wire transfer exemption would still have meaning if interpreted not to cover certain portions of electronically-initiated multipart wire transfers, as it would still cover consumer wire transfer initiated "in person by a consumer." New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *8–9 (S.D.N.Y. Jan. 21, 2025).

177. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 15 (quoting Electronic Fund Transfers, 46 Fed. Reg. 46,876, at 46,879 (Sept. 23, 1981) (3-2 question)).

178. Regulation J, 12 C.F.R. pt. 210, subpart B, app. A, sec. 4 (Oct. 1, 2022); *see* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 16.

179. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 15–16.

180. *See id.* at 19–20; Brief of Amici Curiae, *supra* note 19, at 8.

181. *See, e.g.*, Nazimuddin v. Wells Fargo Bank, N.A., No. 23-CV-4717, 2024 U.S. Dist. LEXIS 128274, at *5–6 (S.D. Tex. June 24, 2024), *aff'd*, 2025 U.S. App. LEXIS 204 (5th Cir. Jan. 6, 2025) (dismissing a claim brought under the EFTA pertaining to "unauthorized wire transfers" after holding that the EFTA "does not apply" to the wire transfers in question); Stepakoff v. IberiaBank Corp., 637 F. Supp. 3d 1309, 1311–13 (S.D. Fla. 2022) (holding that Reg. E exempts wire transfers transacted through systems other than Fedwire from EFTA coverage); McClellon v. Bank of Am., N.A., No. C18-0829, 2018 U.S. Dist. LEXIS 172700, at *14 (W.D. Wash. Oct. 5, 2018) (dismissing a claim brought under the EFTA after

Southern District of New York addressed the question of whether the EFTA and Reg. E covered wire transfers initiated via an online portal.[182] With just one paragraph of explanation, and without addressing whether the transfer at issue consisted of multiple parts, the court held that Reg. E and the EFTA did not cover the transfer because Reg. E and the EFTA "explicitly exclud[e]" wire transfers from coverage.[183] Other courts have come to the same conclusion, still without evaluating whether a type of wire transfer process fits the text of the EFTA's exemption.[184]

The uncomplicated approach employed by courts approaching the EFTA wire transfer exemption prior to the *New York v. Citibank* litigation is reflective of how banking industry advocates claim they have viewed their regulatory obligations under the EFTA.[185] Financial institutions have argued that upsetting this understanding, and effectively extending EFTA coverage to a new class of wire transfer processes that include EFTs before or after bank-to-bank transfers, would lead to interruptions in the services they provide consumers and add a significant financial burden corresponding with assuming liability for funds stolen through this class of transfers.[186]

However, as discussed in the next section, this longstanding framework may not grant sufficient attention to the type of wire transfer process employed by claimants seeking relief under the EFTA, particularly now that consumer wire transfers are routinely initiated through online portals.

2. Mandatory Reg. E Compliance for EFT Portions of Wire Transfer Transactions

Consumer advocates, and specifically the NYAG, have challenged the view of courts that the EFTA and Reg. E exempt all transfer processes that

concluding Reg. E "does not apply to 'wire or similar transfers'"); Fischer & Mandell LLP v. Citibank, N.A., No. 09 Civ. 1160, 2009 U.S. Dist. LEXIS 54184, at *12–13 (S.D.N.Y June 22, 2009).

182. *Fischer & Mandell LLP*, 2009 U.S. Dist. LEXIS 54184, at *4–6.

183. *Id.* at *12.

184. The court in *McClellon v. Bank of America, N.A.* dismissed a plaintiff's claim under Reg. E on grounds that "[Reg. E] does not apply to the wire transfers at issue," without expanding on the text of the EFTA or Reg. E. *McClellon*, 2018 U.S. Dist. LEXIS 172700, at *14–15. Likewise, the court in *Stepakoff v. IberiaBank Corp.* found that because the plaintiff's transfer could have traveled via a similar wire transfer system to Fedwire, it was excluded from coverage by the EFTA; the court did not opine on whether the transfer process used to transfer the plaintiff's money involved multiple transfers. *Stepakoff*, 637 F. Supp. 3d at 1312–13. Importantly, it appears that the wire transfers in both *McClellon* and *Stepakoff* were initiated through correspondences with bank employees. *McClellon*, 2018 U.S. Dist. LEXIS 172700, at *3; *Stepakoff*, 637 F. Supp. 3d at 1311. *Fischer & Mandell LLP*, unlike *Stepakoff* and *McClellon*, addresses the EFTA wire transfer exemption where the transfers at issue were initiated through an online banking portal. *Fischer & Mandell LLP*, 2009 U.S. Dist. LEXIS 54184, at *2–4.

185. *See* Brief of Amici Curiae, *supra* note 19, at 21–22.

186. *See id.* at 21–25; Henry Meier, *If NY's AG Is Right, Then We Are All Doing Something Seriously Wrong*, ALM CREDIT UNION TIMES (Apr. 8, 2024, 12:43 PM), https://www.cutimes.com/2024/04/08/if-nys-ag-is-right-then-we-are-all-doing-something-seriously-wrong/ [https://perma.cc/BPV4-BZK2].

include a wire transfer.[187] The NYAG, in its lawsuit against Citibank, argues that courts should evaluate whether each individual transfer that makes up a multipart wire transfer process qualifies for EFTA coverage.[188] Under its view, with which the district court agreed,[189] if a transfer qualifies as an EFT under the EFTA and Reg. E, then the EFTA and Reg. E provisions apply, including if that transfer is an internal transfer immediately preceding an exempted bank-to-bank wire transfer as part of a larger transfer process.[190]

Accordingly, the NYAG contends that the EFTA requires financial institutions to reimburse the consumers that have their money stolen by scammers using online banking portals to fraudulently wire transfer money to accounts held at separate financial institutions.[191] When the scammers initiate fraudulent wire transfers through these portals, the NYAG claims, the first transfer of funds they approve is an EFT transfer, covered by the EFTA and Reg. E, which the financial institution then uses to transfer funds from the consumer's account to its own.[192]

In support of this view, the NYAG first points to the text of the EFTA.[193] The EFTA exempts from coverage funds transferred "by a financial institution on behalf of a consumer by means of a service" that is "not designed primarily to transfer funds on behalf of a consumer."[194] The NYAG argues that this provision describes a bank-to-bank wire transfer, specifically, not a full consumer wire transfer process initiated through an online portal.[195] It considers the phrase "on behalf of" as an indication that the exemption applies to the portion of the process financial institutions must initiate—the bank-to-bank Fedwire or CHIPS transfer—not the entire process which consumers initiate themselves.[196] Thus, according to the NYAG, the services described in the exemption are Fedwire and related services, specifically, which consumers cannot initiate on their own, rather than consumer wire transfer services, generally, which are initiated by a consumer.[197]

187. *See* Complaint, *supra* note 16, at 16.

188. *Id.*

189. New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *9 (S.D.N.Y. Jan. 21, 2025) (holding that the EFTA wire transfer exemption "does not apply to electronic transfers of funds between consumers and financial institutions, even when made ancillary to an interbank wire").

190. Complaint, *supra* note 16, at 16.

191. *Id.* at 54–56 (claiming that Citibank had a legal duty to comply with the EFTA following unauthorized transfers of consumer funds via wire transfers executed through online banking portals); *see also id.* at 31–53 (describing consumer victims of wire transfer fraud whom the New York Attorney General contends Citibank must reimburse under the EFTA and Reg. E).

192. *Id.* at 14–16.

193. Memorandum of Law in Opposition to the Motion to Dismiss of Defendant Citibank, N.A. at 17–18, New York v. Citibank, N.A., No. 24-CV-0659 (S.D.N.Y. Jan. 21, 2025), ECF No. 25.

194. 15 U.S.C. § 1693a(7)(B).

195. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 17–18.

