

To:
Consumer Financial Protection Bureau
c/o Legal Division Docket Manager
1700 G Street NW
Washington, DC 20552

Date:
January 8, 2024

**Submitted Electronically
and By Electronic Mail**

**Docket No. CFPB–2023–0053 or RIN 3170–AB17,
Defining Larger Participants of a Market for
General-Use Digital Consumer Payment Applications**

Coinbase, Inc. (“Coinbase”) appreciates the opportunity to respond to the Consumer Financial Protection Bureau’s (“CFPB”) proposed rule that would define a new market for general-use digital consumer payment applications and subject larger participants in such market to CFPB supervision (“Proposed Rule”).¹ Coinbase operates the largest platform in the United States for customers to buy, sell, and manage crypto-assets.² Coinbase and its affiliates are dedicated to working openly and constructively with the CFPB and other regulators, both in the United States and globally.

We support the CFPB’s statutory objectives that help ensure consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive.³ Coinbase started in 2012 with these core objectives in mind and, today, millions of verified users around the world rely on our trusted and easy-to-use platform to access the growing crypto economy.

But we have significant concerns with the inclusion of crypto-asset transactions within the scope of the Proposed Rule. In a single paragraph of the preamble, the CFPB asserts sweeping and unsupported conclusions about its authority over crypto-assets and

¹ Consumer Financial Protection Bureau, Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197 (Nov. 17, 2023).

² For the purpose of this letter, Coinbase accepts the Rule’s embedded definition that crypto-assets constitute a subset of private sector digital assets that depend primarily on cryptography and distributed ledger or similar technology and that encompass many assets that are commonly referred to as ‘coins’ or ‘tokens.’ 88 Fed. Reg. 80216.

³ See statutory objectives as enumerated in section 1021 of the Dodd Frank Act as codified at 12 U.S.C. § 5511(b).

the purported similarities between digital applications used for crypto-asset transactions and those used for fiat-denominated transactions.

The CFPB has never formally sought or been given, and currently lacks, the authority over crypto-assets that it asserts in the Proposed Rule. Neither in the Proposed Rule nor elsewhere has the CFPB substantiated its claim of supervisory authority. And the CFPB has not developed a record on which it could reasonably evaluate whether to assert such authority over crypto-asset transactions.

These concerns are amplified by the significant efforts currently underway by Congress to enact legislation that would establish a comprehensive regulatory framework for digital assets that could conflict with the Proposed Rule. Notably, in those legislative efforts, the CFPB is not being explicitly tasked with any supervisory role.

All of this makes the Proposed Rule premature for crypto-assets in particular. As explained further in this letter, the CFPB should modify the Proposed Rule to explicitly state that applications used for crypto-asset transactions are not within the scope of the proposed market. If the CFPB fails to do so, it must provide the public an opportunity to comment on a (re)proposed set of requirements that takes into account crypto-assets and their unique characteristics.

Sincerely,



Paul Grewal
Chief Legal Officer
Coinbase

Executive Summary

Coinbase has significant concerns with the CFPB’s Proposed Rule as drafted, because it effectively extends the CFPB’s supervisory powers to companies that facilitate crypto-asset transactions without the necessary analysis, foundational rulemaking or legislative authority to do so. The CFPB’s stated intent is to subject larger market participants to its supervision as “providers of funds transfer and wallet functionalities through digital applications for consumers’ general use in making payments to other persons for personal, family, or household purposes.”⁴ But the stated examples of these applications – “digital wallets,” “payment apps,” “funds transfer apps,” “person-to-person payment apps,” and “P2P apps”⁵ – do not reflect the unique characteristics of blockchain technology or crypto-asset transactions.

With only cursory analysis, the preamble to the Proposed Rule asserts that crypto-assets constitute a form of “funds” and that digital applications that facilitate certain transfers of crypto-assets will be included in the market definition of larger participants subject to CFPB supervision. Notably, in a single paragraph, the CFPB claims broad-based supervisory authority over a number of companies that offer crypto-asset products and services.⁶ The Proposed Rule reaches this conclusion not only without substantiating what would be a dramatic extension of its supervisory authority to regulate crypto-asset transactions and without the CFPB having conducted research or gathered information regarding crypto-asset transactions, but also without having put the presupposed extension through a formal rulemaking process itself.

The CFPB does not articulate any reasonable basis for the CFPB’s presumption of supervisory authority and assertion of new authority over crypto-assets. The CFPB has simply assumed that crypto-assets are now a form of “funds” based on its “belie[f],” a tacit admission that it has not fully addressed the scope of the term, citing only a cursory analysis of select judicial opinions involving inapposite federal criminal laws.⁷ The CFPB has never itself reached the conclusion that crypto-asset transactions constitute “funds” within the context of any of the federal consumer financial services laws that it is authorized to enforce or that crypto-assets are financial products or services under title X of the Dodd-Frank Act. Nor could it because, under the Supreme Court’s “major

⁴ 88 Fed. Reg. at 80198.

