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Comment Intake—LP Payment Apps Rulemaking  
Consumer Financial Protection Bureau  
c/o Legal Division Docket Manager  
1700 G Street NW  
Washington, DC 20552

**Re: Comment on the Proposed Rule Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, Docket No. CFPB-2023-0053**

The DeFi Education Fund (DEF) appreciates the opportunity to submit this comment letter in response to the Consumer Financial Protection Bureau’s (CFPB) proposed rule “Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications” (the “Proposal”).<sup>1</sup> While DEF supports the CFPB’s goals of educating consumers and protecting them from harmful or malicious conduct, the Proposal should not be finalized as written.

By way of background, DEF is a non-partisan research and advocacy group. Our mission is to educate lawmakers about the technical workings and benefits of decentralized finance, achieve regulatory clarity for the future of the global digital economy, and advocate for individual users and developers in the decentralized finance (DeFi) space. DeFi has immense potential to advance innovation in the world economy, and we believe that potential can best be realized in conjunction with smart policy.

Distributed ledger technology, cryptocurrency, and DeFi protocols promote many of the same goals that the CFPB seeks to accomplish with this Proposal, and DEF shares the CFPB’s objective of empowering and protecting consumers. As explained below, users of these technologies have unencumbered access to a more transparent financial system that does not vary depending on who they are, where they are located, or their ability to open an account with a traditional banking institution. However, we have significant concerns with the Proposal: first, as Section II explains, the Proposal’s definitions for the “general-use digital consumer payment applications” market and “larger participants” in that market are vague and make it nearly impossible to decipher which entities will be included.

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<sup>1</sup> See 88 FR 80197 (proposed November 17, 2023), Docket No. CFPB–2023–0053, RIN 3170–AB17, *available at* <https://www.govinfo.gov/content/pkg/FR-2023-11-17/pdf/2023-24978.pdf>

Section III describes how the Proposal does not include an adequate cost-benefits analysis and fails to consider publicly-available resources that could aid in conducting a more thorough analysis. Section IV outlines how the Proposal conflicts with other agencies' interpretation of their own authorities over the same market participants. Hence, we argue in Section V that novel technology requires careful consideration and the CFPB — among other agencies — should await Congressional action before attempting to regulate the digital asset industry.

## I. Overview of Decentralized Finance

DeFi is an umbrella term used to describe decentralized software protocols that can be used to conduct economic activities on blockchain networks. Users of DeFi protocols have open, transparent access to systems that allow them to conduct various types of financial activities without requiring centralized intermediaries or institutions. Instead of relying on centralized intermediaries to establish trust between counterparties in financial transactions, DeFi systems establish trust via rules-based, encoded protocols that allow individuals to transact via blockchain networks.

### *Blockchain Technology Basics*

In a blockchain network, users are connected through a *peer-to-peer* (P2P) computer network, which is composed of two or more nodes who share authority over the validation and storage of data. There is no need for a central server in a P2P network and, therefore, no single entity has control over a blockchain network — hence, they are referred to as “public blockchains.”

Public blockchains are permissionless, decentralized, and immutable ledgers that enable all computers (nodes) participating in a network to (1) hold a record of the history of transactions on the network and (2) reach consensus as to the validity of those transactions. No single entity participating in the network has control over, or can alter, the ledger of transactions.

Users interact with a blockchain using a “wallet.” A wallet is a pair of two numbers — a private key and a public key — that are necessary to interact with a blockchain.<sup>2</sup> A “private key” is nothing more than a randomly selected number in a range that is astronomically large and known only to the user. A “public key” is a cryptographically-generated string of letters and numbers associated with a private key,

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<sup>2</sup> Asymmetric cryptography is an encrypted method of communication using two keys: a public and a private key. The public key is used to encrypt messages (transactions), while the private key is used to decrypt them; both of which belong to the user receiving the message and are mathematically related to each other. For example: Alice sends Bob a message using his public key to encrypt it so Bob can be the only one to open the message. Bob then uses his private key to decrypt the message. Asymmetric cryptography is also used in authenticating the sender's information by producing a digital signature with the sender's private key, which is then verified by the recipient using the sender's public key, as well as the network when validating the transaction. A private key mathematically generates a public key, which then mathematically generates a blockchain address; a public key is used to encrypt and a blockchain address is an identifier for sending and receiving.

but is public-facing. People colloquially refer to a shorter, user-friendly derivative of the public key as the wallet's "address." While there are software programs that assist a user in creating a wallet and executing transactions associated with a wallet, no third party is needed to create or use a wallet.