196. *Id.*

197. *Id.*

The district court also used reasoning based primarily on the EFTA's text to support its decision to hold that the EFTA does cover portions of multipart wire transfer processes.[198] The Court pointed to the clarification in the EFTA wire transfer exemption that the provision only applied to transfers "made by a financial institution on behalf of a consumer"[199] as requiring that exempted transfers were only those that could be "completed by a bank" not those "initiated by a consumer."[200] Under this logic, the district court continued, the initial transfer between the consumer to the financial institution as part of an electronically-initiated multipart wire transfer process is not exempted from EFTA coverage, because it is initiated by the consumer through an online portal.[201] Separately, the court reasoned that the use of the word "transfers" as distinguished from "wire transfers" in the EFTA wire transfer exemption is "strong evidence" that it only exempts the bank-to-bank portion of a multipart wire transfer process, because the word "transfers" refers more specifically to just the bank-to-bank portion of the process later in the exemption.[202]

The CFPB, in its amicus brief filed in *New York v. Citibank*, offers a similar textual interpretation of the EFTA.[203] It claims that by using the word "transfer" in the wire transfer exemption instead of "transaction," which is used in the EFTA's exemptions for checks[204] and purchases of securities,[205] Congress intended to exempt only the bank-to-bank "transfer" via Fedwire rather than the entire "transaction" process including a chain of separate transfers.[206]

The NYAG also argues that the EFTA's general focus on protecting consumers from unauthorized transfers through consumer-centered services supports EFTA coverage for EFT portions of wire transfer processes.[207] More generally, the EFTA extends coverage to a range of services that

198. New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *5–9 (S.D.N.Y. Jan. 21, 2025).

199. 15 U.S.C. § 1693a(7)(B).

200. *New York v. Citibank*, 2025 WL 251302, at *7.

201. *Id.* at *7–8.

202. *Id.* at *8. The latter portion of the EFTA wire transfer exemption that the district court refers to here states "by means of a service that *transfers* funds held at either Federal Reserve banks or other depository institutions." 15 U.S.C. § 1693a(7)(B) (emphasis added). The district court reasoned that the word "transfers" here refers to the bank-to-bank portion of a wire transfer process. *New York v. Citibank*, 2025 WL 251302, at *6. It infers from this that the entire exemption must only be referring to the bank-to-bank transfer, because the exemption begins with the phrase "any *transfer* of funds," 15 U.S.C. § 1693a(7)(B) (emphasis added), and the word "transfer" should be interpreted to have the same meaning throughout the exemption. *New York v. Citibank*, 2025 WL 251302, at *6.

203. *See* Proposed Statement of Interest for the CFPB, *supra* note 17, at 7.

204. 15 U.S.C. § 1693a(7) (carving out "transaction[s] originated by check" from the general definition of EFT).

205. *Id.* § 1693a(7)(C) (exempting "any transaction" facilitating the "purchase or sale of securities or commodities").

206. Proposed Statement of Interest for the CFPB, *supra* note 17, at 7.

207. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 22–23.

consumers can initiate without face-to-face contact with bank employees.[208] Moreover, the EFTA includes multiple provisions protecting consumers if fraudulent actors authorize transfers through these automated consumer-facing services.[209] Meanwhile, in the view of the NYAG, the types of services that the EFTA explicitly does not cover, including bank-to-bank wire transfers through Fedwire-like services or those initiated through face-to-face contact with bank personnel, are transfers that consumers cannot initiate without some oversight by financial institutions.[210]

The NYAG contends that this suggests that the only EFTA-exempt portion of a wire transfer process initiated through an online banking portal is the bank-to-bank transfer, as it is the only transfer over which financial institutions, but not consumers, have direct control.[211] Under this framework, the EFTA would cover the remainder of the transfer process, because consumers have unfettered access to initiate the full process through the online banking portal.[212] Professor Cherdack agrees with this framing, advocating for EFTA coverage of EFT portions of online portal–initiated wire transfers in part because the EFTA was designed to protect consumers from fraud through transfers that "lacked the protection of in-person banking."[213]

Both the NYAG and CFPB claim that the text and regulatory history of Reg. E support their contention that different portions of multipart wire transfer processes can be covered by different legal frameworks. First and foremost, they point to the active version of Reg. E, which includes an official interpretation of "Wire or Other Similar Transfers."[214] That interpretation states that if an ACH transfer follows a transfer through Fedwire, "the transfer by ACH is covered by [Reg. E] even though the Fedwire or network transfer is exempt."[215] The CFPB, for example, stated in its amicus brief that since 1996—when this interpretation was originally

208. The NYAG claims that the types of transfers that the EFTA explicitly lists as covered under its definition are generally examples of transfers that consumers have the ability to directly authorize. *See id.* at 18. These include ATM transactions, point-of-sale transfers, direct deposits and withdrawals, and telephone-initiated transfers. 15 U.S.C. § 1693a(7). Reg. E currently covers all types of transfers that consumers can directly authorize. *See supra* note 72 and accompanying text.

209. *See* 15 U.S.C. § 1693a(1) (defining "means of access" as gaining access to a "consumer's account"); *id.* § 1693a(12) (defining "unauthorized [EFT]" as an EFT "from a consumer's account a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit"); *id.* § 1693g (limiting consumer liability for unauthorized EFTs).

210. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 17–18.

211. *See id.*

212. *See id.*

213. Cherdack, *supra* note 16, at 15.

214. Electronic Fund Transfers (Regulation E), 12 C.F.R. pt. 1005, supp. I (2024). This Reg. E interpretation is cited by the NYAG and CFPB. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 10, 27; Proposed Statement of Interest for the CFPB, *supra* note 17, at 8.

215. 12 C.F.R. pt. 1005, supp. I.

promulgated[216]—Reg. E "has specifically contemplated that the non-wire-transfer portions of transactions that constitute [EFTs] are covered by the EFTA."[217] The NYAG also points to this interpretation, and the Federal Reserve's broader discussion of Reg. E coverage of multitransfer processes,[218] as evidence that the Federal Reserve has long supported the position that EFT portions of multipart wire transfers are covered by the EFTA.[219] The CFPB and the NYAG also argue that Reg. J has, since 1990, included interpretations contemplating EFTA coverage of certain portions of multipart wire transfer processes.[220]

The NYAG partially relies on regulators' longstanding consciousness of the concept of multipart wire transfer processes to rebut its opponents' arguments that EFTA coverage of wire transfers constitute a novel legal theory out of line with mainstream jurisprudence.[221] However, to a much greater extent, it argues that the rise of online portal–initiated wire transfers constitutes the real novelty in this case, and that by granting consumers unrestricted access to wire transfer services, financial institutions created a new service—online portals that enable consumer initiated wire transfers—that fits the criteria for EFTA coverage.[222]

B. Pure Statutory Question or Room for Agency Discretion?

Although both the NYAG and Citibank argue that the language of the EFTA itself offers a conclusive answer as to which portions of modern multipart wire transfers are covered by the EFTA, both also cite regulatory text or agency interpretations to support their positions.[223] Moreover, between the longstanding Federal Reserve interpretation discussing multipart

216. *See supra* notes 111–23 and accompanying text for a discussion on the development of this interpretation.

217. Proposed Statement of Interest for the CFPB, *supra* note 17, at 8.

218. For an overview of this discussion, see *supra* notes 119–20 and accompanying text.

219. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 10, 27. Although not relevant to the court's eventual holding, the district court also noted that the Federal Reserve's contemplation that different portions of wire transfer processes might be covered by different legal frameworks "may support NYAG's interpretation" that the EFTA covers some portions of multipart wire transfer processes. New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *11 (S.D.N.Y. Jan. 21, 2025).

220. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 27 (citing Reg. J commentary as support for its contention that regulators have long contemplated partial EFTA coverage of multipart wire transfers); Proposed Statement of Interest for the CFPB, *supra* note 17, at 9.

221. *See* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 26–27.

222. *See id.* at 3–4. Professor Cherdack also makes this argument, poignantly concluding that financial institutions "opened the flood gates" to consumer fraud by enabling execution of consumer wires through online portals and that the EFTA applies to this situation better than other legal frameworks. Cherdack, *supra* note 16, at 15.

223. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 15–16; Proposed Statement of Interest for the CFPB, *supra* note 17, at 8; Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 10, 27.

wire transfers[224] and the CFPB amicus brief explicitly endorsing the NYAG's argument in favor of partial coverage of such transfers,[225] both agencies that have had rulemaking authority over the EFTA have issued interpretations relevant to this question.[226] The scope of the EFTA and Reg. E's coverage of wire transfer processes could be decided by the weight given by courts to agency interpretations. This section will discuss arguments for granting significant weight, or no weight at all, to the CFPB and Federal Reserve interpretations of Reg. E and the EFTA.