⁵ 88 Fed. Reg. at 80198.

⁶ 88 Fed. Reg. at 80202. One other passage of the preamble mentions crypto-assets briefly in illustrating how one of the Proposed Rule’s exclusions from the definition of “consumer payment transaction” would operate. *Id.* at 80203.

⁷ 88 Fed. Reg. at 80202.

questions” doctrine, the CFPB cannot assert jurisdiction over the trillion-dollar-plus digital asset industry without a clear statement from Congress, which is absent here, in particular because crypto-assets are not “funds” under the existing relevant law. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

Even if the CFPB had the authority it now asserts over the digital asset industry, it would have to consider and address all important aspects of the issue in a separate rulemaking. Crypto-assets are built upon a unique and complex, continually evolving, borderless technology which offers consumers access to a range of features and properties that differentiate the market in them from the market for consumer products and services that has traditionally been subject to CFPB supervisory activity. In addition to operating as a new frontier for established consumer financial needs, crypto-assets are used to facilitate the validation of transactions on blockchains, administer governance of protocols, and provide access to blockchain-based services and tokenized loyalty programs, among a growing list of other applications. Without a predicate analysis of how the Proposed Rule is allowed or meant to apply to crypto-assets in the rule text, the CFPB has failed to provide any explanation of how rules intended for fiat-denominated mobile wallets and peer-to-peer payment platforms could or should apply to crypto-assets.

The CFPB must also correct several procedural errors plaguing the Proposed Rule. Most notably, the CFPB did not undertake an essential analysis or conduct the research required to comprehend the diverse and complex nature of the crypto-asset industry. Even the term crypto-asset as described by the CFPB, to mean one of two categories of digital assets – the other being a central bank digital currency – reflects a superficial understanding of what comprises the digital asset ecosystem. This failure stands in striking contrast to the significant time dedicated by the CFPB to engage with industry participants to understand fiat-denominated mobile wallets and peer-to-peer platforms as discussed in sections 2 and 4, below. This error is compounded by the CFPB’s improper reliance on undisclosed data and otherwise not fulfilling its statutory consultation obligations to consult with other agencies.

In addition to these shortcomings, and fundamental to any determination of the CFPB’s authority – as well as the prudence of asserting it to extend the Proposed Rule to crypto-asset transactions – is the work currently underway in the U.S. Congress, which is actively considering legislation that would establish a rationalized and comprehensive regulatory framework for digital assets (which we refer to here in CFPB parlance as “crypto-assets”). This regulatory framework would include (1) a taxonomy for classifying different types of crypto-assets based on their unique characteristics, (2) an allocation of responsibility among federal and/or state regulators for supervising crypto-assets and companies that provide crypto-asset products and services, and (3) specific consumer

and investor protection requirements that would apply to certain crypto-asset transactions.

None of the legislation actively under consideration would give the CFPB supervisory authority over companies that facilitate crypto-asset transactions. Consequently, the Proposed Rule would serve to front-run Congressional intent and introduce substantial confusion and unnecessary complexity to the regulatory framework while Congress is attempting to clarify it through legislation. The prudent course is for the CFPB to wait for the legislative cycle to complete, thus avoiding the potential conflicts of laws and duplicative or conflicting compliance obligations that will inevitably occur if rules are adopted before the legislation is enacted.

For all of these reasons, the CFPB should remove crypto-assets from the scope of the Proposed Rule. This would allow Congress the opportunity to complete the process to enact comprehensive legislation that regulates crypto-assets, and in that legislation, provide direction on whether or how the CFPB should participate in the supervision of this activity.

Alternatively, if the Bureau insists on moving forward – notwithstanding the substantial bipartisan and bicameral legislative engagement currently underway – the CFPB must substantiate its rulemaking record with analysis of the crypto-asset industry and explain why it believes that the decades-old statutes it is charged with enforcing enable it to exercise significant new supervisory authority over companies that facilitate crypto-asset transactions. In addition, the CFPB must explain how crypto-asset transactions fit within the Proposed Rule’s market definition and exclusions. Reproposing rules with these details would provide industry participants the necessary opportunity to more fully comment on the intended costs and benefits and potential unintended consequences of subjecting crypto-asset transactions to the jurisdiction of the CFPB.

Finally, given the unique nature of crypto transactions relative to fiat-based transactions that the CFPB is more familiar with, we recommend the CFPB carefully consider any future implementation framework. If Congress ultimately designates the CFPB with supervisory authority over companies that facilitate crypto-asset transactions, or if the CFPB decides to move forward with rules absent a Congressional mandate, the CFPB should ensure that a 24-month implementation period is introduced to enable the CFPB and the newly designated Larger Participants to implement the processes required to comply with this unprecedented and complex area of CFPB supervision.