Self-hosted wallets empower users with complete control over their digital assets by storing both a user's public and private key locally on a user's device (or even by writing the keys down on a piece of paper). Contrary to popular belief, assets are not actually stored "in" a wallet because digital assets are simply digital representations of ownership on a ledger. In reality, only the user's keys that grant access to their assets make up a wallet.

Wallets allow users to interact with "smart contracts," which are software programs that run on a blockchain and automatically execute a function when certain conditions are met. Smart contracts are analogous to a vending machine that automatically releases a bag of chips on the condition that it receives \$2 — the user solely relies on the machine to operate according to the "code" in place. Smart contracts deployed on a blockchain are transparent, secure, and immutable.<sup>3</sup>

### *The Benefits of DeFi*

DeFi protocols are software systems consisting of smart contracts that allow users to engage in various economic activities on blockchains, including the exchange of assets through decentralized exchanges (or "DEXs"), liquidity provision and borrowing, and others. These protocols aim to address challenges and risks inherent in the structure of intermediated financial services, namely, limited access, slow settlement cycles, inefficient price discovery, liquidity challenges, a lack of assurance around underlying assets, opaqueness, broker risk, and uptime issues. DeFi protocols can be distinguished from traditional and centralized exchanges and other market infrastructures in several ways, but most importantly, in that users exercise total independent control over their assets. Instead, assets are held by users in self-hosted wallets or through smart-contract based escrow.<sup>4</sup>

By allowing market participants to transact directly utilizing open-source software, DeFi protocols provide the following benefits to consumers:

- Increased transparency: DeFi protocols increase operational transparency about the mechanics of market infrastructures and associated fees by using open-source software, which makes transactions more transparent and auditable by using blockchain-based records.

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<sup>3</sup> While smart contracts are immutable once they are deployed, users may create intermediary or proxy contracts that redirect calls and transactions to a modified contract as a way of updating an earlier contract.

<sup>4</sup> Before making a transaction, tokens are transferred to a smart contract called escrow. The escrow holds the deposited tokens until the payment conditions are satisfied. The escrow is not controlled by any designated third party.

- Equitable market access: DeFi protocols are open and available to anyone in the world with an internet connection, giving them the potential to significantly expand access to financial services.<sup>5</sup> That access empowers more people to use financial services without having to go through intermediaries who may prevent sectors of the market from participation through unavailability, absolute prohibitions, excessive pricing, or unfair or discriminatory treatment. This includes rural communities in the United States that have limited access to banking options.<sup>6</sup>
- 24/7/365 liquidity: Users can access and use markets at all times of the day without the need for closing markets at the end of each day. Among other things, this eliminates the risk of capital dislocations due to illiquid aftermarket trading in traditional systems.
- Lower costs and faster settlement: DeFi protocols reduce friction and transaction costs for the creation, distribution, trading, and settlement of financial assets with faster settlement times for users.<sup>7</sup>
- Improved security: Transactions using DeFi protocols are recorded on blockchains, the records of which cannot be manipulated or amended, offering greater security to users.
- Greater control: The absence of intermediaries in DeFi protocols provides stakeholders greater control and certainty. Additionally, in some instances, market participants can directly develop community-governance standards.
- Greater Uptime: Permissionless blockchains are operationally resilient (the Ethereum blockchain has never gone down), whereas traditional exchanges have had major technology failures resulting in downtime for securities markets. Additionally, the use of certain DeFi protocols

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<sup>5</sup> See, e.g., Bitange Ndemo, The role of cryptocurrencies in sub-Saharan Africa, Brookings Institution (March 16, 2022), <https://www.brookings.edu/blog/africa-in-focus/2022/03/16/the-role-of-cryptocurrencies-in-sub-saharan-africa>.

<sup>6</sup> The CFPB suggests that the Proposal “should not have a unique impact on rural consumers.” See Proposal, pg. 80214. However, the CFPB may have underestimated the benefits that digital payment technology provides those communities, whose best access point to financial services is through their phone rather than a brick-and-mortar branch. By placing additional burdens on digital payment technology providers, the Proposal may also limit rural communities’ access to such technology.

