

The Crypto Exchange — Navigating 2025: Regulatory Shifts in the Digital Asset Landscape (Crossover Episode With [The Consumer Finance Podcast](#))

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Guest: James Kim

Ethan Ostroff:

Welcome to another episode of *The Crypto Exchange*, a Troutman Pepper Locke podcast, focusing on the world of digital assets. I'm Ethan Ostroff, the host of the podcast and partner at Troutman Pepper Locke.

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Today I'm joined by my colleagues James Kim and Chris Willis. We're going to be discussing how the CFPB, the FTC, and state consumer protection regulators are expected to approach digital assets in light of the recent change in administration in Washington. We're going to take a brief look back at some of the last actions and statements by the CFPB and the FTC under the Biden administration. Explore what we might expect to see from these regulators and the new administration and talk a little bit about the proactive role that state regulators are expected to play in filling any regulatory gaps.

James and Chris, thanks so much for joining me today.

Chris Willis:

It's great to be here. Thanks for having us on.

Ethan Ostroff:

So, I thought we might just start by talking specifically about the CFPB and what was going on at the CFPB towards the end of 2024 and into 2025 before the new change in administration. We got the CFPB rule on digital wallets and payment apps in November. It, I think, pleasantly surprised a lot of people in the digital asset industry in that it did not cover digital assets under the definition of funds and excluded digital asset transactions from the rule opting not to include them in the definition of consumer payment transaction. But James, maybe you could talk a little bit about the backdrop of what led up to that.

James Kim:

Sure. Thanks, Ethan. Obviously, with the election and the new administration and now with the acting director in charge of the CFPB Russell Vought, as well as an appointed permanent director, Mr. McKernan, things are very different. And I think we'll see in the future how things unfold. But to level set, I do want to just kind of summarize where the former director, Rohit

Chopra, was on digital assets, because I think it sets the stage for the rest of this discussion, namely how other agencies, the FTC, and then state banking regulators and state AGs may essentially fill the void that appears to be created with the currency of CFPB leadership.

But on the level setting piece, I think the key headline here is that I think former director Chopra strongly signaled his interest in expanding the CFPB's jurisdiction to cover digital assets. But he didn't go all the way, right? What do I mean by that? First, let's talk about the digital payments larger participant rule. When the proposed rule was issued, it expressly discussed digital assets as a fund under the Consumer Financial Protection Act, which is titled 10 of Dodd-Frank. So, covered payment transactions, which would count for the threshold for being a larger participant under the proposed rule would cover digital asset transactions.

But as you noted, Ethan, we were, I think, happy to see in the final rule that digital assets were dropped. So, in other words, the final rule is silent and does not include digital assets as funds for purposes of the final larger participant rule. The preamble in the final rule doesn't say much about it. It just says something to the effect of the bureau is taking more time to kind of consider the issue. It doesn't indicate that the agency at that time was taking a position. So that's the final rule, and we'll see whether or not the final rule survives. It's currently being challenged in federal court through TechNet, one of the trade associations. And also, we'll see if new leadership at the CFPB rescinds or otherwise amends the rule, which would require a full administrative procedures act process.

The but is in January of this year, so we're talking in the final weeks of the Chopra regime at the CFPB, the Bureau issued a proposed interpretive rule that would kind of expand the definition of funds under both Dodd-Frank and the Electronic Fund Transfer Act to cover a variety of payment mechanisms, including digital assets. So, we're talking about a pretty broad swath of assets and products that might be considered funds, credit card rewards, payment mechanisms, or value in video games, but also digital assets. I think it's worth noting that because it strongly signals that Chopra wanted to proceed in some way, shape or form with expanding CFPB jurisdiction to include digital assets. But I think the key point for the audience is that is both a proposed rule and it's a proposed interpretive rule. So, it's neither final nor binding in any way, right? Especially, in the post Chevron rule, you question how much any interpretive guidance from an agency, how much value it has on statutory construction, i.e., whether or not digital assets are included in funds in either Dodd-Frank or the Electronic Fund Transfer Act.

Because it's not a final rule, it's not in effect, and because it's merely an interpretive rule, I think the new leadership at the CFPB can simply revoke it or rescind it without any sort of formal APA process, or they can just let it die on the vine and basically not enforce it, not do anything with it. I find that latter unlikely. I think there's a long list of things that might be undone, and this will probably be somewhere on the list. It may not be one of the first things, but I would imagine in the next 12 months or so, it would be among the things that are rescinded or revoked.