1. Straightforward Statutory Answer

In years past, under the *Chevron* doctrine, agencies played a central role in deciding the meaning of ambiguous language in a statute; so long as an agency's interpretation of such language was reasonable, and it was promulgated through sufficiently rigorous processes, that interpretation bound a court's ruling, even if others claimed a different interpretation better fit the statute's language.[227] Hence, under this framework, whether the Federal Reserve or CFPB's interpretations of the EFTA wire transfer control would depend on whether the language of the EFTA wire transfer exemption is ambiguous and whether the agency interpretations constituted reasonable interpretations of the ambiguous language.[228] After the Supreme Court's decision in *Loper Bright*, however, courts may no longer defer to an agency's reading of a statute merely because it is one of multiple "permissible" interpretations; rather, they must decide, using tools of statutory construction, which single interpretation best fits the text.[229]

Circuit courts across the country have already issued opinions downplaying the weight of agency interpretations when interpreting statutory provisions with disputed meanings, relying on *Loper Bright* as compelling them to answer statutory questions de novo.[230] In *Restaurant Law Center v. U.S. Department of Labor*,[231] for example, the Fifth Circuit considered whether to set aside a Department of Labor rule limiting the situations under which employers may credit tips its employees received as income in order

224. *See supra* notes 111–23 and accompanying text.

225. *See supra* notes 24, 204–06, 216–17.

226. *See infra* Part II.B.3.

227. For an overview of the *Chevron* doctrine, see Siegal, *supra* note 146, at 944–45.

228. Scholars have argued that, because courts rarely overturned agency interpretations at step two, the *Chevron* analysis hinged on whether a court considered the statute at hand to be truly ambiguous. *See, e.g.*, Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 100–01 (1994); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2380–83 (2018).

229. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

230. *See, e.g.*, Rest. L. Ctr. v. U.S. Dep't of Lab., 120 F.4th 163, 171–73 (5th Cir. 2024); Anderson v. Diamond Inv. Grp., LLC, 117 F.4th 165, 186–88 (4th Cir. 2024); Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024); Union Pac. R.R. Co. v. Surface Transp. Bd., 113 F.4th 823, 833–39 (8th Cir. 2024); Sunnyside Coal Co. v. U.S. Dep't. of Lab., 112 F.4th 902, 910 (10th Cir. 2024).

231. 120 F.4th 163 (5th Cir. 2024).

to comply with the federal minimum wage.[232] Citing *Loper Bright*, the three-judge panel engaged in a statutory analysis of the Fair Labor Standards Act,[233] the statute under which the Department of Labor cited authority to promulgate rules in this area, instead of deferring to the Department of Labor's interpretation, as had the district court in this case under the *Chevron* doctrine.[234] Following *Loper Bright*'s framework, the panel unanimously declared the rule invalid after determining that the agency's view did not reflect the "best reading of the statute."[235]

Likewise, in *Anderson v. Diamond Investment Group, LLC*,[236] the U.S. Court of Appeals for the Fourth Circuit overlooked a Drug Enforcement Administration (DEA) interpretation when determining the legality of a particular type of cannabis under federal law.[237] Instead of deferring to an interim final rule promulgated by the DEA which considered the substance at issue illegal,[238] the court held that the substance was legal based on its independent interpretation of the Agriculture Improvement Act of 2018,[239] claiming that, under *Loper Bright*, they "needn't defer to the agency's interpretation" regardless of its ambiguity.[240] Other circuit courts have similarly indicated a hesitancy to defer to agency interpretations of statutes, pointing to *Loper Bright* as ending the requirement that courts defer to agency interpretations merely because a statutory provision is ambiguous.[241]

Given the seemingly straightforward mandate from the Supreme Court that courts answer statutory questions using only their own independent judgment, determining the scope of the EFTA wire transfer exemption may solely require courts to scrutinize the EFTA's language, without considering the Federal Reserve or CFPB's interpretations of the statute. Litigants on

232. *See id.* at 167.
233. 29 U.S.C. § 201–219.
234. *See Rest. L. Ctr.*, 120 F.4th at 168, 171–73.
235. *Id.* at 172–73. Notably, the panel ultimately ruled against the agency interpretation despite noting that *Loper Bright* allows courts to weigh heavily agency interpretations that, like the interpretation at issue in the case, have "remained consistent over time." *Id.* at 174.
236. 117 F.4th 165 (4th Cir. 2024).
237. *See id.* at 186–88.
238. *See id.* at 186.
239. Pub. L. No. 115-334, 132 Stat. 4490 (codified in scattered titles of the U.S. Code).
240. *Id.* at 187.
241. *See, e.g.*, Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024) (casting doubt on the Department of Education's interpretation of "on the basis of sex" in Title IX to include "discrimination" based on the requirement in *Loper Bright* that courts determine the single best meaning of a statute); Union Pac. R.R. Co. v. Surface Transp. Bd., 113 F.4th 823, 833–39 (8th Cir. 2024) (overturning a rule promulgated by the Surface Transportation Board that set out procedures for challenging the agency's rail carrier rate decisions after citing *Loper Bright* as requiring the court to exercise independent judgment when facing statutory ambiguities and then determining the rule conflicted with the agency's statutory duties); Sunnyside Coal Co. v. U.S. Dep't. of Lab., 112 F.4th 902, 910 (10th Cir. 2024) (reviewing de novo the United States Department of Labor Benefits Review Board's interpretation of the Black Lung Benefits Act, and its subsequent hearing decision that rested upon it, after determining *Loper Bright* prohibited granting the interpretation deference).

both sides of this issue start with statutory arguments,[242] and the district court presiding over *New York v. Citibank* answered this statutory question primarily by scrutinizing the EFTA's text.[243] Indeed, the EFTA contains a provision that appears to exempt some wire-like transfers from its scope.[244] However, *Loper Bright* contemplated situations in which courts might remain compelled to defer to agency views.[245] The next section includes an overview of these potential carve outs and the argument for their relevance in the context of the EFTA wire transfer exemption.

2. Limited Court Delegation Under the *Loper Bright* Framework

Loper Bright provides two primary carve outs from its general rule that courts should interpret statutes independent of agency interpretations.[246] First, *Loper Bright* seems to allow for judicial deference to agency views when the best interpretation of a statute is that Congress intended to delegate to an agency the authority to decide the issue at hand.[247] Indeed, the Court in *Loper Bright* explicitly stated that courts must "effectuate the will of Congress" even when "the best reading of a statute is that it delegates discretionary authority to an agency."[248] Thus, when a statute "expressly delegate[s]" authority to an agency to "give meaning" to statutory provisions, reviewing courts must allow the agency to do so, provided it acts within the "boundaries of the delegated authority."[249] The Court also suggested that agency interpretive authority exists when statutes use language delegating to agencies the authority to "'fill up the details' of a statutory scheme."[250]

Some commentators argue that, because of this carve out, *Loper Bright* ultimately changed very little of the agency deference framework under the modern application of *Chevron*.[251] Professor Adrian Vermeule, in particular,

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242. *See* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 14 (arguing that the text of the EFTA supports Citibank's position that the EFTA fully exempts wire transfer processes); Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 17–18 (arguing that the text of the EFTA wire transfer exemption implies that some portions of modern wire transfers are covered by the EFTA); Proposed Statement of Interest for the CFPB, *supra* note 17, at 7 (discussing the textual component of the CFPB's position that the EFTA covers EFTs portions of multipart wire transfer processes).

243. *See* New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *5, *9 (S.D.N.Y. Jan. 21, 2025) (holding that *Loper Bright* required the court to exercise its "independent legal judgment" when resolving "statutory ambiguities").

244. 15 U.S.C. § 1693a(7)(B).

245. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

246. *See id.*; *see also* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 [https://perma.cc/ZL39-HTJH].

247. *See Loper Bright*, 144 S. Ct. at 2263.

248. *Id.*

249. *Id.*

250. *Id.* (quoting Wayman v. Southard, 23 U.S. 1, 43 (1825)).

