



NFTs and Virtual Currency in Games: Compliance Issues and Legal Risks

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Topics

- In-game currency
- Cryptocurrency
- NFTs
- Loot boxes

In-game Currency – Core Concepts

- Broadly, in-game currency is a monetization mechanic for facilitating microtransactions (in-game purchases) or incentivizing specific activities.
- May be earned by completing in-game tasks (signing in, winning matches, etc.)
- May be purchased with real currency (most often with a credit card)
- Used to purchase:
 - Cosmetic items (virtual apparel for a player's character, furniture for virtual home, etc.)
 - Gameplay advantages (new weapon or armor with better stats) (Pay-to-Win).
 - Loot crates containing cosmetic items or items that provide a gaming advantage.
- Games often have different tiers of in-game currency (gold bars, gems, coins, etc.)

Cryptocurrency – Core Concepts

A cryptocurrency is a digital currency or token that is secured by cryptography and a network of computers (i.e., a blockchain), which makes it virtually impossible to counterfeit or double-spend.

- May be centralized or decentralized (control)
- Permissioned or permission-less (access)

Visa’s Rules on Cryptocurrency

- Card-absent environment merchants that sell cryptocurrency are classified as a “high-brand risk merchant.”

Cryptocurrency in Games

- Esports tournaments are integrating Bitcoin payouts into their prize pools.
- Games are integrating custom cryptocurrencies that function as in-game currency.
- Game-specific cryptocurrency platforms have partnered with game developers to integrate cryptocurrency purchases to buy in-game products or upgrade to premium versions of the game.
 - A single cryptocurrency platform may be compatible with hundreds of online games.
 - Smart contract features allow players to exercise control without the use of dedicated apps.
 - Examples: MobileGo (MGO); Game Credits (GAME); Enjin (ENJ)
 - “Play to earn”

NFTs – Core Concepts

- An NFT, or “non-fungible token,” is simply proof of ownership achieved through a blockchain, allowing the purchase and sale of unique digital assets.
- A blockchain, consisting of a network of computers, records the transaction on a publicly viewable, digital ledger. The owner of the address (or wallet) holding the NFT is the indisputable owner of its contents – like a digital deed that can’t be forged or counterfeited.
- NFTs can be traded or purchased through native blockchain applications or purchased through traditional payment channels.
- Visa does not define NFT or reference NFTs directly in its Core Rules.

NFTs – Core Concepts

- NFTs can be applied to all manner of collectibles, including in-game characters (CryptoKitties), videos, digital trading cards, digital artwork, tweets, and even sports highlights.
- Underlying digital assets (e.g., digital art) are often viewable by anyone. However, the NFTs themselves cannot be duplicated.
- Unlike Bitcoin, which can be swapped for other Bitcoin, NFTs have no equivalent asset.

NFTs – New Legal Issues

- Scope of intellectual property rights transferred to a buyer.
- Is an NFT considered a “security” under federal and state securities laws?
- NFT marketplaces where individual artists create and sell NFTs
 - Artist royalties
 - IP infringement
 - What happens if the game or NFT platform ceases to exist?

NFTs in Games

- NFTs in games often take the form of trading cards, avatars, or other collectibles.
 - For example, an NFT can represent a pet that players can breed, battle, and trade.
 - NFT land deeds for land ownership in the virtual world space
 - Player ownership of digital assets
- NFT games may allow players to earn money.
 - Through direct distribution of cryptocurrencies
 - By selling upgraded or earned NFTs to other players
- NFT platforms allow for the possibility for items to cross over between games.
 - An NFT sword purchased in one game can be used in another, cross-compatible game.
- NFTs may be integrated with cryptocurrencies and smart contracts.

Loot Boxes – Core Concepts

- A loot box is a digital container holding unknown virtual item(s) of varying rarity.
 - The player does not know what is in the loot box before purchasing.
 - The box could contain an extremely rare item or items already owned by the player (or somewhere in between).
 - Can be purchased with real money or in-game currency, or may be earned as a reward for completing in-game tasks.

Loot Boxes – Core Concepts

- FTC hosted a workshop on loot boxes and related microtransactions in August 2019 and released a staff paper on the topic in August 2020.
 - Manipulative or confusing mechanics
 - Spending pressure
 - Impacts on children
 - Disclosure of odds
- Industry self-regulation:
 - Many mobile platforms require mobile games featuring loot boxes to disclose odds.
 - Major game console manufacturers have committed to similar disclosures on new games on their platforms.

