BLOCKCHAIN ASSOCIATION

January 8, 2024

Via E-mail (2023-NPRM-PaymentApps@cfpb.gov)

Emily Ross
Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Defining Larger Participants of a Market for General-Use Digital Consumer Payment (RIN 3170-AB17; Docket No. CFPB-2023-0053; Fed. Reg. No. 2023-24978)

Ms. Ross:

Blockchain Association (the "Association") submits this letter in response to the request for comments by the Consumer Financial Protection Bureau (the "CFPB") regarding its proposed rule to define a market for general-use digital consumer payment applications (the "Proposed Rule")[1].

The Association is the leading nonprofit membership organization dedicated to promoting a pro-innovation policy environment for the digital asset economy. The Association endeavors to achieve regulatory clarity and to educate policymakers, regulators, courts, and the public about how blockchain technology can pave the way for a more secure, competitive, and consumer-friendly digital marketplace. The Association represents over 100 member companies reflecting the wide range of the dynamic blockchain industry, including software developers, infrastructure providers, exchanges, custodians, investors, and others supporting the public blockchain ecosystem.

The Association writes to highlight issues the CFPB should weigh as it considers the Proposed Rule's application to digital assets. In particular, we (1) provide an overview of digital assets, with particular attention on their use in the consumer-payments context and the unique technology powering digital assets, and (2) offer suggestions for how the CFPB can better address the complexities of the digital asset sector. As a threshold matter, the CFPB has not established jurisdiction over digital assets by way of an independent rulemaking process, which it must do if it seeks to supervise the sector. Putting that issue aside, the CFPB should clarify the Proposed Rule so as to avoid pulling in unintended developers or those technologically unable to assess whether they are covered. To do that, the CFPB should narrow the rule to expressly exclude digital assets.

[1] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80215 (Nov. 17, 2023).

I. Overview of Digital Assets as a Form of Consumer Payment

The Proposed Rule would define the new market to encompass those "providing a covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s)."[2] The CFPB defines "consumer payment transaction(s)" to cover most payments involving a transfer of "funds," where "funds" is presumed to include mediums beyond fiat currency.[3] The Proposed Rule indicates that it reaches "digital assets that have monetary value and are readily usable for financial purposes."[4] Given the Proposed Rule's purported application to digital assets, which the Association contests, we write to offer our perspective as the leading trade organization for the digital asset industry.

Digital assets are a nascent but growing method for consumer payments. According to recent surveys, approximately 2,352 US businesses accept bitcoin as a form of payment.[5] This number is only expected to increase, given that 85% of business leaders predict that the use of digital currencies will become more widespread and 64% of merchants believe their customers have a significant interest in using digital currencies.[6] As of 2021, about 23% of U.S. consumers — nearly 59.6 million people — owned at least one cryptocurrency,[7] and nearly one-third of those consumers had used a digital currency to make a payment.[8] Using digital assets for consumer payments offers consumers several benefits that do not exist in using traditional forms of payment. Consumers have the opportunity to privately initiate peer-to-peer payments, without the need for an intermediary, who may charge high fees, have slower transaction times, and be vulnerable to cybersecurity or data breaches.

To initiate a payment using digital assets, a consumer must have a digital asset wallet, which holds digital assets. Each wallet contains a set of public addresses and a private key. A public address, simply a series of letters and numbers, is akin to an email address—if person A wishes to send person B digital assets, person A must know person B's public wallet address. And, for person A to initiate such payment, person A must approve the transaction using a private key—akin to a password. A consumer may hold digital assets in either a custodial wallet or a non-custodial wallet.

Custodial wallet services are the more prominent kind of payment functionality. As their name suggests, the third-party service holds custody of the users' digital assets by holding the users' private keys. That third-party manages access to the digital assets held in the custodial wallet,

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[2] *See id.* at 80215.
[3] *Id.*
[4] *Id.* at 80202.
[5] Deloitte, The Use of Cryptocurrency in Business, http://tinyurl.com/mtbvje3d.
[6] Deloitte, Digital Currency Payments and Merchant Adoption Survey, http://tinyurl.com/6cmbxjnw.
[7] PYMNTS.com (with BitPay). "Paying with Cryptocurrency: What Consumers and Merchants Expect from Digital Currencies." Accessed Dec. 8, 2023.
[8] PYMNTS.com (with BitPay). "Paying with Cryptocurrency: Can Crypto At Checkout Become a Profit Center for Merchants?" Accessed Dec. 8, 2023.

transmittal of those assets, and security protocols for the wallet. Though custodial wallet services may solicit certain user information as part of the user onboarding process and hold users' private keys, they often have limited insight into user activity—particularly when users interact with off-platform wallets or services.