Ethan Ostroff:

Yes, it's interesting. I mean, I think with the proposed interpretive rule, the callouts about credit card rewards and video games, I mean, those seem to have been things that the radar of director at that time for a while, it was seeing cryptocurrency come back, that was really the surprise. To me, prior to this larger participant rulemaking and the original inclusion of defining

funds in a way that would cover digital assets, the CFPB almost seem to be uninterested in any sort of research or supervision or enforcement on the crypto industry, despite, I think from some people's perspective, having ample UDAAP authority to be involved, and then they take that language out of the final larger participant pool, and then in a matter of a couple of months, decide to issue this proposed interpretive rule where they go right back, it seems, to the same reasoning and thought process.

I mean, they went right back to this idea of, for example, pointing to certain courts that have said funds is defined under EFTA in a way that could your digital assets and it seemed to me like one of the main focuses of that interpretive rule was stablecoins, right? Which seems to be getting hotter and hotter with more and more activity and in particular in the peer-to-peer payment situation, right? So, one of the things I was wondering about was I believe if I'm correct the CFPB also issued an RFI to gather input do you Do you have any sense of where that stands? Is there still a request for information for people to respond to the CFPB, or is it just completely disregarded at this point?

James Kim:

Well, I haven't seen anything for provoking or rescinding at RFI, but we know that Bureau leadership has basically told staff, the employees, the ones that are still there, at least, to not do anything. So, I think in effect, it's dead.

Ethan Ostroff:

Okay, interesting. Because one of the things I thought that really caught my attention about that RFI that I don't think necessarily has been on the radar of a lot of people in the digital asset space is it's wanting information about the advocacy of existing privacy protections under the GLBA. So, I would just put that as a pin for our listeners out there that I think we're going to be hearing more and more about the GLBA at digital assets looking ahead this year and into the future.

Chris Willis:

I wonder, Ethan, if I might ask James a question that might explain the question you asked about why did the CFPB eliminate crypto from the larger participant rule, but then turn around in the proposed interpretive rule and include it. I wonder, I want to run in something by both of you and see what you think about it. The larger participant rule was one that the CFPB wanted to finalize prior to the administration change, and the attempt to cover crypto in it, I think, would have made the rule even more vulnerable to litigation than it already was, whereas the interpretive rule came out on the eve of the administration change as a proposed rule. There was no hope of finalizing it prior to the administration change, and I viewed that as the director, the former director, basically laying down sort of a future state for what a future democratic administration might do or what some state regulator might do and so there wasn't a constraint on leaving crypto out. James, what's your reaction to that as an explanation?

James Kim:

I agree with your take on the situation, Chris, and I would kind of add that the larger participant rule would only give power to the CFPB itself to supervise certain larger institutions. I think a lot of what former director Chopra was doing in the last days of the CFPB was arming, encouraging states to pick up the slack in anticipation of the administration change. So, I think one way to read it is the proposed interpretive rule was a roadmap or a signal to other agencies, namely state agencies, who can enforce Dodd-Frank, and we'll talk about that later, to take up the position that digital assets are funds under various federal laws.

Ethan Ostroff:

So yes, James, I mean, it's an interesting point about looking at this through the lens of we got this roadmap from the CFPB about what state regulators could be doing in this space in early January, but from my review of it, that actual document didn't say anything about digital assets or stablecoins or anything. It could have, but it didn't. So, I'm interested to hear more about how you sort of view this proposed interpretive rule as being part of that overarching effort by the former director of the CFPB to help lay the groundwork in the near-term, in particular, for state regulators to fill in the gaps, pursue various ways of, I would describe it as a high level, is applying existing consumer protection laws to innovative technology, in particular, diesel assets, stablecoins, right? How do you sort of think about that? And how do they go about doing that? I think our audience might be interested and understanding more about how that's even sort of possible.

James Kim:

So, this is, I think, where the real action is going to be in the next couple of years or four years. I'd say number one, I think former director Chopra publicly explicitly went out of his way to encourage states to kind of work with the Bureau, but I think implicitly fill the void once there's a new administration. And then I think kind of non-publicly what Chris and I and others in our group saw during the first Trump administration was, it's very easy for CFPB employees if they're handcuffed, prevented from opening investigations or taking certain actions. It's very easy for them to pick up the phone and call their contacts and friends at various state agencies and encourage them to open an investigation or look into an issue or whatever it might be, right? I mean, there are mechanisms for them to formally share information, but even if they can't share information because it's confidential supervisor information or it's confidential investigative information, it's very easy to say, pick up the phone and say, "Hey, Joe, I can't tell you anything because it's confidential, but I would encourage you to look into this company and ask these five questions."