Specific Comments on the Proposed Rule

The CFPB’s rulemaking must comply with the Administrative Procedure Act (“APA”). Under the APA, a rulemaking is “unlawful” if it exceeds the agency’s constitutional or statutory authority, is “arbitrary, capricious, [or] an abuse of discretion,” or is promulgated “without observance of procedure required by law.”⁸ A rulemaking is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁹

The CFPB’s proposal to assert broad new supervisory authority over larger participants that facilitate crypto-asset transactions and to group digital applications that facilitate certain crypto-asset transactions with digital applications that facilitate fiat transactions in one market, if finalized, would violate the APA for several reasons.

1. *The CFPB has incorrectly and improperly assumed that crypto-assets are a form of “funds.”*

The Proposed Rule’s preamble incorrectly presumes that crypto-assets can be considered a form of “funds” that fall under the CFPB’s authority and within the scope of the Proposed Rule—because they “have monetary value and are readily useable for financial purposes, including as a medium of exchange.”¹⁰ However, the Proposed Rule fails to support that critical proposition. The CFPB’s citations for this presumption are a handful of lower court cases interpreting various inapposite federal criminal laws, such as the criminal prohibition on money laundering. Nowhere has the CFPB explained its legal authority over crypto-assets in general. Nor has it explained how section 1024 of the Dodd-Frank Act authorizes the Bureau to promulgate a regulation that subjects companies that facilitate crypto-asset transactions to supervision as a larger participant of a market for other “consumer financial products or services.” The term “consumer financial product or service” generally includes “financial products or services” that are offered or provided for use by consumers primarily for personal, family, or household purposes.¹¹ Examples of “financial products or services” include:

⁸ 5 U.S.C. § 706(2).

⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰ Applying these criteria, certain securities, commodities, and other financial instruments would constitute “funds” and even certain collectibles could constitute “funds,” thus potentially expanding the concept of “funds” and the scope of the Proposed Rule beyond any accepted bounds and beyond the CFPB’s statutory authority.

¹¹ 12 U.S.C. § 1002(5).

- (1) extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions),
- (2) engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer, and
- (3) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data.

The Proposed Rule's passing assumption that crypto-assets are "funds" contains no analysis supporting the premise that crypto-asset transactions are a type of financial product or service as defined in the unique and specific framework set out in section 1002 of the Dodd-Frank Act, nor is there any analysis of the circumstances in which a crypto-asset transaction is a consumer financial product or service. And although the CFPB excludes cryptocurrency exchange and trading activities from the scope of the Proposed Rule,¹² it has not explained why other crypto-asset transactions, such as the transfer of crypto-assets from one person to another person, should be characterized as consumer financial products or services within the scope of the Proposed Rule. Such transactions do not fit within any of the types of financial products or services enumerated in the Dodd-Frank Act.¹³

The major questions doctrine does not allow this. Under that doctrine, "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."¹⁴ That clear congressional authorization is missing here. When the Dodd-Frank Act was enacted in 2010, thereby creating the CFPB and empowering it to define markets for consumer financial products, the digital asset industry was in its infancy. Bitcoin had only entered circulation the year prior, and the Ethereum network would not be launched for another five years. Coinbase, which has been at the forefront of the industry's growth, maturation, and regulatory engagement, was not founded until 2012. USDT and USDC,

¹² See Proposed Rule, 12 C.F.R. § 1090.109(a)(2) (excluding from the definition of a "consumer payment transaction" those transfers of funds that are linked to the consumer's receipt of a different form of funds, "such as a transaction for foreign exchange as defined in 12 U.S.C. § 5481(16)").

¹³ 12 U.S.C. § 5481(15).

¹⁴ *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

the two most prominent stablecoins (which aim to facilitate the transfer of stable value using crypto-assets), did not launch until 2014 and 2018, respectively. As such, it is highly unlikely – and likely impossible – that Congress then intended with section 1024 of the Dodd-Frank Act to grant the CFPB power to supervise larger crypto-asset companies alongside larger participants in longstanding markets like payday lending and mortgage lending and therefore to prematurely appoint itself the primary regulator of consumer protection for the crypto-asset industry.

The Proposed Rule’s application to crypto-asset transactions is built entirely on the CFPB’s newly announced “belie[f]” that crypto-assets can be considered “funds” within the existing authority of the agency. But whether a crypto-asset transaction is such a type of “funds” within the regulatory authority of the CFPB cannot simply be assumed – it must be explained in the rulemaking process so it can be understood and evaluated by the public. That fundamental part of rulemaking is absent here.