Non-custodial (sometimes referred to as unhosted or self-custodial) wallet software is different. It provides an interface for users to hold digital assets and then to transact them on various blockchains. Importantly, non-custodial wallets provide the user a means of locally generating, storing, managing, and securing the private security key for his or her account on the blockchain. The software developer cannot access that data. Nor does the developer know the identity of the wallet's users, track users' transactions, or otherwise collect AML/KYC information. This absence of a third-party intermediary is a feature, not a bug. Users of non-custodial wallet software are safe from risks associated with entrusting one's personal information and finances to an intermediary, including that the intermediary may be hacked, default, or defraud the user. A consumer's ability to hold his or her own assets in the same way that a person can keep cash in a physical wallet eliminates the many risks of middlemen or intermediaries.

II. Recommendations for Revising the Proposed Rule

The Proposed Rule seeks to use the CFPB's "larger participant" authority under the Consumer Financial Protection Act[9] to create a newly defined market of "general-use digital consumer payment applications."[10] The new market would encompass those "providing a covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s)" and identify nonbank covered persons as "larger participants" if they facilitate at least five million transactions in a calendar year and are not a "small business concern" under the Small Business Act.[11]

The CFPB has failed to establish that it can properly extend "larger participant" authority to reach digital assets. The hollow assertions included in the Proposed Rule are insufficient, both substantively and procedurally, to expand CFPB supervisory authority over entities providing for the transfer of digital assets. Nevertheless, in an effort to record all concerns raised by the Proposed Rule, the Association responds to it in its entirety. Our doing so should not be interpreted as a waiver of this position.

The Association recommends that given the Proposed Rule's insufficient analysis of the complexities associated with applying the same rules to both traditional financial entities and entities operating in the digital asset sector, the CFPB should expressly limit the Proposed Rule to apply only to transactions in fiat currency and omit the Proposed Rule's application to digital assets entirely. At a minimum, the CFPB must reframe the Proposed Rule to ensure it does not

[9] *See* 12 U.S.C. § 5514(a)(1)(B), (a)(2).
[10] *See* 88 Fed. Reg. 80197.
[11] *Id.* at 80215–16.

accidentally sweep in smaller participants, such as by raising the annual transaction threshold, evaluating each company's transactions separately, and assessing whether entities qualify based on at least two consecutive years of data. The CFPB should also make clear that the Proposed Rule does not apply to non-custodial wallet software developers, for whom assessment of "larger participant" status would be very nearly impossible. Regardless of how the CFPB chooses to proceed, it is essential that the CFPB revise the Proposed Rule to fully comply with all legal and regulatory guidelines, including those discussed herein.

A. The CFPB has failed to establish jurisdiction over digital assets.

The CFPB has not established that digital assets are "funds," which is a prerequisite to determining that the transfer of digital assets can qualify as a "consumer payment transaction" under the Proposed Rule. This failure to address a threshold issue means that the Proposed Rule cannot, at this time, apply to *any* application of digital assets, custodial or otherwise. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). For this reason, the Association only comments on the entirety of the Proposed Rule for the sake of completeness.

The CFPA[12] gives the CFPB supervisory authority over "larger participants" of a market for consumer "financial products or services,"[13] a term that is defined as "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."[14] The CFPA does not define "funds."[15] Nevertheless, the CFPB asserts in the Proposed Rule that the term "funds" is "not limited to fiat currency or legal tender, and includes digital assets[.]"[16]

This sweeping declaration is flawed as a matter of substance. When the CFPA was passed in 2010, digital asset technologies were in their infancy—the Bitcoin network only came into existence in 2009. Given that none other than bitcoin existed, it is unlikely that the word "funds" was ever meant to encompass these technologies. If there is anything in the legislative history or related case law that suggests otherwise, the CFPB fails to identify it. Instead, the CFPB relies on cases examining whether digital assets are "funds" as that term is used in a federal anti-money laundering statute. *See United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (citing 18 U.S.C. §§ 1956, 1960). But it is unclear how that could have any relevancy to whether digital assets are "funds" for purposes of the CFPA, and the CFPB does not elaborate.

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[12] Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 1955 (2010) (hereinafter, ''CFPA'').
[13] 12 U.S.C. § 5514(a)(1)(B), (a)(2); see also *id.* § 5481(5) (defining ''consumer financial product or service'').
[14] *Id.* § 5481(15)(A)(iv).
[15] 88 Fed. Reg. at 80202.
[16] *Id.*

In any event, this purported extension of authority also fails as a matter of procedure. In order to properly exert supervisory authority over the digital asset industry, the CFPB would have to engage in a separate rulemaking that considered all "important aspect[s] of" whether digital assets are "funds." *State Farm*, 463 U.S. at 43. A five sentence declaration in the proposing release of an unrelated rulemaking clearly fails to meet that standard.