So, we saw that last time, and I would expect the same to occur this time. But if we were to get to the legal portion of it, I'd say that for state banking regulators and also federal provincial regulators, OCC, the Fed, FDIC, they have the power to enforce or supervise for compliance with laws that are not necessarily their laws. So, in other words, the federal banking regulators, OCC, FDIC, the Fed, they have the power to check for compliance with any law for their supervised institutions. And I think similarly, I don't know about every state, but many or most states have a similar kind of legal mechanism where the state banking regulator or the state

financial regulator, vis-à-vis chartered banks or licensed entities can check for and enforce violations of any law, even if it's not their state law.

So, in other words, if you violate TILA or EFTA or Dodd-Frank, I think these federal and state banking regulators can enforce those laws against their covered institutions. And for state AGs, it's explicitly in Dodd-Frank. Dodd-Frank, I think a lot of people know this gives state AGs the power to bring federal claims and federal court for violations of "federal consumer financial law." A federal consumer financial law is more than just UDAAPs under Dodd-Frank. It is all of the enumerated consumer laws, FCRA, EFTA, RESPA, TILA for example, and they're enabling regulations. So, we've seen that time and time again, the New York AG, for example, has multiple pending lawsuits in federal court, often with the CFPB as a co-plaintiff, but they plead state law violations and federal law violations under the section of Dodd-Frank.

So, they could take, in other words, I just kind of connect this to the original point. These state agencies could take the CFPB's position, or at least former director Chopra's position that digital assets are funds subject to Dodd-Frank, subject to the EFTA, subject to Reg E, and then devise creative claims and theories and then enforce them either in exams or in laws.

Ethan Ostroff:

Yes, it's very interesting. The trend of state AGs, I mean, one could envision New York, California, and other democratic state AGs picking up a verbal torch here about wanting the super protection found in EFTA and to be applied in the context of digital assets, right? That could be a huge significant sea change space it seems to me.

Chris Willis:

Well, and Ethan, keep in mind too, to your point, those same state AGs like New York, California, and many others are very motivated to try to stand in where they think the CFPB is being weakened or scaled back. In fact, several of them have joined a lawsuit opposing the administration's effort to "dismantle" the CFPB. So, they have clearly shown the motivation to try to preserve the consumer protections that they thought the CFPB was providing, and there's no question, at least in my mind that they'll use the authority that they have, which James just told us about, to try to fill in those consumer protections if they think the CFPB is not actually executing on them.

Ethan Ostroff:

Yes. I mean, it seems like the idea of digital asset platforms need to start thinking about what are their processes for resolving errors, what are their mechanisms to [inaudible 0:16:10] sufficiently, and how are they making sure they're providing clear upfront disclosures of associated fees and risks and terms, all those sorts of things you'd think about in the context of EFTA compliance. So, that to me is something I'm very interested to watch as we move on through the rest of this year and during the current administration.

I wanted to just conclude talking a little bit about the FTC. And Chris, I think, historically, it seems like the FTC's mission has been to protect consumers through law enforcement, but also

doing a lot of advocacy research and education. I'm interested in what little of anything we saw from the FTC last year and what you might expect in 2025.

Chris Willis:

Sure, Ethan. I don't think of the FTC as really a cryptocurrency or digital assets regulator in the sense that the SEC was trying to position itself, or the CFPB looked like it was wanting to position itself, or like New York DFS has a bit license for digital asset platforms. The FTC's involvement with crypto seems to me to have been directed at addressing what it considered to be more traditional consumer frauds that just took place in the context of crypto. So, you see that the FTC has put out a lot of education and advocacy warning consumers to beware of scammers who use crypto as a way to defraud the consumers, either by demanding payment for illusory goods or services in cryptocurrency so that once it's in the bad guy's hands, there's no getting it back. Or the FTC had filed a lawsuit actually in 2023 against a cryptocurrency platform and then settled that case against the platform for basically making alleged misrepresentations about the safety of the assets on the platform, the returns that people would get, et cetera.