<sup>7</sup> To be sure, users of DeFi protocols may pay certain fees, such as gas fees, to facilitate use of the protocol. But any comparison of costs should also account for the fact that DeFi users do not additionally need to compensate other intermediaries such as executing brokers, prime brokers, clearing brokers, or custodians. On balance, this typically leads DeFi protocols to be available to users at lower costs than centralized exchanges and traditional banking institutions. As additional blockchains are created and new technology, such as scaling solutions, are developed, costs for transacting using DeFi protocols likely will continue to decrease.

referred to as automated market makers eliminates trading halts that occur at times as a result of buy and sell order imbalances.

- Eliminate broker risk: DeFi protocols have no employees to supervise, no financial risk for users from broker activity or custody, and no interaction between a broker and customers that could result in unlawful sales practices or other unfair and discriminatory dealing.
- Eliminate anti-competitiveness: Users can easily move their cryptocurrencies from one protocol to another at any time without significant friction, unlike the experience on traditional exchanges where sharing liquidity across exchanges is near-impossible, resulting in a lack of competition.

DeFi protocols are already making substantial contributions to financial innovation generally and in the U.S. specifically. The Official Monetary and Financial Institutions Forum observed that DeFi is being harnessed for the public good and has spurred innovation in the banking system.<sup>8</sup> Academic scholarship has discussed how DeFi protocols benefit efficiency, by “significantly decreas[ing] counterparty credit risk”; how they benefit transparency, by offering more publicly available data during a crisis than the data “scattered across a large number of proprietary databases or not available at all” in traditional financial systems; how they benefit accessibility, as “the risk of discrimination is almost inexistent due to the lack of identities”; and how they benefit composability, by creating “an ever-expanding range of possibilities and unprecedented interest in open financial engineering.”<sup>9</sup>

## **II. The Definitions for the “General-Use Digital Consumer Payment Applications” Market and “Larger Participants” of that Market Are Vague and Difficult to Apply**

The Proposal’s definitions of the new market for “general-use digital consumer payment applications” and “larger participants” in that market are irreconcilably vague and will be nearly impossible for potential market participants to parse. As written, the definitions make it difficult to determine which entities will be included in the overall market and even more difficult to apply the “larger participant” test in an intelligible way. This lack of clarity means any reading of the definitions will also result in far more entities being designated as “larger participants” than what is estimated in the Proposal.<sup>10</sup>

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<sup>8</sup> See Official Monetary and Financial Institutions Forum, *Harnessing Decentralised Finance Innovation for the Public Good* (July 20, 2021), *Harnessing decentralised finance innovation for the public good - OMFIF*.

<sup>9</sup> See, e.g., Fabian Schär, *Decentralized Finance: On Blockchain- and Smart Contract-Based Financial Markets*, *Federal Reserve Bank of St. Louis Review* (Second Quarter 2021) at 169, *available at* <https://research.stlouisfed.org/publications/review/2021/02/05/decentralized-finance-on-blockchain-and-smart-contract-based-financial-markets>.

<sup>10</sup> See Proposal, pg. 80215 (estimating that there are currently 17 larger participants in the proposed market).

### *The Proposed Market Definition Is Vague*

The Proposal's "market definition" in §1090.109(a)(1) is vague as to which digital consumer payment application providers will be included in the new market.<sup>11</sup> Breaking down the definition into sub-parts for clearer discussion, the proposed market includes anyone who provides "a general-use digital consumer payment application," which "means [1] providing a covered payment functionality through a digital application [2] for consumers' general use in making consumer payment transaction(s)."<sup>12</sup>

First, the definition of "providing a covered payment functionality," and the included sub-definitions of "funds transfer functionality," and "wallet functionality,"<sup>13</sup> are impermissibly vague. The definition of "funds transfer functionality" might describe an application provider who plays an intermediary role, such as when a service provider receives and transmits funds on behalf of a consumer. However, it might also include a software developer who creates an application that simply communicates payment instructions without ever taking custody of such funds. And while the definition of "wallet functionality" would pull in any application that securely stores and processes account or payment credentials to facilitate transactions, it might also improperly include any user who uses a self-hosted wallet. Additionally, wallet software applications could meet the definition of "wallet functionality" even when such applications simply store a user's private and public keys and do not in any way assist in a user completing a transaction. Software developers and individual users should not be included in the proposed new market as if they are "larger participant" business entities appropriately subject to CFPB supervision, and the Proposal should be clarified so as to ensure they are not captured.