These concerns are amplified for the Proposed Rule given the significant effort currently underway for Congress to enact legislation – discussed in section 3 below – that would establish a comprehensive regulatory framework for crypto-assets, which could directly conflict with the Proposed Rule. That “earnest and profound debate” in Congress confirms not only that the question is major but also that Congress, in enacting the Dodd-Frank Act, did not contemplate or intend that the CFPB would exercise supervisory authority over crypto-asset companies.¹⁵ And whether the CFPB may supervise a crypto-asset company is an issue of major national significance that cannot be decided by the CFPB in the absence of clear congressional authorization.

2. At a minimum, asserting expansive new supervisory authority over the digital asset industry requires a separate rulemaking.

If the CFPB wants to proceed with rulemaking for the digital asset industry, a separate rulemaking explaining the CFPB’s basis for that authority is a necessary first step. The CFPB cannot exercise expansive new supervisory authority over any new industry until it first establishes through rulemaking its authority to do so and conducts a comprehensive analysis of the implications of that decision (including costs and benefits). This has yet to be done for the digital asset industry. The CFPB has never before concluded and still has not explained how crypto-assets constitute “funds” within the context of any of the federal consumer financial services laws that it is authorized to enforce, including title X of the Dodd-Frank Act.¹⁶ Nor has the CFPB provided any evidence that crypto-asset

¹⁵ *W. Virginia v. EPA*, 142 S. Ct. at 2614.

¹⁶ Crypto-assets have been classified as securities and commodities, as well as barter transactions, by other federal regulators. The Proposed Rule provides no indication that the CFPB has evaluated the effect of deeming a crypto-asset to be a type of “funds” under these other regimes. *Cf.* 12 U.S.C. § 5517(i) (explaining that the CFPB and SEC can never have overlapping jurisdiction).

transactions pose the types of risk that justify subjecting companies that facilitate such transactions to CFPB supervision, as set out further in Section 4 below.

As currently written, the Proposed Rule seeks to modify defined terms and exclusions that were designed for traditional forms of e-commerce involving fiat currencies, not crypto-assets. For example, the CFPB has defined “consumer payment transaction” to mean, except for certain excluded transactions, the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes.

This definition could describe peer-to-peer payments platforms that are marketed as primarily for personal, family, or household use cases and specifically designed to facilitate payments between two consumers or two consumer bank accounts. It could also cover mobile wallets that allow consumers to store payment credentials for consumer credit cards and other payment devices and use these wallets primarily at the point of sale to make retail purchases. All of these products have been designed for specific consumer financial uses by way of integration with bank and payment card accounts that are recognized, understood, and marketed as being established primarily for personal, family, or household purposes.

Crypto-assets do not fit neatly into the same categories, which is unsurprising given that these categories and the laws behind them were not designed with crypto-assets in mind. Crypto assets such as ETH have broader and more varied uses. ETH is required to participate in the transaction validation process, provide security to the Ethereum blockchain, and to use as gas to execute smart contracts. Other crypto-assets on top of the Ethereum blockchain serve as governance tokens or loyalty points in decentralized applications.

Transfers of crypto-assets using digital wallets are rarely designed or marketed primarily for personal, family, or household purposes, nor are they routinely integrated with external accounts established primarily for such purposes. A customer’s decision to send crypto-assets to another wallet address may be motivated by a commercial transaction, such as funding a capital markets transaction that settles in crypto-assets or a payment for commercial services in crypto-assets or a purchase of a non-fungible ‘digital asset’ token (“NFT”). The unique and beneficial nature of these transactions, for example, their occurrence in real-time on the public blockchain, mean it is generally not practical and often impossible to distinguish the intent of specific transfers. Significantly, the company that facilitates the transaction does not by default have information that would enable it to readily determine whether a particular users’ transactions were primarily for personal, family, or household purposes. Moreover, imposing an information collection obligation on a crypto-assets company to determine whether the Proposed Rule applies to users would be antithetical to one of the core benefits of crypto-asset adoption and use – limiting

those users' exposure of their personally identifiable information to the risk of compromise, an additional risk of the Proposed Rule that has not yet been evaluating by the CFPB.

Simply stated, the inclusion of crypto-asset transactions in the Proposed Rule is premature and far too vague. The Proposed Rule would be promulgated pursuant to section 1024 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, codified at 12 U.S.C. § 5514. The CFPB has used that authority to promulgate rules subjecting larger participants in the markets for consumer reporting, consumer debt collection, student loan servicing, international money transfers, and automobile financing to CFPB supervision. But these larger participant rules were promulgated on a foundation of the CFPB's established authority to do so. And consistent with this founding principle and well-understood agency authority, the definitions in those rules are far more concrete and predictable than the definitions that comprise the market in the Proposed Rule despite the CFPB's attempt to define the parameters of this new market by excluding certain crypto-asset activities. For example, the market for "consumer reporting" consists of a single defined term for "consumer reporting," which means "collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service."¹⁷

Further explanation and opportunity for comment is required if the CFPB seeks to include crypto-asset transactions in the relevant definitions of "consumer payment transactions" or "consumer financial services" generally.