Those cases can occur with any kind of currency, with real hard fiat currency versus cryptocurrency. There are just sort of the traditional frauds and scams that the FTC has always pursued, and they happened to also pursue them in the context of crypto, that's something that doesn't require any stretch to any statutory interpretation. The FTC's UDAAP authority is not limited to consumer financial products or services, unlike the Dodd-Frank UDAAP that the CFPB has to deal with. It could be any unfair or deceptive practice anywhere in the economy. And the positions that the FTC was taking in these matters and in its public outreach seemed to me to be pretty down the middle of the road in terms of the agency's authority and historical practice.

For that reason, I'm not really expecting a difference in behavior from the Federal Trade Commission under the new administration because I don't think there's anything politically charged about the kinds of activity it was doing in the crypto space over the last couple of years.

Ethan Ostroff:

Yes, I wonder if we're going to just see a complete absence of any type of effort by the FTC to do any sort of public education awareness, if we're going to see the complete absence of alerts, guidelines to help consumers recognize it with scan. It would be very interesting to see if they just completely go silent in this space.

Chris Willis:

We'll see.

Ethan Ostroff:

Which seems like a real possibility. You mentioned the New York DFS, maybe we might finish up our discussion today just talking briefly about its role and what we saw last year and what we might expect going forward this year.

Chris Willis:

Sure, of course. I think the New York Department of Financial Services has really staked out a position for itself as a leader in a lot of areas of regulation where it did not feel and the New York legislature didn't feel that the federal authorities were doing enough to protect consumers. So, for example, the New York DFS was one of the leading state regulators in terms of cybersecurity and now has a very well-known cybersecurity regulation that it examines for and enforces a lot. Likewise, the New York Department of Financial Services has a licensing scheme for consumer reporting agencies. There's not a lot of states that have that, and so they directly do examinations of consumer reporting agencies. New York DFS, also unique among many state regulators, has a very heavy fair lending focus, which you don't see a lot of other states doing that. And it's poised to sort of continue that even if the federal regulators let off on fair lending. I think the same is true with regard to crypto.

Since 2015, the New York Department of Financial Services has had this bit license that I referred to earlier, that if you're going to have a cryptocurrency or digital asset business in New York, you have to have a license and then you are subject to their examination authority, which that examination authority is no joke. It's there incredibly thorough about their examinations, not just in terms of checking for compliance with various New York laws, but also, as James made the point earlier, about federal laws and general unfair and deceptive practices as well.

So, I think we're going to continue to see the New York Department of Financial Services, assert and maintain a leadership role with respect to the regulation of digital assets and virtual currencies through the licensing scheme that it already has and through the examinations that it will do, and it's done some enforcement actions as well and will continue to do enforcement actions. It will continue to send out consumer alerts about frauds and what it considers to be scams.

For example, there was a relatively recent one about meme coins that the New York Department of Financial Services put out. So, even if the FTC isn't doing that or the CFPB walks off or the SEC does it, there's still a lot of regulatory authority in the New York Department of Financial Services and that's such a big market. It can be very influential nationwide with respect to digital platforms and other digital asset businesses.

Ethan Ostroff:

Yes, it's interesting, it will be something to watch to see how other states, if at all, use their existing regulatory supervision enforcement powers to dip their toes further into the space and to try to fill these gaps. I mean, one can certainly envision California regulators, there's been highly active becoming significantly more active. Again, particularly when you consider the economy of California and the economy, those regulators might be the most active in democratic states. It would be interesting to see if other states do something simple.

Chris Willis:

Well, the other thing, Ethan, is that in New York as well as in California, in places like Illinois and several other states too, it's not just the regulator that's in on this action, it's the state legislatures. They've been very active in it, passing enabling legislation to allow the regulators to

exercise authority like what we've been talking about, and all those states have shown that they are capable and willing of legislating in this area. So, it's not just that the regulators will decide what to do on their own, which they might well do, but the legislatures will enable them to do so in probably a lot of instances in the coming years.

Ethan Ostroff:

Yes. Good point. Definitely something to be thinking about. Well, James, Chris, again, thank you for joining me today. Thanks to our audience for listening to today's episode. Don't forget to visit our blogs and subscribe so you can get the latest updates. And please also make sure to subscribe to this podcast via Apple Podcasts, Google Play, Stitcher, or whatever platform you use, and we look forward to our next episode. Thanks.

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