B. <u>The CFPB should expressly limit its market definition to reach only fiat currency-based transactions.</u>

Even if the CFPB had properly established jurisdiction, the scope of the Proposed Rule's application to digital assets is not fully clear. The Proposed Rule declines to "fully address[] the scope of th[e] term" "funds," but it notes that "digital assets" count as "funds" if they "have monetary value and are readily usable for financial purposes."[17] The Proposed Rule suggests that digital assets fall into this category if they are "[c]rypto-assets, sometimes referred to as virtual currency." But not all digital assets are a form of virtual currency and the Proposed Rule would leave open cases where it is ambiguous whether the asset qualifies as "funds." For example: non-fungible tokens or "NFTs" are digital assets that have monetary value and can be used for financial purposes, but are not used as a form of fungible currency. NFTs serve a variety of purposes—they may be used by an artist to monetize their artwork, they may be used as a brand to facilitate a customer rewards program, or they simply may create a digital record of a unique item such as a car, house, or collector's item. Even a casual observer would be unlikely to consider an NFT to be a form of virtual currency. And there are many, many use cases that pose a similar problem. Services tokens like tokenized event tickets, securities, and loyalty points program tokens, are just a few more examples of digital assets that might be incorrectly construed as "funds."

Given the complexities associated with digital assets as a consumer payment method, and the resulting difficulties providers will have in assessing how they fare under the "larger participant" threshold, the CFPB should expressly limit its market definition to reach only fiat currency-based consumer payments, or otherwise exclude digital assets from the reach of this Proposed Rule. The CFPB has previously recognized that the "complexities" of a sub-market can support carving it out from immediate regulation in a "larger participant" rule.[18] The CFPB should follow that precedent here, or, at a minimum, justify any departure from it. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923–24 (D.C. Cir. 2017).

[17] *Id*. at 80202.
[18] *Id*. at 80203 (citing Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56631, 56635 (Sept. 23, 2014)).

C. <u>The CFPB should take care not to accidentally sweep in smaller market participants.</u>

The CFPB correctly recognizes that, in exercising its supervisory authority over larger market participants, it should only regulate market participants with enough transactions that they play an "important role" in the market.[19] But aspects of the Proposed Rule risk sweeping in smaller entities. The CFPB should therefore tighten the criteria for "larger participant" status in the Proposed Rule, to ensure that the Rule does not unwittingly capture entities that the CFPB is not intended to regulate through this authority, and for whom the burdens of CFPB supervision would be unreasonably demanding.

In the Proposed Rule, the CFPB notes that it is considering "one major alternative" to the Proposed Rule: "choosing a different transaction volume threshold to define larger participants."[20] The Association urges the CFPB to adopt such an alternative; specifically, the CFPB should raise the annual consumer-to-consumer or consumer-to-business transaction threshold.[21]

The CFPB expressed concern that were it to raise the threshold, "the benefits of supervision to both consumers and covered persons would likely be reduced because entities impacting a substantial number of consumers and/or consumers in important market segments might be omitted."[22] But the CFPB's own findings belie this worry. The CFPB found that "the market for general-use digital consumer payment applications is highly concentrated, with a few entities that facilitate hundreds of millions or billions of consumer payment transitions annually[.]"[23] This suggests that the threshold should be much higher than five million, as the vast majority of transactions and users are going to be captured by applications that process millions and, in some cases, billions more transactions annually.

The CFPB argues that five million is nonetheless a reasonable threshold because "certain populations of consumers, including more vulnerable consumers, may not transact with the very largest providers and instead may transact with the range of other providers that exceed the five million transaction threshold."[24] But the CFPB offers no basis for this assumption, much less any evidence that this is actually the case. It is essential that it provides that data and analysis here, as the CFPB's supervisory authority does not *per se* apply to "a substantial portion of the market"

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[19] *Id.* at 80210.
[20] *Id*. at 80214.
[21] The CFPB should query whether the threshold should be based on relative transaction volume rather than on a static number of transactions that may not appropriately reflect organic growth of the digital payments market. For instance, if in the future there are 100 billion covered transactions per year, a company that does 10 million (or even 20 million) transactions cannot reasonably be considered a "larger participant."
[22] *Id*.
[23] *Id*. at 80210.
[24] *Id*.

or those participants that "have a significant impact on consumers" as the Proposed Rule seems to suggest.[25] The CFPB may only supervise the "larger participants." If covering "a range of other providers of general-use digital consumer payment applications that play an important role in the marketplace" beyond the very largest entities is a priority to the CFPB, then it must explain what "important" means in this context.[26] It is unclear, for example, why entities processing between 10 million and multiple billions in annual transactions would not represent a sufficiently "varied [] mix" of participants.[27] Finally, as the CFPB acknowledges, the costs of the regulation would be significantly reduced if fewer entities were defined as larger participants.[28]