251. *See* Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/SPV9-V73L]; *cf.* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference: 6/29/2024 Update*, NOTICE & COMMENT, YALE J. REG.,

claims that *Loper Bright* largely just "relabel[ed]" the "deference" required by *Chevron* as compulsory "delegation" after statutory interpretation under the new framework.[252] Professor Vermeule contends that judges may proceed with deferring to agency interpretations as they did before *Loper Bright* after saying the best reading of a given statute authorizes the agency to exercise discretion in interpreting a statutory provision.[253]

Indeed, lower courts in multiple circuits have deferred to agency interpretations in circumstances where a statute explicitly delegates authority to an agency to determine the meaning of the statutory language.[254] In *Bernardo-De La Cruz v. Garland*,[255] the U.S. Court of Appeals for the Seventh Circuit ruled in favor of the U.S. Attorney General, holding that, even following *Loper Bright*, the attorney general had authority to interpret a federal immigration statute to limit eligibility for voluntary departure privileges of noncitizens who challenge their orders of removal.[256] The court reasoned that when the statute stated that the attorney general "may" permit a nonresident to exercise this privilege, it delegated "broad discretion" to the agency to promulgate regulations to govern voluntary departure procedures such that the agency's interpretation of its mandate fell "within the agency's delegated authority."[257]

Using similar logic, in *Mayfield v. U.S. Department of Labor*,[258] the Fifth Circuit upheld the authority of the U.S. Department of Labor to determine the minimum salary required to be exempted under the "White Collar Exemption" of the Fair Labor Standards Act, because the statute explicitly delegated the Department of Labor the power to "define and delimit the terms of the Exemption."[259]

In this case, the EFTA grants a broad mandate for the implementing agencies, first the Federal Reserve and now the CFPB, to promulgate rules and create "classifications [and] differentiations" where necessary and proper to effectuate the purposes of the EFTA.[260] It also delegates specific authority to its implementing agencies to promulgate regulations to clarify what types of transfers qualify for an exemption from EFTA coverage by including after the list of excluded transfer types the phrase "as determined under regulations of the Bureau."[261] Thus, the best reading of this text could be that the Federal

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https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ [http://perma.cc/F97J-KLAS] (last visited Feb. 14, 2025).

252. Vermeule, *supra* note 251.

253. *See id.*

254. *See, e.g.*, Bernardo-De La Cruz v. Garland, 114 F.4th 883, 890 (7th Cir. 2024); Mayfield v. U.S. Dep't. of Lab., 117 F.4th 611, 617–18 (5th Cir. 2024); *cf.* Vanda Pharms., Inc. v. FDA, No. 23-5299, 2024 U.S. App. LEXIS 31895, at *12, *18–22 (D.C. Cir. Dec. 17, 2024).

255. 114 F.4th 883 (7th Cir. 2024).

256. *Bernardo-De La Cruz*, 114 F.4th at 890.

257. *Id.*

258. 117 F.4th 611 (5th Cir. 2024).

259. *Id.* at 614 (quoting 29 U.S.C. § 213(a)(1)).

260. 15 U.S.C. § 1693b(c).

261. *Id.* § 1693a(7).

Reserve (while it had implementation over the EFTA) and the CFPB have had significant authority to determine what constitutes an exempted wire transfer.[262]

The framework laid out in *Loper Bright* also leaves room for courts to recognize agency interpretations as persuasive authority even when the best reading of a statute does not require deference to agency views.[263] The Court in *Loper Bright* contemplated that judges may find, in the course of independently interpreting statutes, that agency interpretations are "especially informative" if they are based on "factual premises within the agency's expertise."[264] Professor Kristin E. Hickman suggests that this language signals that the Supreme Court effectively replaced *Chevron* deference with the framework laid out in *Skidmore v. Swift*,[265] under which a court should not automatically defer to agency interpretations of statutes, but still may grant them some amount of persuasive weight depending on a variety of contextual factors.[266]

Professor Hickman claims that expertise, a factor alluded to by the Court in *Loper Bright* which refers to the amount of specialized experience an agency possesses with respect to its regulatory scheme,[267] has often been cited by contemporary courts applying *Skidmore* as a reason for giving agency interpretations "special consideration" or considering the extent to which the issue at hand falls within an "agency's core competenc[y]."[268] Another "oft-cited" *Skidmore* factor concerns the longevity of the interpretation;[269] perhaps courts will continue to view this factor as weighing in favor of considering an agency interpretation after *Loper Bright*. Professor Hickman predicts that under the *Loper Bright* version of the *Skidmore* framework, courts might be persuaded more often by agency interpretations that underwent more significant procedures prior to promulgation.[270]

Perhaps the CFPB's and Federal Reserve's interpretations of the EFTA could be granted persuasive authority under this carve out in the *Loper Bright* framework. Payment systems and the regulatory regimes that govern them are complicated, especially given the extent and intricacy of modern financial technology.[271] Additionally, the CFPB and the Federal Reserve primarily

262. *See infra* Part III.A.I.

263. *See* Loper Bright v. Raimondo, 144 S. Ct. 2244, 2263, 2267 (2024).

264. *Id.* at 2267 (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98, n.8 (1983)).

265. 323 U.S. 134 (1944).

266. *See* Hickman, *supra* note 246, at 4. Indeed, *Skidmore* is cited multiple times in the Court's opinion in *Loper Bright*. *See Loper Bright*, 144 S. Ct. at 2259, 2262, 2265, 2267.

267. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1256 (2007).

268. *See* Hickman, *supra* note 246, at 7.

269. *Id.*

270. *Id.* at 10.

271. A recent report by the Congressional Research Service overviewed the current landscape of consumer financial regulation and how new financial technologies have complicated regulatory efforts to protect consumers from fraud. *See* CHERYL R. COOPER, ANDREW P. SCOTT & PAUL TIERNO, CONG. RSCH. SERV., R47475, CONSUMER FINANCE AND FINANCIAL TECHNOLOGY (FINTECH) (2023).

serve as financial regulators, and both have explicit implementation authority over statutes governing the financial system;[272] regulating wire transfers and online banking portals fits comfortably within the core competency of each agency. Considering this, their interpretations of the EFTA wire transfer exemptions, particularly those that have remained consistent for decades, could have considerable persuasive power, even if Congress did not explicitly delegate interpretive authority to Reg. E's implementing agency.[273]

3. Potential Controlling Authorities

If the best reading of the EFTA is that it delegates power to the implementing agency to decide which portions of multipart wire transfers are covered by the statute, whether Reg. E covers a particular portion of such a transfer would depend on what the CFPB's official stance on the matter actually is, and whether the stance was articulated in such a way that it can command legal effect.[274] Legal observers and the litigants in *New York v. Citibank* have varying views about whether the text of Reg. E and the agency interpretations that accompany it support partial coverage of multipart wire transfer processes.[275] In general, there are three key regulatory sources that constitute a binding agency view on this matter.

First, advocates for full exemption of multipart wire transfers claim that their position is supported by the text and development of the wire transfer exemption housed in the active version of Reg. E.[276] Reg. E's regulatory text includes "[w]ire or other similar transfers" in its "exclusions from coverage" provision, and it clarifies that this exclusion applies to transfers "through Fedwire or through a similar wire transfer system."[277] The Reg. E exemption mimics the EFTA exemption by limiting its scope to "transfers between financial institutions or between business."[278] Banking advocates, in their joint amicus brief in *New York v. Citibank*, point to the broad nature of this passage—that it exempts "any" wire transfer—to suggest that Reg. E's promulgating agencies removed "any doubt" that multipart wire transfers are fully exempted from EFTA and Reg. E coverage.[279] Citibank itself focuses

272. *See supra* notes 66–68, 125 and accompanying text.

273. *See infra* Part III.C.

274. *Cf. supra* notes 140–45 and accompanying text (discussing the factors courts use to decide whether an interpretation of an agency's own regulation can have binding effect).

275. *Compare* Brief of Amici Curiae, *supra* note 19, at 8, *and* Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 8–9, *with* Proposed Statement of Interest for the CFPB, *supra* note 17, at 10, *and* Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 26–27, *and* Proposed Statement of Interest for the CFPB, *supra* note 17, at 6.

276. Not to be confused with the wire transfer exemption housed in the EFTA, the Reg. E provision stating that wire transfers are exempted from its coverage can be found at Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(c)(3) (2024).