Second, the proposed market would include any digital consumer payment application provider who provides an application "for consumers' general use in making consumer payment transactions," which is just as vague. While the definition of a "consumer payment transaction" seems to narrow the universe of application providers to include only those facilitating transactions "primarily for personal, family, or household purposes," the addition of "for consumers general use" creates ambiguity and renders that narrowing moot. The proposed definition of "general use" makes clear that there are *not* "significant limitations on the purpose of consumer payment transactions" so as to exclude software providers from the market.<sup>14</sup> And the "general use" definition goes on to say that providers of

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<sup>11</sup> See Proposal, pg. 80205.

<sup>12</sup> Proposal, pg. 80215 (proposed addition to 12 CFR part 1090, § 1090.109(a)(1) "Market definition. Providing a general-use digital consumer payment application means providing a covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s) as defined in this subpart.")

<sup>13</sup> See Proposal, pg. 80205.

<sup>14</sup> Proposal, pg. 80206-80207.

applications that facilitate “person-to-person transfers” generally would be included in the market.<sup>15</sup> However, many person-to-person transfers are not made for “personal, family, or household purposes.” If an application is primarily used for purposes unambiguously beyond the scope of the Proposal but could also be used to conduct “personal, family or household” transactions, it is unclear whether such an application provider would be included in the defined market, as proposed. Accordingly, as written, it is impossible to parse which payment applications that allow for person-to-person transfers would *not* be included in the proposed market.

#### *The Larger Participants Test Is Nearly Impossible to Apply*

While the Proposal purports to subject only “larger participants” of the proposed market to CFPB supervision, the “test to define larger participants” is so vague that it will be next to impossible to apply in practice. A “larger participant” of the digital consumer payment application market is an entity that “provides annual covered consumer payment transaction volume . . . of at least five million transactions” and is not a small business as defined by statute.<sup>16</sup> As discussed above, “consumer payment transactions” include person-to-person payments made “primarily for personal, family, or household purposes.”<sup>17</sup> However, the vast majority of digital payment applications do not currently collect or are not capable of collecting data concerning the purpose for which a fund transfer is made. This is especially true for wallet software application providers who merely write the code that makes it possible for an individual user to store and use their private keys to complete a transaction — such a software developer would have no ability to ascertain the purpose of a user’s transaction. While it therefore may be possible to ascertain the total amount of transactions processed by an application, there would be no way to determine how many transactions count for the purpose of the “larger participant” test. Accordingly, it would not be possible for a software developer to determine whether it is in fact a larger participant of the proposed market subject to CFPB regulation.

#### *The Proposal’s Criteria Could Encompass Independent Software Developers*

The Proposal is also vague to the extent that the larger participant test can be understood to include individual software developers who may not qualify as “small business concerns” under the

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<sup>15</sup> The “general use” definition does include exceptions for payment functionality provided “solely” for specific purposes such as the purchase or lease of services, goods, property, transportation, lodging, etc. However, these are not actually that limiting. There are far fewer single-use applications that relate only to one transaction purpose than there are general payment applications that facilitate person-to-person transactions for a variety of reasons. And for the latter applications, as discussed herein, it will be nearly impossible for any entity to determine the purpose of the vast majority of user transactions.

<sup>16</sup> Proposal, pg. 80208.

<sup>17</sup> Proposal, pg. 80201.

Small Business Act.<sup>18</sup> As currently drafted, any individual software developer or small group of developers who does not meet the definition of a “small business concern” but provides an application that processes five million covered transactions could be a “larger participant” of the proposed market. This is inherently at odds with the remainder of the Proposal, which explicitly states that only larger entities are meant to be captured.<sup>19</sup>

The Small Business Act’s definition for a “small business concern” may not include software developers who act independently in developing software that many people use but are, in fact, small businesses.<sup>20</sup> Subjecting such small businesses or independent software developers to CFPB examinations could be an existential crisis, as the cost of responding to a subpoena or producing documents can be exorbitantly expensive. Federal agencies must consider the realities of current technologies and industries in their rulemakings — in fact, it is paramount to sustaining free competition in the American economy. The Proposal does not address the increasingly common reality that many independent software developers write code on their own and do not work for a large company, and simply cannot afford to participate in a CFPB examination alongside the true “larger participants” the Proposal hopes to capture. For this reason, the Proposal should be revised to be more specific in its criterion or simply exclude independent software developers.