3. *The U.S. Congress is currently considering legislation that would establish a comprehensive and coherent regulatory framework for crypto-assets, which does not give the CFPB a supervisory role.*

Crypto-assets are an innovative, trillion-dollar global industry and Congress is actively considering the best way to fill the "regulatory gap" for the industry. Coinbase has actively and enthusiastically participated in that conversation. Twice in 2023, Coinbase's Chief Legal Officer appeared before Congress to testify in connection with proposed legislation that would grant shared regulatory authority over crypto-assets between the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"). Coinbase has engaged in hundreds of meetings with members of Congress and staff related to building a comprehensive federal framework for crypto-assets so that consumers can be protected. It also created what is now an independent entity, standwithcrypto.org, to provide a voice to consumers so they can

¹⁷ 12 C.F.R. § 1090.104(a).

directly ask Congress to engage. In short: Coinbase welcomes a federal market structure for crypto-assets, one that does not yet exist under existing law.

Congress has listened. Recognizing the lack of regulatory clarity for crypto-assets, Congress has been active in exploring crypto-assets to build a record and consensus for legislation. Congress's ongoing efforts to address this issue undermine the Proposed Rule's premise that the CFPB already possesses authority over crypto-assets and highlight the imprudence of the CFPB pressing forward to assert authority unilaterally even while Congress crafts a comprehensive solution.

Congress recognized the significance of crypto-assets and need for congressional action during the current legislative session. On January 12, 2023, the House Financial Services Committee announced the creation of the Digital Assets, Financial Technology and Inclusion Subcommittee, which among other objectives, is tasked with exploring "clear rules of the road among federal regulators for the digital asset ecosystem."¹⁸ On February 2, 2023, the House Agriculture Committee announced the creation of the Commodity Markets, Digital Assets, and Rural Development Subcommittee, which, among other objectives, is directed to pursue "policies to bring robust oversight and retail customer protections to digital commodity markets."¹⁹

¹⁸ See Press Release, U.S. House Financial Services Committee, McHenry Announces Financial Services Subcommittee Chairs and Jurisdiction for 118th Congress (Jan. 12, 2023), available at <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408500>.

¹⁹ See Press Release, U.S. House Agriculture Committee, Thompson Announces Subcommittee Chairs and Jurisdiction for the 118th Congress (Feb. 2, 2023), available at <https://agriculture.house.gov/news/documentsingle.aspx?DocumentID=7531>.

In 2023, Congress held at least eleven hearings in six committees or subcommittees in both the House and the Senate specific to crypto-assets and blockchain technology.²⁰ Congress has turned this substantial record into proposed legislation: in recent years it has considered no fewer than 15 legislative proposals concerning crypto-assets, many with bipartisan support. By and large, these proposals allocate authority over crypto-assets to the CFTC and/or SEC, not the CFPB. The Crypto-Currency Act of 2020, for example, defines “cryptocommodity,” “crypto-currency,” and “crypto-security,” and would assign primary regulatory authority over such assets to the CFTC, the U.S. Secretary of Treasury, and the SEC.²¹ The Digital Asset Market Structure and Investor Protection Act of 2021 likewise defines “digital asset” and “digital asset security” and would vest regulatory jurisdiction with the CFTC and SEC.²²

More recently, on July 27, 2023, the House Financial Services Committee approved, with a strong bipartisan 35-15 vote, the Financial Innovation and Technology for the 21st Century Act (“FIT for the 21st Century Act”). The FIT for the 21st Century Act would vest regulatory jurisdiction with the CFTC and SEC, including registration requirements for certain crypto-asset entities.