277. *Id.*

278. *Id.*

279. Brief of Amici Curiae, *supra* note 19, at 8. At least one court has cited the breadth of Reg. E when summarily dismissing plaintiff's claims brought under the EFTA. *See* Fischer &

on the language in the original version of this provision promulgated in 1979 which stated that Reg. E exempted "[a]ny wire transfer of funds *for a consumer*."[280] Citibank claims that the inclusion of "for a consumer" in this version implies that the Federal Reserve at the time intentionally meant to exempt all wire transfers, including the portion initiated by consumers, not just the transfers between financial institutions.[281]

By contrast, the NYAG and the CFPB focus on the provision in the "Official Interpretations" supplement (the "1996 Interpretation") to the active version of Reg. E corresponding to the wire transfer provision.[282] In that provision, which was originally promulgated by the Federal Reserve in 1996,[283] the regulation that clarifies "if a financial institution makes a fund transfer to a consumer's account after receiving funds through Fedwire or a similar network, the transfer by ACH is covered by [Reg. E] even though the Fedwire or network transfer is exempt."[284] It further states that, in the case of a multipart wire transfer involving a Fedwire transfer, "the portion of the fund transfer that is governed by the EFTA is not governed by [Reg. J]."[285]

The CFPB, in its amicus brief in *New York v. Citibank*, claims that the 1996 Interpretation underpins a "longstanding acknowledgment" that the "EFTA covers the [EFT] portion of a transaction involving a wire transfer."[286] It further states that this interpretation indicates that "[s]ince 1996, [Reg. E] has specifically contemplated" that "when a single transaction includes both Fedwire and non-Fedwire portions," the non-Fedwire "[EFT] is governed by EFTA and [Reg. E]."[287] The NYAG concurs with this view, stating that this interpretation has provided a framework requiring EFTA coverage of certain parts of processes involving wire transfers for years.[288] The district court presiding over *New York v. Citibank* also posited that the Federal Reserve's contemplation that the "EFTA might apply to individual 'legs' of transactions and not others . . . may support [the] NYAG's interpretation" that the EFTA covers some portions of multipart wire transfer processes.[289]

Mandell LLP v. Citibank, N.A., No. 09 Civ. 1160, 2009 U.S. Dist. LEXIS 54184, at *10–11 (S.D.N.Y. June 22, 2009).

280. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 8–9 (quoting Electronic Fund Transfers, 18 Fed. Reg. 18468, 18481 (Mar. 28, 1979)) (emphasis added by Citibank). "Of a consumer" is not included in the active version of the Reg. E exemption. *See* 12 C.F.R. § 1005.3(c).

281. Memorandum of Law in Support of its Motion To Dismiss, *supra* note 19, at 8–9.

282. Electronic Fund Transfers (Regulation E), 12 C.F.R. pt. 1005, supp. I (2024) (at "3(c)(3) Wire or Other Similar Transfers" referring to the Reg. E wire transfer exemption housed at 12 C.F.R. 1005.3 (c)(3)).

283. *See supra* notes 115–23 and accompanying text.

284. 12 C.F.R. pt. 1005, supp. I (at "3(c)(3) Wire or Other Similar Transfers").

285. *Id.*

286. Proposed Statement of Interest for the CFPB, *supra* note 17, at 10.

287. *Id.* at 8.

288. Memorandum of Law in Opposition to the Motion to Dismiss, *supra* note 193, at 26–27.

289. New York v. Citibank, N.A., No. 24-CV-0659, 2025 WL 251302, at *11 (S.D.N.Y. Jan. 21, 2025).

Although the 1996 Interpretation has been part of the active version of Reg. E since the 1990s and was published in the Code of Federal Regulations after promulgation, its value as potentially binding authority on this matter could be somewhat undermined by the fact that the main focus of the interpretation is on ACH transfers that occur after a bank-to-bank transfer.[290] Although it could support the idea that the Federal Reserve viewed different portions of multipart transfers as being covered by different legal regimes, the 1996 Interpretation does not directly speak to coverage of internal transfer mechanisms prior to bank-to-bank transfers, the key question in *New York v. Citibank*.[291]

Finally, the stance laid out in the CFPB's amicus brief in *New York v. Citibank* (the "CFPB Amicus Interpretation") could itself represent a binding interpretation of the Reg. E wire transfer exemption. With regard to whether EFT portions of multipart wire transfer processes are covered by the EFTA, the CFPB states directly that "the Bureau believes that the proper approach is to first determine whether the entire transaction constitutions an '[EFT]' and then exempt only the wire transfer portion of that '[EFT].'"[292] Unlike the 1996 Interpretation, the view expressed in the CFPB Amicus Interpretation says explicitly that portions of transfers must be independently evaluated for Reg. E compliance, regardless of the EFT type[293] or whether they occur before or after an exempted transfer.[294]

In the CFPB Amicus Interpretation, the agency directly extended the application of this rule to multipart transfer processes initiated through online banking portals, positing that "[t]his rule applies just the same whether the electronic means for initiating the transfer is a telephone transfer plan (as in 1996)" or "an online portal or mobile application (as today)."[295] Moreover, the CFPB Amicus Interpretation addresses the transfer process discussed in *New York v. Citibank*, stating explicitly that although UCC Article 4A would cover the wire portion of the Citibank multitransfer process, the "EFTA and [Reg. E] apply to the rest."[296]

In support of its view, the CFPB lays out a textual argument regarding why it thinks the best reading of the EFTA supports its view.[297] However, it also frames this interpretation as a clarification of the 1996 Interpretation.[298] If the CFPB Amicus Interpretation is viewed as an interpretation of Reg. E or the 1996 Interpretation housed in a Reg. E appendix, this reading could be entitled binding *Auer* deference, requiring courts to view Reg. E and other

290. *See* Citibank, N.A.'s Reply Memorandum of Law in Further Support of its Motion to Dismiss at 17, New York v. Citibank, N.A., No. 24-CV-0659 (S.D.N.Y. Jan. 21, 2025), ECF No. 33.

291. 12 C.F.R. pt. 1005, supp. I (at "3(c)(3) Wire or Other Similar Transfers").

292. Proposed Statement of Interest for the CFPB, *supra* note 17, at 6.

293. For instance, regardless of whether the EFT was an ACH transfer, point-of-sale transfer, or ATM withdrawal.

294. Proposed Statement of Interest for the CFPB, *supra* note 17, at 6, 9–10.

295. *Id.* at 9–10.

296. *Id.*

297. *See id.* at 7.

298. *See id.* at 8.

official agency interpretations through the light of the CFPB Amicus Interpretation.[299]

To receive *Auer* deference, though, the CFPB Amicus Interpretation would need to meet the criteria for receiving such deference laid out in *Kisor*.[300] Primarily, the text of Reg. E and the 1996 Interpretation must be unclear in some way; *Kisor* only allows granting an interpretation *Auer* deference when the existing regulatory text is ambiguous.[301] Additionally, the CFPB Amicus Interpretation would need to meet the set of factors *Kisor* sets out to determine whether the interpretation is entitled to "controlling weight."[302] The CFPB Amicus Interpretation may have difficulty meeting these criteria, particularly because of its recency and because it did not undergo any rigorous rulemaking procedures;[303] both of these will implicate key factors in the *Kisor* framework.[304] In line with this, Citibank claims that the CFPB Amicus Interpretation is not entitled to any deference, particularly because it claims that the CFPB had never before "given the slightest indication" of its view that "every consumer wire also includes an EFTA-covered component."[305]

III. RESPONSIBLE RESPECT FOR DUAL-AGENCY INTERPRETATION

The sweeping pronouncement by the Supreme Court in *Loper Bright* that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous" seems to leave little doubt that statutory questions must be resolved without undue deference to agency interpretations.[306] The Supreme Court also made clear, however, that under

299. *See supra* Part I.D.1 (providing an overview of *Auer* Deference and the *Kisor* framework).

300. *See id.*

301. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414–15 (2019). Because the 1996 Interpretation was promulgated through notice and comment procedures and exists in an official appendix in Regulation E, its text, too must be ambiguous for the CFPB Amicus Interpretation to receive *Auer* deference. *See id.*

302. *See id.* at 2416–18; *supra* notes 140–45 and accompanying text.

303. The CFPB Amicus Interpretation was promulgated in 2024 in an amicus brief in *New York v. Citibank*; it was not published in the Federal Register, though it is published on the CFPB website. See *New York v. Citibank, N.A.*, CONSUMER FIN. PROT. BUREAU (May 29, 2024), https://www.consumerfinance.gov/compliance/amicus/briefs/new-york-v-citibank-na/ [https://perma.cc/CG8U-26NU]; Seth Frotman, *Banks Responsibility for Scams*, CONSUMER FIN. PROT. BUREAU (May 29, 2024), https://www.consumerfinance.gov/about-us/blog/banks-responsibility-for-scams/ [https://perma.cc/28PQ-WCUG].