### **III. The Proposal Fails to Engage in an Adequate Cost-Benefit Analysis**

The Proposal does not include a sufficient cost-benefit analysis of the proposed regulations. First, the Proposal admits that its cost-benefit analysis is limited because “limited data [was] available with which to quantify the potential benefits, costs, and impacts of the Proposed Rule”<sup>21</sup>: “the CFPB lacks sufficient information on a substantial number of known market participants necessary to estimate their larger-participant status.”<sup>22</sup> The Proposal then goes on to include only “a qualitative discussion of the benefits, costs, and impacts of the Proposed Rule” based on “general economic principles” and “limited data that are available” rather than a quantitative analysis.<sup>23</sup> However, predicated on the Proposal

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<sup>18</sup> Proposal, pg. 80209, 80216 (proposed § 1090.109(b)(2), excluding from the larger participant pool small business concerns “as that term is defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a) and implemented by the Small Business Administration under 13 CFR part 121, or any successor provisions.”).

<sup>19</sup> See, e.g., Proposal, pg. 80209 (“The CFPB . . . does not seek to use this rulemaking as a means of expending its limited supervisory resources to examine small business concerns . . . In light of its resources, the CFPB believes that it would be preferable to focus on larger entities, instead of requiring all entities with an annual covered consumer payment transaction volume over five million to be subject to supervisory review under the Proposed Rule.”).

<sup>20</sup> See Small Business Act, 15 U.S.C. 632(a).

<sup>21</sup> Proposal, pg. 80211.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*



adopting clear definitions, there are numerous publicly-available resources that the CFPB should consult in order to undertake the quantitative analysis it abandoned. Specifically, in order to gain a better understanding of the amount of “consumer payment transactions” occurring in the digital asset industry, the CFPB should consult data on public blockchains — which can also be analyzed using forensic tracing tools,<sup>24</sup> as well as publicly available analyses of blockchain data trends.<sup>25</sup>

Second, the Proposal vastly underestimates the costs of applying the large participant test to digital payment application providers who do not already collect information on the purpose of transactions. Businesses in the digital asset industry, including software developers, do not typically collect the information necessary to distinguish covered transactions from other transactions, preventing them from determining their potential categorization as a large participant. Currently, public blockchain displays wallet addresses of the sender and receiver, type of digital asset, transaction amount, timestamp, and other details unique to the particular transaction; however, it does not identify the purpose of a transaction nor the wallet software used to conduct a transaction, which is necessary information for determining whether a transaction is covered under this Proposal.<sup>26</sup> Therefore, all potential market participants who process a large number of transactions in general would need to newly develop and implement a transaction purpose identification and collection system, which may not even be possible for some digital asset businesses. This is a significant burden that the Proposal fails to account for in its cost-benefit analysis.

Last, putting aside the vagueness of the Proposal’s definitions and the difficulty in applying them precisely, it is clear from a plain language reading of the Proposal that the CFPB is vastly underestimating just how many participants of this new market are likely to be included and meet the threshold requirement for larger participants. The Proposal claims that it is aware of only 17 entities that currently meet the larger participant test based on the limited data the CFPB analyzed.<sup>27</sup> However, given the prevalence of widely-used digital payment applications in the market right now — a simple Google

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<sup>24</sup> For example, Chainalysis, TRM and Elliptic provide forensic blockchain analytic tools that monitor transactions and develop data reports. These tools are already widely used by government agencies and their data has been accepted by U.S. courts. *See, e.g., Nelson, Danny, “Crypto Analytics Tools ‘Wave of the Future, Dude,’ Judge Quotes Cult Film in \$3.6B Bitcoin Seizure Case” (Feb. 9, 2022), available at <https://www.coindesk.com/policy/2022/02/09/crypto-analytics-tools-wave-of-the-future-dude-judge-quotes-cult-film-in-36b-bitcoin-seizure-case/> (“IRS-CI has signed multimillion-dollar contracts with Chainalysis, Elliptic and TRM Labs; all had something to say following yesterday's news.”); “Chainalysis Takes the Stand: How Expert Testimony Helped Convict the Creator of Two Fraudulent ICOs” (Aug. 10, 2022), available at <https://www.chainalysis.com/blog/flik-coinspark-icos-chainalysis-expert-testimony/>.*