²⁰ Crypto Crash: Why Financial System Safeguards are Needed for Digital Assets, Hr’g Before the U.S. S. Comm. on Banking, Housing, and Urb. Aff. (Feb. 14, 2023), <https://tinyurl.com/3dve2mnt>; Coincidence or Coordinated? The Administration’s Attack on the Digital Asset Ecosystem, Hr’g Before the U.S. H. Subcomm. on Dig. Assets, Fin. Tech. & Inclusion (Mar. 9, 2023), <https://tinyurl.com/5ydb4hya>; Understanding Stablecoins’ Role in Payments and the Need for Legislation, Hr’g Before the U.S. H. Subcomm. on Dig. Assets, Fin. Tech. & Inclusion (Apr. 19, 2023), <https://tinyurl.com/anexx3rt>; The Future of Digital Assets: Identifying the Regulatory Gaps in Digital Asset Market Structure, Hr’g Before the U.S. H. Subcomm. on Dig. Assets, Fin. Tech. & Inclusion (Apr. 27, 2023), <https://tinyurl.com/4ytksm4h>; The Future of Digital Assets: Identifying the Regulatory Gaps in Spot Market Regulation, Hr’g Before the U.S. H. Subcomm. on Commodity Mkts, Dig. Assets, and Rural Dev. (Apr. 27, 2023), <https://tinyurl.com/bdzck9mf>; The Future of Digital Assets: Measuring the Regulatory Gaps in the Digital Asset Markets, Joint Hr’g Before the U.S. H. Fin. Servs. Comm. & Agric. Comm. (May 10, 2023), <https://tinyurl.com/mr2eddc>; Putting the ‘Stable’ in ‘Stablecoins’: How Legislation Will Help Stablecoins Achieve Their Promise, Hr’g Before the U.S. H. Subcomm. on Dig. Assets, Fin. Tech. & Inclusion (May 18, 2023), <https://tinyurl.com/4shc9wwh>; The Future of Digital Assets: Providing Clarity for Digital Asset Spot Markets, Hr’g Before the U.S. H. Comm. on Agric. (June 6, 2023), <https://tinyurl.com/z44sz9ru>; Building Blockchains: Exploring Web3 and Other Applications for Distributed Ledger Technologies, Hr’g Before the U.S. H. Subcomm. on Innovation, Data & Commerce (June 7, 2023), <https://tinyurl.com/yc7j25yc>; The Future of Digital Assets: Providing Clarity for the Digital Asset Ecosystem, Hr’g Before the U.S. H. Fin. Servs. Comm. (June 13, 2023), <https://tinyurl.com/9wm2jzn6>; Digital Dollar Dilemma: The Implications of a Central Bank Digital Currency and Private Sector Alternatives, Hr’g Before the U.S. H. Subcomm. on Dig. Assets, Fin. Tech. & Inclusion (Sept. 14, 2023), <http://tinyurl.com/26wsz25w>.

²¹ Crypto-Currency Act of 2020, H.R. 6154, 116th Cong. (2020), available at <https://www.congress.gov/bill/116th-congress/house-bill/6154>.

²² Digital Asset Market Structure and Investor Protection Act, H.R. 4741, 117th Cong. (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/4741>.

In the Senate, on July 12, 2023, Sen. Cynthia Lummis (R-Wyoming) and Sen. Kirsten Gillibrand (D-New York) introduced an updated version of their Responsible Financial Innovation Act (“Lummis-Gillibrand Act”), which was originally introduced on June 7, 2022.

The Lummis-Gillibrand Bill would similarly vest the CFTC and SEC with regulatory jurisdiction, but also would go further in assigning regulators to various aspects of the crypto-asset industry: the Financial Crimes Enforcement Network and Office of Foreign Assets Control would also have regulatory authority for illicit financial activity, the Office of the Comptroller of the Currency would be authorized to issue a new form of bank charter for the purpose of issuing a payment stablecoin, and the Federal Trade Commission would receive a \$150 million appropriation to conduct relevant consumer education and enforcement activities. The CFPB would have the limited role of issuing guidance regarding disclosures for crypto-asset intermediary customer agreements. Of significance here, the CFPB would *not* have consumer protection enforcement authority over crypto-asset entities – that authority would be allocated amongst the banking regulators, other licensing and chartering authorities, and a newly created “customer protection and market integrity authority.”

In addition to these comprehensive pieces of legislation, Members of Congress have introduced various bills to regulate specific aspects of crypto-asset activities. For example, Representative Patrick McHenry (R-NC) has introduced the Clarity for Payment Stablecoins Act of 2023, which was approved by the House Financial Services Committee on July 27, 2023. That act would apply tailored prudential standards to issuers of stablecoins, ensuring that they hold high quality assets in reserve for the full value of stablecoins issued, and prescribing disclosure standards around reserve holdings and redemption procedures. Recognizing the bank-like nature of stablecoin issuers, it would place their regulation with the federal banking agencies, or a state payment stablecoin regulator where applicable, and would include a limited role for the CFTC and SEC in overseeing stablecoin custody activities.

In sum, Congress is well aware of the absence of an assigned federal regulator in the crypto-assets industry, and actively considering legislative options to close that gap in order to create a fair and transparent regulatory framework for crypto-assets that would both bolster the industry and protect consumers. None of those options contemplate the CFPB having a role in regulating crypto-assets, and the CFPB cannot preempt that pending decision. Indeed, this activity should preclude the CFPB from proceeding further with regulation of crypto-asset transactions and supervision of companies that facilitate such transactions as Larger Participants.

Any attempt by the CFPB to step in now with the Proposed Rule, as drafted, would only exacerbate the lack of regulatory clarity that Congress is working to cure. Excluding crypto-assets from the Proposed Rule would resolve this confusion.