304. The Court in *Kisor* requires that agency interpretations reflect the agency's "'authoritative' or 'official position'" rather than . . . [an] ad hoc statement." *See Kisor*, 139 S. Ct. at 2416 (quoting United States v. Mead Corp., 533 U.S. 218, 257–59 n.6 (2001) (Scalia, J., dissenting)). Accordingly, the Court held in *Kisor* that it would caution against granting deference to "interpretations advanced for the first time in legal briefs," particularly if it would create "unfair surprise" to regulated parties. *Id.* at 2417–18 n.6, 2420–21 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

305. Citibank, N.A.'s Reply Memorandum of Law, *supra* note 290, at 20.

306. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

the new *Loper Bright* framework, deferring to agency interpretations remains prudent, and is even compulsory, under certain circumstances.[307]

This Note proposes that the best reading of the EFTA is that the CFPB has authority to decide which portions of modern wire transfers are covered by the EFTA. Part III.A.1 outlines the expansiveness of the authority granted to the EFTA's implementing agencies to determine the scope of the EFTA's coverage and exceptions, while Part III.A.2 posits that the EFTA wire transfer exemption does not address whether EFT portions of modern multipart wire transfer processes fall under the scope of the exemption or are covered by the EFTA. Thus, this Note argues that the best reading of the EFTA is that it delegates authority to the CFPB to determine the scope of the EFTA wire transfer exemption regarding modern multipart wire transfers. Part III.B then proposes that the 1996 Interpretation, which remains in the active version of Reg. E, should be treated as binding authority extending EFTA coverage to EFT portions of modern multipart wire transfers. Finally, even if the EFTA did not delegate clear authority to the CFPB to decide this question, Part III.C contends that courts should grant the 1996 Interpretation considerable weight as persuasive authority, given the substantive expertise of the Federal Reserve and CFPB as well as the authoritativeness of the 1996 Interpretation.

A. The Best Reading of the EFTA Delegates Authority to the CFPB to Determine Whether EFT Portions of Multipart Wire Transfer Processes Are Covered Under the EFTA

Despite the prevalence of arguments that the text of the EFTA clearly covers or exempts EFT portions of multipart wire transfer processes, the best reading of the text of the EFTA is that it delegates authority to its administrating agency, the CFPB, to determine which portions of multipart wire transfers are covered by the EFTA. The Supreme Court in *Loper Bright* made clear that courts should defer to agency interpretations in circumstances where the best reading of statutory text is that it delegates authority to the agency to decide the statutory question.[308] Because the EFTA explicitly grants authority for the CFPB to define the boundaries of EFT for purposes of EFTA coverage,[309] and because the EFTA wire transfer exemption does not address whether EFT portions of multipart wire transfers are exempted from coverage,[310] the best reading of the EFTA requires courts to defer to the CFPB's official interpretation extending Reg. E coverage to non-wire portions of multipart wire transfers.

307. *See supra* Part II.B.2.
308. *See supra* notes 247–61 and accompanying text.
309. *See infra* Part III.A.1.
310. *See infra* Part III.A.2.

1. The EFTA Delegates to the CFPB General Implementation Authority and Specific Authority to Define Which Transfers Are Exempted from EFTA Coverage

The EFTA grants wide authority to agencies to implement the statute's provisions. As a general matter, the EFTA grants power to the CFPB to prescribe regulations to "carry out the purposes of this subchapter."[311] It further states that these regulations may include "classifications, differentiations, or . . . other provisions" that the CFPB deems "necessary or proper to effectuate the purposes of this subchapter [or] to prevent circumvention or evasion thereof."[312] In addition to this general implementation authority, the EFTA specifically expands this authority when it comes to defining which types of transfers are considered EFTs covered by the statute.[313] To indicate this, the EFTA includes in the statutory definition of EFT, just after the list of the transfers excluded from coverage, the phrase "as determined under regulations of the [CFPB]," which makes clear that the CFPB has a role in determining the scope of each of the EFTA's statutory exemptions.[314]

Courts, along with Professor Cherdack, have long emphasized that this language represents significant delegated authority, noting both the breadth and flexibility of the EFTA's language.[315] Moreover, the U.S. District Court for the Southern District of New York specifically noted that the text of the definition "was intended to give the law's administrator," now the CFPB, "flexibility in determining whether new or developing electronic services should be covered."[316]

The language that the EFTA uses to indicate delegations of authority to the CFPB is also very similar to the statutory language the Supreme Court and lower courts have pointed to as indicating courts should recognize agency power to interpret statutory provisions under *Loper Bright*.[317] The Supreme Court in *Loper Bright* contemplated granting agencies certain implementation authority when a statute "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme."[318] The passage in the EFTA that provides CFPB general implementation authority uses more expansive language than "fill up the details";[319] the EFTA lists a variety of

311. 15 U.S.C. § 1693b(a)(1). The Federal Reserve held this authority exclusively before the creation of the CFPB, and it still retains rulemaking authority over certain provisions of the EFTA, none of which are relevant to the potential coverage of multipart wire transfers. *See supra* notes 57–70 and accompanying text.

312. 15 U.S.C. § 1693b(c).

313. *See supra* notes 58–59 and accompanying text.

314. 15 U.S.C. § 1693a(7).

315. *See supra* notes 61–65.

316. Nero v. Uphold HQ Inc., 688 F. Supp. 3d 134, 141 (S.D.N.Y 2023) (quoting S. REP. NO. 95-915, at 9 (1978)).

317. *See supra* notes 254–59 and accompanying text.

318. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (quoting Wayman v. Southard, 23 U.S. 1, 43 (1825)).

319. *Loper Bright*, 144 S. Ct. at 2263 (quoting *Wayman*, 23 U.S. at 43).

actions the CFPB may take, beyond just filling in details, if the CFPB feels they are "necessary or proper" to implement the statute or prevent evasion of compliance.[320]

The language used in the EFTA to grant the CFPB specific authority to "determine" the transfers covered under the EFTA's definition of EFT also mimics the language used in statutes which lower courts have cited when ruling agencies acted within their delegated authority to define key statutory terms. For example, in *Mayfield*, the Fifth Circuit determined that the Department of Labor had authority to limit the scope of the White Collar Exemption of the Fair Labor Standards Act merely because that statute allowed the agency to "'define[] and delimit[]' the terms of the Exemption."[321] The EFTA similarly qualifies its statutory exemptions of its definition of EFT with the phrase "as determined under regulations of the Bureau."[322] This delegation of authority to determine what, exactly, falls under each exemption commands similar respect to that of the Fair Labor Standards Act's delegation to the Department of Labor to determine the scope of the White Collar Exemption.

In line with this explicit delegation of authority to the CFPB to determine the scope of the EFTA's statutory exemption, the best reading of the EFTA is that it allows the CFPB to determine whether a particular transfer type qualifies as an exempted transfer under the EFTA wire transfer exemption. Of course, the CFPB must act within the "boundaries of [the] delegated authority"[323] and could not assert that the EFTA covers a type of transfer that clearly qualifies as a wire transfer under the statutory exemption or claim the statute exempts a transfer that clearly does not constitute a wire transfer under that provision. However, as discussed in the next section, the EFTA wire transfer exemption is terse and vague. If its text does not shed light on whether EFT portions of multipart wire transfer processes are covered by the exemption, the EFTA's delegation of authority to the CFPB to determine the scope of the exemption would apply and allow the CFPB to decide whether such transfers are covered.

2. The EFTA Wire Transfer Exemption Does Not Address Whether EFT Portions of Modern Multipart Wire Transfers Are Covered

Although advocates on both sides of this issue claim that the EFTA clearly covers or exempts EFT portions of multipart wire transfers,[324] the EFTA wire transfer exemption is silent as to whether it exempts an entire wire transfer process or just the actual bank-to-bank wire transfer. This section overviews

320. *See supra* note 312 and accompanying text.

321. Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617–18 (5th Cir. 2024) (quoting 29 U.S.C. § 213(a)(1)).

322. 15 U.S.C. § 1693a(7).

323. *Loper Bright*, 144 S. Ct. at 2263 (quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983)).

324. *See supra* note 242 and accompanying text.

the arguments made that suggest the text of the EFTA is clear as to this issue and advocates that none of these claims are persuasive. Instead, it argues that the EFTA's text does not contemplate wire transfer processes consisting of multiple different transfers of different types.