In-Game Currencies, Cryptocurrencies, and NFTs – Regulatory Risks

- Federal AML and state money transmission risks
- Securities (SEC)
- Gambling
- Unclaimed property
- Advertising and consumer protection risks

Money Transmission Risks

- The Financial Crimes Enforcement Network (FinCEN) and several state regulators have published guidance stating that, in certain circumstances, the movement of monetary value through virtual currencies may trigger money transmitter obligations.
- FinCEN and state guidance generally define regulated virtual currency as one that (1) has an equivalent value in fiat currency or (2) acts as a substitute for fiat currency.
 - I.e., a convertible virtual currency (CVC)
- The question of whether a digital currency can be “cashed out” is an important indicator of whether money transmission rules may apply.
 - If users can both buy into the in-game currency with fiat currency and “cash out” by exchanging the digital currency back to fiat currency, the digital currency may have equivalent value in fiat currency and act as a substitute for fiat currency.

Money Transmission Risks

If players cannot cash out their game currency for fiat currency, does that avoid money transmission requirements? Maybe not.

- **Purchasing Third-Party Goods:** A Platform facilitates the purchase of items from third-party sellers, such as video games or merchandise, in exchange for in-game currency. Although the user cannot cash out, the Platform has still created a currency that is being used as a substitute for fiat currency. Where the Platform redeems the user's in-game currency and provides fiat currency to the seller as payment, it may be acting as a money transmitter.
- **Purchases from the Platform:** If the Platform is the seller, the Platform has already received the user's fiat currency and then redeems the in-game currency in exchange for merchandise. Here, the in-game currency is like a gift card program. In many cases, gift card programs are carved out of the scope of money transmission, but may be subject to other laws specifically applicable to gift cards and other stored-value products.
- **Marketplace Transactions:** If an in-game currency has value because it can be exchanged for goods, cash, or valuable cryptocurrency from other players or a third party, then the Platform's movement of that in-game currency between users, through marketplace transactions, gifting, or otherwise, could be considered money transmission.

Money Transmission Risks – NFTs

- Is the transmission of NFTs, alone, subject to money transmission regulation?
 - Are NFTs a cryptocurrency?
 - Are NFTs a substitute for currency?

The answer depends on facts and circumstances.

In-game Currency Hypothetical

- **Game Virtual Marketplace:** An online game features two virtual currencies, “gold” and “gems.” Gold is acquired through in-game achievements, while gems can be purchased with real currency. Gems can also be exchanged for real currency. The game also features a marketplace where players can buy, sell, or exchange virtual items they have acquired by playing the game. Accordingly, players who sell items on the marketplace for gems can exchange their gems for real currency.
 - The developer has facilitated the movement of funds between buyers and sellers in the marketplace.

NFT / Cryptocurrency Hypothetical

- **Crypto Token and NFT Platform:** A game developer has created a cryptocurrency token on top of a popular blockchain. Players can purchase the token with cryptocurrency from the developer, earn tokens from in-game activities, or purchase the tokens from or sell the tokens to other players for cryptocurrency. The game developer also sells collectible pets with unique traits represented by an NFT. The platform allows players to trade their NFT pets with each other for game tokens.
 - By allowing the players to sell game tokens for cryptocurrency, the token may act as a substitute for currency and trigger the application of money transmission regulations.

Securities

- Digital assets, depending on their characteristics, may be a “security” under federal securities laws.
- “Framework for Investment Contract Analysis of Digital Assets.”
 - In 2019, the SEC’s FinHub published a framework for analyzing whether a digital asset is offered and sold as an investment contract, and, therefore, is a security.
 - Factors include:
 - ❑ Does the digital asset provide holders rights to share in the enterprise’s income or profits, or to realize gain from capital appreciation of the digital asset?
 - ❑ Is the digital asset traded on or through a secondary market or platform?
 - ❑ Is the digital asset offered/purchased in quantities indicative of investment intent?
 - ❑ Are proceeds used to develop the network or platform?

Gambling

- Developers are increasingly using loot boxes and other reward programs to entice gamers to play.
- Prize promotions, including sweepstakes and contests, are subject to a wide range of federal, state, and local regulation in the U.S.
- Traditional loot boxes are not typically considered to be a form of gambling in the U.S.
 - However, if not properly structured and administered, may constitute illegal gambling or an unfair and deceptive trade practice.
 - Awards that can be exchanged with other players or off-platform for money or cryptocurrency may raise gambling issues.
 - Games targeting children and teenagers amplify gambling concerns.