4. *The CFPB has not developed the necessary record to substantiate the inclusion of crypto-asset transactions in the Proposed Rule alongside mobile wallets and peer to peer transactions.*

The Proposed Rule was designed to cover fiat-based mobile wallets and peer-to-peer payment platforms, and not crypto-asset transactions, as the record is noticeably insufficient to support the latter. The previous studies and other CFPB issuances regarding Big Tech and its role in the payments system, the ample discussion in the preamble of these fiat-based technologies, and the specific rule text geared towards these technologies is all absent for crypto-assets. The CFPB should not complicate or create unnecessary ambiguity in the Proposed Rule by including crypto-asset transactions or defining the “market” using broad umbrella terms. By attempting to include crypto-assets without the necessary supporting record, the scope of the Proposed Rule has become less targeted and focused than the existing larger participant rules, and impermissibly vague.

The CFPB has not undertaken the necessary analysis to include crypto-assets in the Proposed Rule. And its failure to do the legwork required to understand crypto-assets transactions undermines its decision to assert regulatory authority over larger participants that facilitate certain crypto-asset transactions in the proposed market. That lack of due diligence, which stands in stark contrast to the agency’s obligations and its substantial work to understand fiat-based digital payment applications before regulating, creates a serious risk of regulating ineffectively or even harmfully, and virtually ensures that the agency will miss important aspects of the problem.

Before proposing a rule defining a market for digital consumer payment applications, the CFPB took several steps to collect information about fiat-based mobile wallets and peer-to-peer payments platforms. In October 2021, the CFPB ordered six large technology and peer-to-peer platforms that operate payment services (Amazon, Apple, Facebook, Google, PayPal and Square) to provide information about their business practices, including their data collection and use, their policies for removing individuals or businesses from their platforms, and their policies and practices for adhering to key consumer protections like addressing disputes and errors.²³ The CFPB, at the same time, issued a statement and invited interested parties to submit comments to inform the Bureau's inquiry into the six firms.²⁴ In October 2022, the CFPB determined that it was

²³ CFPB Press Release, CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans (Oct. 21, 2021).

²⁴ CFPB, Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms, 86 Fed. Reg. 61182 (Nov. 5, 2021).

appropriate to re-open the October 2021 Federal Register docket and add two questions for public comment pertaining to acceptable use policies.²⁵

In December 2022, in his prepared remarks before the Senate Committee on Banking, Housing, and Urban Affairs, CFPB Director Rohit Chopra outlined concerns over the market dominance of payment apps from large tech firms, and called for Congress to take action to ensure that those systems remain neutral and nondiscriminatory.²⁶ In June 2023, the CFPB published an Issue Spotlight and Consumer Advisory highlighting the risk of maintaining fiat currency balances in payment apps rather than FDIC-insured deposit accounts.²⁷ The Issue Spotlight included in-depth analysis of the structures of payment systems and the ways in which fiat balances held with these apps may or may not be insured. Also in June 2023, the CFPB made the risks of payment apps a focus of the annual report published by its Office of Servicemember Affairs.²⁸

In September 2023, the CFPB published an “issue spotlight” highlighting the impacts of Big Tech companies’ policies and practices that govern tap-to-pay on mobile devices like smartphones and watches. In conjunction with that report, CFPB Director Rohit Chopra spoke at the Federal Reserve Bank of Philadelphia’s Annual Fintech Conference and described payments as “critical infrastructure” and the “plumbing and pipes of our economy.”²⁹ In this speech, Director Chopra also commented on the evolution in the fiat-based payments ecosystem to include increased involvement by large technology companies and the related CFPB inquiry into such companies in 2021. These comments distinguished fiat-based payment platforms from crypto-assets and highlighted the CFPB’s prior efforts to understand the former.

In contrast to the efforts applied to understanding fiat-based mobile wallets and peer-to-peer payments platforms, the CFPB has not engaged in any such formal outreach

²⁵ CFPB, Notice and Request for Comment Regarding the CFPB’s Inquiry Into Big Tech Payment Platforms, 87 Fed. Reg. 67023 (Nov. 7, 2022).

²⁶ See Prepared Statement of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs (Dec. 14, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-statement-of-director-chopra-before-senate-committee-on-banking-housing-urban-affairs/>.

²⁷ See CFPB Issue Spotlight, Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps (June 1, 2023).

²⁸ CFPB, CFPB Report Identifies Issues with Increased Servicemember Use of Digital Payment Apps (June 20, 2023).

²⁹ See Prepared Remarks of CFPB Director Rohit Chopra at the Federal Reserve Bank of Philadelphia’s Annual Fintech Conference, CFPB (Sept. 7, 2023), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-federal-reserve-bank-of-philadelphias-annual-fintech-conference/>.

or research with respect to crypto-asset transactions or the companies that facilitate such transactions. Absent a thorough understanding of crypto-asset transactions, how they work, and the parties involved, the CFPB, through the Proposed Rule, risks materially and adversely impacting the development of the crypto-asset ecosystems in the U.S. and establishing ineffective and/or harmful consumer protection controls.