First, parties on both sides of this dispute debate the meaning of the phrase "on behalf of a consumer" in the EFTA wire transfer exemption,[325] each of which claim it supports their view that the EFTA conclusively speaks to whether it covers EFT portions of multipart wire transfer processes. Citibank claims that this provision implies that the exemption must apply to the consumer portion of a transfer, because otherwise, that provision would be meaningless; in its view, if the EFTA is interpreted to cover EFT portions of multipart wire transfer processes, and only exempt the bank-to-bank wire transfer itself, consumer-initiated wire transfers will never be exempted from the EFTA.[326] Meanwhile, the NYAG argues that this phrase, which in full states that exempted transfers are those "made by a financial institution on behalf of a consumer,"[327] describes exactly the bank-to-bank portion of a multipart wire transfer process, during which a bank facilitates a wire transfer to complete a process initiated by a consumer.[328] From this it deduces that the EFTA wire transfer exemption must be referring only to the bank-to-bank transfer itself, and that other EFT transfers that precede or follow that portion do not fall under the purview of the exemption.[329] The district court presiding over *New York v. Citibank* also came to a similar conclusion when ruling on this issue, reasoning that the phrase "by a financial institution on behalf of a consumer" requires that the EFTA wire transfer exemption only applies to the portion of a wire transfer process executed by a financial institution—the bank-to-bank transfer.[330]

Neither position constitutes the best reading of this textual passage, because the EFTA wire transfer exemption does not include any language that contemplates multipart transfers. Regarding Citibank's position, although the inclusion of "on behalf of a consumer" means that this passage must have been meant to cover some consumer-initiated transfers (otherwise, as Citibank claims, it would have no meaning), the district court in *New York v. Citibank* correctly pointed out that it would still do so if interpreted to only exempt consumer wire transfer processes that are initiated through interactions with bank personnel, which are authorized verbally or in writing and thus do not include an electronically-authorized EFT transfer prior to the bank-to-bank transfer.[331] The fact that the exemption's text could apply to

325. 15 U.S.C. § 1693a(7)(B).
326. *See supra* notes 168–70 and accompanying text.
327. 15 U.S.C. § 1693a(7)(B).
328. *See supra* notes 194–96 and accompanying text.
329. *See supra* note 197 and accompanying text.
330. *See supra* notes 198–201 and accompanying text.
331. *See supra* note 176; *cf. supra* notes 15, 37–38 and accompanying text (explaining the rise of services allowing execution of consumer wire transfer online, which often include EFTs preceding the bank-to-bank practice, and distinguishing these services from the historical method of initiating wire transfers through interactions with banking personnel).

consumer wire transfers initiated in person, even if it is interpreted to exempt those initiated online and thus preceded by a separate EFT, rebuts the banking community's claim that this passage would be redundant if read to only apply to the bank-to-bank portion of multipart wire transfers.[332]

Likewise, the claim that the exemption specifically describes the bank-to-bank transfer portion, and thus conclusively does not exempt preceding EFTs as part of the same process, is similarly unconvincing, because textually, the provision just as easily describes the entire process from the time a consumer initiates the transfer. Even an entire multipart wire transfer process is made "on behalf of a consumer" by "a financial institution,"[333] just through a process involving multiple electronic transfers of varying types.

Finally, the CFPB's textual argument highlighting the wire transfer exemption's use the word "transfer" rather than the word "transaction" which is used in other of the EFTA's exemptions[334] also provides little insight into whether the exemption was meant to exempt an entire multipart transfer or just the bank-to-bank wire portion. The EFTA uses the term "transfer" to exempt processes that seem to require just one transfer, including "automatic transfer[s] from a savings account to a demand deposit account,"[335] and also those that are completed using multistep services, like "point-of-sale transfers,"[336] a process through which merchants are paid from consumer accounts.[337] Accordingly, interpreting the use of the word "transfer" in the wire transfer exemption to mean that the exemption does not exempt EFT parts of multipart wire transfer processes is not appropriate, because the EFTA sometimes uses the term "transfer" to describe multipart transfer services. The same logic undermines the district court's reasoning that the exemption's inclusion of the word "transfer" rather than the two-word phrase "wire transfer" implies Congress meant the exemption to only apply to the bank-to-bank transfer, not the entire multipart process.[338] Given the EFTA uses word "transfer" to describe multipart processes in other exemptions, it could do so here as well, even without the word "wire" preceding it.

The key flaw underlying each of the preceding statutory arguments is that the EFTA wire transfer exemption does not contemplate the existence of multipart wire transfers. Thus, the EFTA's text does not shed light on whether, in a world with multipart wire transfers, it exempts just the bank-to-bank portion of such a transfer or the entire multipart process. However, the EFTA's statutory exemption provision does separately account for this situation. By delegating broad authority to determine the scope of

332. *See supra* notes 171–73 and accompanying text.
333. 15 U.S.C. § 1693a(7)(B).
334. *See supra* notes 286–87 and accompanying text.
335. 15 U.S.C. § 1693a(7)(D).
336. *Id.*
337. *See supra* note 71.
338. See *supra* note 202 and accompanying text (overviewing the district court's reasoning regarding role of the word "transfers" in the EFTA transfer exemption).

each statutory exemption to the CFPB,[339] courts have determined that the EFTA explicitly provides that, when the statute's text is not sufficient to do so, the CFPB may determine which novel transfers type fit under each exemption.[340] Due to this delegation, and because the text of the EFTA wire transfer exemption does not shed any light on whether it exempts EFTs in multipart wire transfer processes, the CFPB has authority to determine such in its promulgation of Reg. E even following *Loper Bright*.[341] The next section will argue that the CFPB has already authoritatively spoken on this issue, and that its view requires Reg. E compliance for all non-wire EFT portions of modern multipart wire transfer processes.

B. The CFPB's Official Stance on the Scope of the EFTA Wire Transfer Exemption

Through the 1996 Interpretation, housed in Reg. E, the EFTA's implementing agencies have for years interpreted the EFTA to cover EFT portions of multipart wire transfer processes. A variety of regulatory sources promulgated by the Federal Reserve and CFPB, the two agencies that have had implementation authority over the EFTA, discuss or allude to coverage or exemption of EFT portions of multipart wire transfers.[342] However, the 1996 Interpretation best qualifies as the CFPB's authoritative official position. This section discusses why the text of the Reg. E wire transfer and CFPB Amicus Interpretation cannot serve as binding authority on this issue and argues that the 1996 Interpretation should be viewed as requiring Reg. E compliance for all EFT portions of multipart wire transfers.

First, the text of the Reg. E wire transfer exemption, much like the text of the EFTA,[343] cannot control whether EFT portions of multipart wire transfer processes are covered by the regulation as it does not contemplate multipart transfers at all. Along with stating that "wire other or similar transfers" are not included in the regulatory definition of EFT, the Reg. E exemption exempts "[a]ny transfer of funds through Fedwire" or similar systems "used primarily for transfers between financial institutions or between businesses."[344]

The main clause of this exemption cannot be considered an official agency position on which portion of multipart wire transfer processes are exempted from coverage because, similar to the EFTA wire transfer exemption,[345] "any transfer . . . through Fedwire or [similar systems]" does not confer any clarity on whether "transfer" refers to the entire process or just the bank-to-bank portion. Likewise, the final portion of the Reg. E wire transfer exemption, which states "used primarily for transfers between financial institutions or

339. *See supra* notes 314, 318–23 and accompanying text.
340. *See supra* notes 61–65 and accompanying text.
341. *See supra* Part III.A.1.
342. *See supra* Part II.B.3.
343. *See supra* Part III.A.2.
344. Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005.3(c)(3) (2013); *see supra* notes 277–78 and accompanying text.
345. *See supra* Part III.A.2.

between businesses,"[346] merely distinguishes the systems it mentions from those like ACH or point-of-sale systems; it does not imply anything about whether the exemption applies to just a portion of a multipart process that utilizes those systems or exempts the entirety of such a process from beginning to end. Thus, nothing in the Reg. E exemption clarifies whether the EFTA applies to EFT portions of multipart wire transfers.

However, the 1996 Interpretation, originally promulgated by the Federal Reserve but still active in an appendix to Reg. E,[347] addresses which portions of multipart wire transfers are exempted by Reg. E and the EFTA.[348] That provision states that "if a financial institution makes a[n] [EFT] to a consumer's account after receiving funds through Fedwire or a similar network, the transfer by ACH is covered by [Reg. E] even though the Fedwire or network transfer is exempt."[349] It further provides that the "portion of [a] fund transfer" governed by the EFTA "is not governed by [Reg. J]."[350] Unlike the text of the EFTA or Reg. E wire transfer exemptions,[351] this interpretation directly accounts for multipart wire transfers by describing that an ACH transfer is covered even if occurring in the same multipart transfer process as a bank-to-bank wire transfer. And it clearly dictates that such EFT transfers are "covered by" Reg. E.[352]

Moreover, this interpretation would qualify as a sufficiently authoritative opinion to serve as a binding interpretation of Reg. E under the criteria set out in *Kisor*.[353] The interpretation has been enshrined in the text of Reg. E for more than twenty-five years and has been published multiple times as an official staff interpretation in the Federal Register.[354] Because of the longevity of this interpretation, and because it can currently be found in the Code of Federal Regulations,[355] it should not be considered "unthinkable," as Citibank claims,[356] that parties risk civil liability if choosing not to comply with this requirement. The Federal Reserve also included in its rationale for promulgating the interpretation a discussion of concerns over the lack of coverage for certain consumers given the complicated regulatory landscape,[357] thus relying on its substantive expertise as a financial payment

346. 12 C.F.R. § 1005.3(c)(3).