<sup>25</sup> *See Circle, The State of the USDC Economy (2022), available at [https://www.circle.com/hubfs/PDFs/2301StateofUSDCeconomy\\_Web.pdf](https://www.circle.com/hubfs/PDFs/2301StateofUSDCeconomy_Web.pdf). Also, Chainalysis, The 2023 Global Crypto Adoption Index (September 12, 2023), available at <https://www.chainalysis.com/blog/2023-global-crypto-adoption-index/>.*

<sup>26</sup> *See Proposal, pg. 80215-80216.*

<sup>27</sup> *See Proposal, pg. 80215 (estimating that there are currently 17 larger participants in the proposed market).*

search for “digital payment application” returns a multitude of hits - it seems likely that there are far more than 17 entities that would meet the larger participant test and be subject to CFPB oversight. The CFPB has clearly underestimated the cost to the digital payment market as a whole by under-including the number of entities that will be considered larger participants required to comply with CFPB regulations.

#### **IV. The Proposal Runs Contrary to President Biden’s “Whole-of-Government” Approach to Digital Assets**

By asserting broad authority over the digital assets market, the Proposal strays from President Joe Biden’s “whole-of-government” approach to addressing policy questions posed by digital assets and fails to wrestle with other agencies’ claimed authorities over the same market participants. As a result, the Proposal is also incompatible with the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank).<sup>28</sup>

In March of 2022, President Biden issued an Executive Order on Ensuring Responsible Development of Digital Assets (the “EO”).<sup>29</sup> The EO directs coordination between federal agencies — including the CFPB — for the development and use of digital assets. The President refers to this approach as a “whole-of-government” effort.<sup>30</sup> President Biden specifically calls upon agencies to work together in crafting a coordinated approach to regulating digital assets.<sup>31</sup>

However, the at times contradictory positions adopted by a variety of federal agencies — including from the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Treasury Department, and now the CFPB — undermine the President’s coordination effort and propagate a competitive playing field among agencies for authority over the

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<sup>28</sup> See 12 U.S.C. § 5517 (2010), available at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title12-section5517&num=0&edition=prelim>.

<sup>29</sup> See Executive Order on Ensuring Responsible Development of Digital Assets (March 9, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>

<sup>30</sup> *Id.*, Section 8(b)(i).

<sup>31</sup> *Id.* Section 2 (Objectives); Section 3 (Coordination) (the EO specifically calls on “the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Labor, the Secretary of Energy, the Secretary of Homeland Security, the Administrator of the Environmental Protection Agency, the Director of the Office of Management and Budget, the Director of National Intelligence, the Director of the Domestic Policy Council, the Chair of the Council of Economic Advisers, the Director of the Office of Science and Technology Policy, the Administrator of the Office of Information and Regulatory Affairs, the Director of the National Science Foundation, and the Administrator of the United States Agency for International Development.”).

digital asset space. In this instance, the incompatibility under Dodd Frank of the Proposal with the SEC's assertion that digital assets embody securities proves the point.

The enactment of Dodd Frank created the CFPB in response to the 2007-2008 financial crisis. In doing so, Congress was careful not to undermine existing agencies and clearly delineated that each agency must "consult and coordinate" with other agencies in an effort to limit and preserve authorities of those agencies.<sup>32</sup> Indeed, Dodd Frank explicitly limits the CFPB's authority in areas that are already regulated by other agencies — among them, the securities markets regulated by the SEC and the futures and derivatives markets regulated by the CFTC.<sup>33</sup> While Congress has yet to weigh in on whether cryptocurrencies are securities, commodities, or something else entirely, it is clear that several agencies have a view of their own jurisdiction in the markets, as expressed through enforcement actions and rulemakings. The Proposal does not include any consideration of coordinating with these other agencies to clearly delineate in which jurisdiction a digital asset will fall.