Of particular importance, the CFPB’s cost-benefit analysis of the Proposed Rule does not mention the costs and benefits of including crypto-assets in the scope of the rule—presumably because it has not yet taken the opportunity to do the necessary work to assess crypto-asset transactions. The CFPB has not provided any analysis of the costs associated with examinations of crypto companies or the compliance concerns that the CFPB could resolve through such examinations. That failure alone is fatal to the Proposed Rule’s inclusion of crypto-assets within its scope.

Because it has not developed the record necessary to support its application to such transactions, the CFPB should exclude crypto-asset transactions from the scope of the Proposed Rule.

5. *The Proposed Rule is procedurally defective because the CFPB is relying on undisclosed data and has not fulfilled its statutory consultation obligations.*

In addition to the substantive problems with including crypto-assets in the Proposed Rule, their inclusion is procedurally defective in two additional ways.

First, the CFPB must “identify and make available ... data that it has employed in reaching the decisions” made in the Proposed Rule.³⁰ Yet the CFPB relied on undisclosed data to justify setting the threshold for a “large participant” at 5 million transactions.³¹ The CFPB must disclose this data and provide an “opportunity to comment” on them.³²

Second, although the statute requires the agency to “consult” with the FTC and other agencies,³³ it is not clear that the CFPB actually did so. Instead, the CFPB merely gave those agencies “the opportunity for consultation.”³⁴ But when Congress commands that one agency consult with another before proposing a rule, it must actually consult with the other agency; merely providing an opportunity for the other agency to weigh in is insufficient particularly where, as here, multiple federal agencies have already expressed conflicting views of their potential authority over the crypto-asset industry.

³⁰ *Window Covering Manufacturers Ass’n v. Consumer Prod. Safety Comm’n*, 82 F.4th 1273, 1283 (D.C. Cir. 2023).

³¹ See 88 Fed. Reg. at 80,209 n. 86, 80,210 n. 90.

³² *Chamber of Commerce v. SEC*, 443 F.3d 890, 900–01 (D.C. Cir. 2006).

³³ 12 U.S.C. §§ 5514(a)(2), 5512(b)(2)(B).

³⁴ 88 Fed. Reg. at 80,119

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Modifying the Proposed Rule to remove crypto-asset transactions from its scope is necessary to solve the issues identified here, and to enable the CFPB to fulfill its statutory obligations and objectives. For these reasons, Coinbase urges the CFPB to reconsider the scope of the Proposed Rule and its application to crypto-assets if it chooses to proceed with the Proposed Rule.

To the extent that the CFPB continues to “believe” that the Proposed Rule should include crypto-assets, the rulemaking process and record must be revisited. Therefore, Coinbase urges the CFPB to:

- Substantiate its rulemaking record with analysis of its legal authority to include crypto- assets in the scope of the Proposed Rule and the supervisory basis to subject crypto-asset transactions to CFPB supervision. This analysis should then be the foundation for application of the defined market to crypto-asset transactions. In order to make an informed assessment of consumer protection risks presented by crypto-asset transactions, the CFPB also should conduct outreach to companies in the crypto-asset industry to understand the products and services made available to consumers, the risks posed to consumers and the protective measures and controls implemented to enhance consumer protection.
- Explain how crypto-asset transactions fit within the Proposed Rule’s market definition and exclusions. The CFPB needs to show how a crypto-asset transaction is a “consumer payment transaction” and “consumer financial product or service” more generally. This requires guidance that walks through the definitions and calls out particular exclusions that may be applicable to common crypto-asset transactions. This explanation is critical to providing a workable roadmap for determining whether a company is a larger participant subject to CFPB supervision.
- Ensure that crypto-asset transactions are subject to a sufficient implementation period. Companies deemed Larger Participants by virtue of their crypto-asset transactions and the CFPB itself will require meaningful time to prepare for and adjust to such a significant transformation of existing regulations, including in particular time for companies and the agency to implement processes to prepare for CFPB supervision. The CFPB has never examined crypto-asset companies, and existing CFPB examination guidance is designed for fiat-denominated financial products and services. During this implementation period, the CFPB needs to issue CFPB examination guidance (e.g., a dedicated part of its CFPB Supervision and Examination Manual) to explain how it will examine crypto-asset companies for compliance with the consumer financial services laws and regulations

administered by the CFPB. At a minimum, a 24-month implementation period and such CFPB examination guidance are necessary given the significance of subjecting crypto-asset companies to CFPB supervision and the examinations across consumer financial services laws that would follow shortly thereafter.