Escheatment (Unclaimed Property)

- In-game economies and wallet systems can potentially trigger escheat/unclaimed property requirements.
- Completely closed-off in-game currency (can't be transferred between players or exchanged for cash or a substitute for cash) is unlikely to trigger escheat requirements.
- However, unclaimed property laws may apply, the closer the digital currency comes to being:
 - redeemable for fiat currency,
 - exchangeable for valuable cryptocurrency,
 - denominated in U.S. dollars,
 - or used to purchase real goods (including other video games).

Advertising Issues with In-Game Currency

- **“Mobile Offer Wall”**

- A mobile advertising platform that acts as a middleman between advertisers, gamers, and game developers.
- Such platforms integrate “offers” into mobile games, promising users in-game currency and other rewards for completing the offers and promising developers a percentage of the platform’s advertising revenue.
- Offer wall platforms can get into trouble if they fail to issue promised rewards to consumers and ignore complaints about missing rewards.

- **Loot Boxes**

- Disclosure of odds
- Advertising towards children
- Class action risks

Tapjoy FTC Settlement

In January 2021, the FTC settled with mobile advertising platform Tapjoy over allegations that it failed to provide in-game rewards that users were promised.

The Tapjoy platform integrates “offers” into mobile games, promising users in-game currency and other rewards for completing the offers.

Advertisers pay Tapjoy for each consumer who is induced to complete an offer, and Tapjoy pays developers a percentage of its advertising revenue.

“Offers” may require users to complete a survey, download an app, watch a short video, purchase a product, or enroll in a continuity program.

Tapjoy FTC Settlement

According to the FTC's complaint:

- Tapjoy failed to issue promised rewards to consumers.
- Tapjoy received hundreds of thousands of complaints concerning its failure to issue promised rewards.
- Tapjoy adopted policies to discourage consumers from contacting Tapjoy about missing rewards.

Tapjoy FTC Settlement

The FTC's settlement requires Tapjoy to:

- clearly and conspicuously state the terms of its offers (and require its advertisers to do so)
- closely monitor consumer complaints and diligently track advertising partners that deliver (and fail to deliver) promised rewards
- provide an easy-to-use method that consumers can use to submit support requests
- clearly and conspicuously disclose when the advertiser determines whether a reward shall be issued and when consumers are likely to receive the reward

Commissioners Rohit Chopra and Rebecca Kelly Slaughter issued a [Joint Statement](#), criticizing mobile app “gatekeepers” for excessive “rent extraction” from mobile gaming apps, which they believe has forced developers to adopt alternative – and often harmful – means of generating revenue, such as loot boxes.

The settlement and the Joint Statement highlight the increased scrutiny of the entire mobile gaming ecosystem and the various businesses that operate within it.

Other Advertising Enforcement

- **Homescapes and Gardenscapes**

- In October 2020, the UK Advertising Standards Authority banned mobile ads for Homescapes and Gardenscapes in the UK.
- The ads showed a game where users pull pins in a specific order to solve a puzzle. However, the actual games had totally different “core gameplay.” Because the ads were not representative of the games, the Advertising Standards Authority concluded that they were misleading.

- **Miniclip S.A.**

- In July 2020, the FTC settled claims against Miniclip S.A., a mobile game developer, for misrepresenting its participation in The Children’s Advertising Review Unit (CARU) safe harbor program for the Children’s Online Privacy Protection Act (COPPA) Rule.
- CARU terminated Miniclip’s participation in the program in 2015. However, through mid-2019, Miniclip falsely claimed on its website and privacy policy page that it was a current member of CARU’s safe harbor program.

Compliance Best Practices

Legal Status: Make clear that the virtual currency represents a limited, non-transferable, non-exclusive license to use the features of the game or app for personal use and does not represent a property interest of any kind.

Value: State that the virtual currency has no value in real currency.

Purchase Price: Reserve the right to change the purchase price for virtual currency at any time to avoid the perception that it has a set, equivalent value in real currency.

Restrict Cash-out: State that the virtual currency is not returnable, exchangeable, or refundable.

Restrict Transfers: State that the virtual currency cannot be transferred, gifted, exchanged, or sold between users and that each user agrees not to sell, transfer, or assist other users in selling or transferring virtual currency in any manner.

Questions?



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