347. *See supra* notes 115–23 and accompanying text.

348. The district court presiding over the *New York v. Citibank* litigation contemplated the potential significance of the 1996 Interpretation as a regulatory material that contemplated EFTA coverage of some portions of wire transfer, see *supra* note 289 and accompanying text, even as it came to its ultimate conclusion after completing an analysis of the EFTA's text. *See supra* notes 198–202.

349. 12 C.F.R. pt. 1005, supp. I.

350. *Id.*

351. *See supra* Part III.A.2 (regarding the EFTA wire transfer exemption) and the paragraph including notes 343–45 (regarding the Reg. E exemption).

352. 12 C.F.R. pt. 1005, supp. I.

353. *See supra* Part I.D.1.

354. *See supra* notes 111–23 and accompanying text.

355. 12 C.F.R. pt. 1005, supp. I.

356. Citibank, N.A.'s Reply Memorandum of Law, *supra* note 290, at 17; *see also supra* note 305 and accompanying text.

357. *See supra* notes 119–20 and accompanying text.

systems regulator. Accordingly, this interpretation is sufficiently authoritative to command legal effect as both a regulatory and statutory interpretation.

Citibank claims that this provision does not apply to EFTs preceding bank-to-bank wire transfers, because it specifically focuses on ACH transfers occurring "after" a bank-to-bank transfer.[358] However, this fails to take into account the first clause of the 1996 Interpretation which describes EFT transfers to consumer accounts, generally, not ACH transfers, specifically.[359] Citibank's claim also overlooks the succeeding passage which clarifies that "[t]he *portion* of" a multipart wire transfer that is covered by the EFTA is not governed by Reg. J—the language of this passage does not specifically reference ACH transfers.[360] In light of this general language describing EFT portions of multipart wire transfer processes, this interpretation cannot be cabined to apply just to ACH transfers occurring after a bank-to-bank wire transfer as Citibank suggests. Indeed, the CFPB is correct in arguing that "since 1996, [Reg.] E has specifically contemplated that the non-wire-transfer portions of transactions that constitute [EFTs] are covered by the EFTA even when the transaction also includes a wire transfer."[361]

Because this provision remains in an appendix in Reg. E,[362] and because it unambiguously requires that all EFT portions of multipart wire transfer processes comply with Reg. E,[363] the explicit clarification in the CFPB Amicus Interpretation that Reg. E applies to these EFTs is not necessary. Thus, it is not relevant whether the CFPB Amicus Interpretation is sufficiently authoritative to constitute a binding interpretation of Reg. E under *Kisor*,[364] because in any case, the 1996 Interpretation clearly requires that EFT portions of multipart wire transfer processes are covered under Reg. E and the EFTA.

C. CFPB and Federal Reserve Interpretations of the EFTA as Persuasive Authority

Even absent an explicit delegation in the EFTA, prudence dictates that the CFPB and the Federal Reserve interpretations be granted significant persuasive weight by courts determining the scope of the EFTA wire transfer exemption. *Loper Bright* allows courts to consider agency interpretations as persuasive weight while interpreting statutes, particularly if the statutory

358. *See supra* note 290 and accompanying text.

359. A general description of a financial institution executing an EFT "to a consumer's account" after it "receive[s] funds through Fedwire" generally describes a transfer from a financial institution to a consumer who has an account at that institution—none of the language in this clause specifically refers to that transfer being completed through an ACH system, as opposed to a different type of EFT. 12 C.F.R. pt. 1005, supp. I.

360. 12 C.F.R. pt. 1005, supp. I (emphasis added).

361. Proposed Statement of Interest for the CFPB, *supra* note 17, at 8.

362. *See* 12 C.F.R. pt. 1005, supp. I.

363. *See supra* notes 359–61 and accompanying text.

364. For a discussion on *Kisor* and the requirements for establishing that an interpretation merits *Auer* deference, see *supra* Part I.D.1.

question implicates the agency's substantive expertise.[365] Even absent text in the EFTA explicitly delegating authority for CFPB interpretations of the wire transfer exemption to serve as binding authority, the CFPB interpretations discussed above[366] have considerable merit as persuasive materials.

The Supreme Court in *Loper Bright* held that the ability for an agency interpretation to bind a court is contingent on whether the interpretation "rests on factual premises within the agency's expertise."[367] Professor Hickman explains that "expertise" in this context refers to whether the agency interpretation confronts an issue that relates to the agency's core competency.[368] Other traditionally relevant *Skidmore* factors, such as the longevity of an interpretation or the sophistication of the procedures used to promulgate the interpretation, may also be relevant to this analysis.[369]

In the case of the dispute over the scope of the EFTA wire transfer exemption, each of these factors favor granting significant persuasive weight to the 1996 Interpretation housed in Reg. E. First, the regulation of consumer electronic transfers constitutes a heavily technical area; understanding the distinctions between EFTs and wire transfers requires an in-depth knowledge of financial technology.[370] Determining the scope of the wire transfer exemption warrants the core competency of both the Federal Reserve and CFPB, given that both agencies serve as financial regulators, who together oversee the major federal regulatory landscapes that could govern any part of a consumer wire transfer.[371] Further, the Federal Reserve relied heavily on its substantive experience regulating consumer transfers when it promulgated the 1996 Interpretation.[372] The interpretation was also promulgated as an official interpretation, published in the Federal Register, and has been included in an appendix to Reg. E, without any edits and without facing any judicial challenges, since 1996.[373]

In light of the complexity of the regulatory area, the experience of the Federal Reserve and the CFPB regulating new consumer financial technology, and the authoritativeness of the 1996 Interpretation, courts would be wise to weigh heavily the current CFPB view that EFT portions of multipart wire transfers are covered by Reg. E and the EFTA, even absent a clear delegation authority in the EFTA to issue binding interpretations in this area.

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365. *See supra* notes 155, 263–70.

366. *See supra* Part III.B.

367. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024) (quoting Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rel. Auth., 464 U.S. 89, 98 n.8 (1983)); *see supra* note 155 and accompanying text.

368. *See supra* notes 267–68 and accompanying text.

369. *See supra* notes 269–70 and accompanying text.

370. *See generally* Parts I.B–C (providing a partial overview of the full landscape of payments regulations).

371. *See supra* notes 66–68, 125 and accompanying text.

372. *See supra* note 357 and accompanying text.

373. *See supra* notes 354–55 and accompanying text.

CONCLUSION

Modern banking technology has made it possible for consumers to initiate wire transfers through online banking portals without needing to speak with banking employees. It has also enabled scammers to steal money from consumer accounts with new fraud schemes.[374] This Note discusses how a dispute over the meaning of the EFTA wire transfer exemption—specifically whether it exempts from coverage EFT portions of multipart wire transfer processes—could determine whether financial institutions must reimburse consumer victims of wire transfer fraud initiated through online banking portals.[375] However, despite a lack of clarity in the EFTA as to whether it fully exempts multipart wire transfer processes,[376] the EFTA clearly delegates significant authority to the CFPB to determine the scope of its wire transfer exemption.[377]

This Note contends that the best reading of the EFTA is that it grants authority to the CFPB to determine whether the multipart wire transfer processes initiated through online banking portals are covered by the EFTA.[378] Further, it argues that the long-standing interpretation of the CFPB that the EFTA covers EFT portions of multipart transfers that include a wire transfer, which was originally promulgated by the Federal Reserve in 1996, should be treated as binding.[379] As such, financial institutions need to reimburse many victims of consumer wire transfer scams initiated through online banking portals. This Note posits that this framework best complies with the *Loper Bright* requirement that courts interpret a statute in line with the "best reading"[380] of its text, even if the text delegates authority to an agency to define a statutory provision. Equally importantly, it allows the entity with true expertise on financial payment systems and consumer fraud, the CFPB, to determine how best to regulate new wire transfer technologies that have left consumers vulnerable to sophisticated fraud schemes.

374. *See supra* Part I.A.
375. *See supra* Part II.A.
376. *See supra* Part III.A.2.
377. *See supra* Part III.A.1.
378. *See supra* Part III.A.
379. *See supra* Part III.B.
380. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).