To put an even finer point on it, the CFPB's Proposal would sweep transactions into its supervision orbit over which the SEC has already claimed authority. For example, the Proposal defines "wallet functionalities"<sup>34</sup> in a manner that could include developers of self-hosted wallets and bring them into the CFPB's supervisory remit. However, in both 2022 and 2023, the SEC proposed a rulemaking that would define certain self-hosted wallets as exchanges and require their developers to register with the SEC.<sup>35</sup> Additionally, the SEC filed a lawsuit against Coinbase in 2023 for developing its wallet application, alleging that Coinbase engaged in broker activity by providing Coinbase Wallet.<sup>36</sup> But under Dodd Frank, an SEC-regulated activity cannot also be regulated by the CFPB. If the Proposal is finalized in its current form, it will introduce additional statutory contradictions and digital asset market participants will be further relegated to a gray area of shifting agency jurisdiction and regulation.

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<sup>32</sup> 12 U.S.C. § 5517 (2010).

<sup>33</sup> 12 U.S.C. § 5517(i)(1), (j)(1) (2010).

<sup>34</sup> See Proposal, pg. 80205.

<sup>35</sup> See SEC, "Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities" (Mar. 18, 2022), 87 FR 15496, Release No. 34-94062 (initially reopened on May 12, 2022, at 87 FR 29059); SEC, "Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange"" (May 5, 2023), 88 FR 29448, Release No. 34-97309, available at <https://www.federalregister.gov/documents/2023/05/05/2023-08544/supplemental-information-and-reopening-of-comment-period-for-amendments-regarding-the-definition-of>.

<sup>36</sup> *Securities and Exchange Commission v. Coinbase, Inc. and Coinbase Global, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. 2023).

## V. The Proposed Rule Should Not Be Finalized Before Congressional Action

The CFPB — like other agencies — should await Congressional action before prematurely implementing regulations that would affect novel digital asset-related activities. The competing and incompatible regulatory positions discussed above demonstrate that novel digital asset-related activities do not fit into existing laws and regulatory regimes. A technology that cultivates new opportunities for progress and prosperity requires informed Congressional debate so as to develop an appropriate framework for fostering innovation while mitigating risk.

Indeed, Congress is currently and actively engaged in this legislative process: in the second half of 2023, no less than four bills relevant to the digital asset-related issues considered in the Proposal passed through three congressional committees. First, the Financial Innovation and Technology for the 21st Century Act — passed by both the House Financial Services Committee and the House Agriculture Committee — would create a comprehensive and bespoke regulatory framework for digital asset markets under the purview of the SEC and CFTC.<sup>37</sup> Second, the Clarity for Payment Stablecoins Act — passed by the House Financial Services Committee — would establish federal oversight over the issuance and management of stablecoins, a type of digital asset well-suited for conducting payments.<sup>38</sup> Third, the Deploying American Blockchains Act — passed unanimously by the House Energy and Commerce Committee — aims to promote the United States' competitiveness in blockchain development and requires the Secretary of Commerce to engage with the public and coordinate across federal agencies to that end.<sup>39</sup> Fourth, the Consumer Safety Technology Act — also passed unanimously by the House Energy and Commerce Committee — requires the Secretary of Commerce and Federal Trade Commission to study and report on the use of blockchains in commerce and consumer protection.<sup>40</sup>

Given the sheer number of proposed bills currently or soon to be in active consideration in Congress, the CFPB should allow the legislative process to play out before imposing additional regulatory burdens on the digital asset market.

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We sincerely appreciate the opportunity to provide comments on the Proposal. If you have any questions or comments regarding this letter, please do not hesitate to contact the undersigned at [miller@defieducationfund.org](mailto:miller@defieducationfund.org) and [lizandro@defieducationfund.org](mailto:lizandro@defieducationfund.org).

Sincerely,

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<sup>37</sup> H.R. 4763, 118th Cong. (1st Sess. 2023).

<sup>38</sup> H.R. 4766, 118th Cong. (1st Sess. 2023).

<sup>39</sup> H.R. 6572, 118th Cong. (1st Sess. (2023).

<sup>40</sup> H.R. 4814, 118th Cong. § 202 (1st Sess. 2023).



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