



Memo

To: ULC Drafting Committee for the Uniform Regulation of Virtual Currency Businesses Act
Reporter, Sarah Jane Hughes
Observers

Fr: Michael Warnecke, Entertainment Software Association

Date: November 15, 2016

Re: ESA's comments in response to October draft and meeting on the URVCBA

The Entertainment Software Association generally supports the overall approach that the Drafting Committee has taken with respect to game-related digital points as presented in the October draft, subject to the remarks we shared at the recent meeting. In our comments below, we elaborate on our remaining issues and respond to concerns raised during the meeting.

1. Definition of "virtual currency"

Treatment of affinity/rewards programs

Like other consumer-facing industries, the video game industry operates rewards and affinity programs. We use the term "points-for-prizes" ("P4P") to describe these game-related programs, where gamers can earn points through game play and, in some cases, making various purchases from the game publisher or game platform. Gamers can then redeem those points for a limited range of goods and services provided by the game publisher, game platform operator, and/or designated merchants. The goods or services may be digital (*e.g.*, a game download) or real (*e.g.*, a branded coffee mug). In light of these similarities to affinity and rewards programs, we think that the exception could reasonably encompass P4P programs and that doing so would promote the interests of regulatory parity.

For further clarity, we propose the following revision:¹

(B) digital units that can be redeemed for goods, services, discounts, or purchases as part of a customer affinity, ~~or~~ rewards, or points-for-prizes program with the issuer and/or other designated merchants or can be redeemed for digital units in another customer affinity, ~~or~~ rewards, or points-for-prizes program, but cannot be converted into, or redeemed for, Fiat Currency or Virtual Currency;

Excluding P4P would be consistent with recent FinCEN guidance directed to the video game industry.²

Treatment of digital units in games and game platforms

ESA proposes to further tighten the subsection (C) exception for “digital units” in response to feedback provided at the October meeting. That feedback emphasized the need to clearly delineate that the points must be limited to use exclusively within the game or game platform environments. We can support that limitation, subject to two caveats. First, movement of digital units between affiliated games and platforms should be protected so long as everything remains within a closed environment (*e.g.*, points move from Game A to Game B but cannot be cashed out from within either game). Second, game publishers and operators of game platforms should not be penalized for unauthorized secondary markets, over which they have no control and from which they do not profit. Qualifying digital units by reference to “non-convertible” should address these concerns.

ESA proposes to narrow the exclusion as follows:

(C) non-convertible digital units used within a game or game platform or affiliated games or platforms;

This language would protect routine game play uses of digital units while also preserving the bright line rule on cash out.³ ***To the extent a game publisher or game platform operator permitted exchange of digital units for legal tender, the exception would not apply.***

The Drafting Committee also requested that ESA provide a definition of “game platform” that could be included in the Reporter’s Note. We propose the following:

The term “game platform” can refer to both (i) a proprietary gaming device, including its accompanying online service, for playing video games and enjoying other entertainment

¹ Our modifications are to the New York BitLicense language, rather than the language from the October draft. At the meeting, it appeared that the Drafting Committee elected to substitute the meeting draft language with the language from the BitLicense.

² FinCEN, Administrative Ruling: *Application of FinCEN’s Regulations to Points Earned or Purchased for Use in Games* at p. 3 (Mar. 21, 2016) (hereinafter, “FinCEN Ruling”)(concluding that points-for-prizes, among other uses of game points, “do not correspond to our definition of convertible virtual currency”).

³ This approach is consistent with the FinCEN Ruling, which found that game points are not virtual currency “because, although the points may be purchased for real currency, they cannot be converted back to either real currency or a convertible virtual currency.” *Id.*

content; or (ii) an online service or app store distributing games for playing on a category of devices (e.g., PCs or mobile devices) not necessarily with regard to a specific brand of hardware.

The first part of the definition captures a traditional home game console (e.g., Microsoft's Xbox One). But "game platform," as used within our industry, also refers to some "online only" platforms used for distributing video games to a broad category of devices, such as desktop computers, and that aren't necessarily proprietary to a particular device maker (e.g., Electronic Arts' Origin platform for PC games).

With these proposed changes to subsection (C), subsection (D) becomes redundant; we would be alright with omitting (D) from the draft.

~~(D) digital units used with the same online gaming platform to purchase intangible goods or services used with the same closed platform.~~

2. Definition of "virtual currency business activity"

ESA proposes to streamline one aspect of the definition of VCBA to address concerns raised during the October meeting of the Drafting Committee.

ESA agrees with the Drafting Committee that game-related digital units only should be protected so long as those units remain within a closed environment (i.e., non-convertible). However, we heard the concern that the current language in 27(D) needed improved clarity and simplicity. Also, an observer raised the concern of potential liability for sites, like Craigslist, that merely facilitate exchanges between other parties but are not directly involved in the transaction.

With these concerns in mind, we propose revising §103(27)(D) to focus on the act of "exchanging":

(27) "Virtual currency business activity" means engaging as a business in:

(D) ~~making a market~~ exchanging otherwise non-convertible digital, ~~in-game~~ units for legal tender outside the game or game platform from which the original digital units were received ~~or facilitating person-to-person, player-to-player, or user-to-user exchanges of digital, in-game units in exchange for legal tender.~~

This bright line will capture as VCBA any unauthorized secondary markets that profit from the exchange of digital units. However, it would not capture sites, such as Craigslist, that merely facilitate the exchange.

Finally, we recognize the importance of the prohibition against cash out as a condition for granting any limited exception for games and game platforms. Accordingly, we'd support the following further clarification as a Reporter's Note in the appropriate section of the General Provisions:

Non-convertible digital units that are used in video games or video game platforms and that cannot be monetized into legal tender are exempted. If, however, otherwise non-convertible digital units are monetized into legal tender by third parties (e.g., in an unauthorized secondary market), then the person conducting that exchange as a business would be subject to this act. In

such a situation, however, the status of the digital units as used with the game or game platform (*i.e.*, for their original, non-convertible purpose) would be unaffected.

3. *Required Disclosures*

We recommend striking the reference to “digital units” in §501(b)(3). Presumably, the notice requirements would not apply to “digital units,” which fall outside the definition of “virtual currency.”

A notice that transfer of virtual currency ~~or digital units~~ is irrevocable and any exception to the irrevocability of transfer.

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Thank you for your consideration. Please feel free to email me (mwarnecke@theesa.com) or call me at (202) 223-2400 if we can provide any further information.