The CFPB should also do away with the Proposed Rule's provision allowing the CFPB to aggregate transactions across affiliated companies in order to determine whether or not the five million threshold has been met.[29] This would allow the CFPB to skirt around the limitations of its larger participant authority, as it may sweep in companies that come nowhere close to facilitating five million transactions annually. Because this loophole contradicts the CFPB's stated aim and statutory directive to supervise only *bona fide* larger market participants, it would likely violate the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 551 *et seq.; see also Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (vacating agency action based on reasoning that is "internally inconsistent and inadequately explained").

Finally, the Proposed Rule would allow the CFPB to determine whether a nonbank covered person is a larger participant based on its annual covered consumer payment transaction volume and whether it qualified as a "small business concern" during the preceding year only.[30] This may lead to inaccurate determinations of market share, depending on short-term fluctuations, and gives market participants insufficient runway to prepare for the possibility for supervision, which the CFPB acknowledges will generally prompt changes to systems and conduct requiring time and money.[31] The larger participant test should require a nonbank covered person to meet the transaction threshold and fall out of "small business concern" status for at least two consecutive years before qualifying.

D. <u>The CFPB should revise the Proposed Rule to clarify that non-custodial wallets are not a "covered payment functionality."</u>

The proposed definition of "covered payment functionality" includes a "funds transfer functionality" and/or a "wallet functionality."[32] "Funds transfer functionality" is defined to mean: (1) receiving funds for the purpose of transmitting them; or (2) accepting and transmitting payment

[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 80216.
[30] *Id*.
[31] *Id*. at 80213.
[32] *Id.* at 80215.

instructions.[33] "Wallet functionality" is defined to mean a product or service that: (1) stores account or payment credentials, including in encrypted or tokenized form; and (2) transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.[34]

It is our position that neither custodial wallet services nor non-custodial wallet software developers can be properly subjected to CFPB supervisory authority as a consequence of this rulemaking.[35] However, as written, it is particularly unclear whether non-custodial wallet software developers would qualify as providing a "wallet functionality" under the Proposed Rule. There is ambiguity around, for example, whether software enabling a user to store their own private key[36] would constitute "stor[ing] account or payment credentials."[37] Nevertheless, the CFPB should edit the Proposed Rule to make crystal clear that non-custodial wallets or those providing or developing back-end software are not a "covered payment entity," as any other result would fundamentally upend the service provided and risk driving these companies out of existence.

There are at least two obstacles that make determination of "larger participant" status infeasible for non-custodial wallet software developers. As an initial matter, a "consumer payment transaction" must result in a transfer of funds "by or on behalf of the consumer" rather than, for example, a business.[38] To determine whether a non-custodial wallet belongs to an individual or a business would be all but impossible for a non-custodial wallet software developer given that the software developer does not collect identity information from their users. They provide and, in some cases, maintain software that allows users to interact with a blockchain, but they do not intermediate that interaction. Therefore, these businesses cannot know whether any given wallet is owned and operated by a consumer such that its transactions should count toward the transaction threshold.

But even if one were to assume for the purpose of the Proposed Rule that every transaction emanating from non-custodial wallet software was initiated by or on behalf of a consumer, these software developers would have to fundamentally change the nature of their software and their relationship with their users in order to assess whether the transactions count towards the larger participant threshold. The Proposed Rule defines a "consumer payment transaction" as one that is "primarily for personal, family, or household purposes."[39] While a fiat-based custodial application like Google Pay might be able to categorize its users' transactions based on whether transfers of funds are made to other consumers, or businesses that provide family or household

[33] *Id.* at 80215–16
[34] *Id.* at 80216.
[35] *See supra* Sec. II.A.
[36] *See, e.g.*, MetaMask, Frequently Asked Questions, "How do I import my wallet into MetaMask?", http://tinyurl.com/2s3rn2m5.
[37] 88 Fed. Reg. at 80216.
[38] *Id*. at 80202.
[39] *Id*. at 80203.

services like Target or Starbucks, developers of wallet software that facilitate transactions in digital assets have little to no insight into users' transactions.

The Proposed Rule excludes certain types of transactions from counting toward the threshold, including the purchase of a digital currency using fiat or the exchange of one type of digital currency for another,[40] that likely make up a large percentage of non-custodial wallet transactions. But there is simply no means for non-custodial software developers to parse these transactions out as being any different from true consumer transactions. To understand their regulatory status, as entities will want to do, non-custodial software would need to become, to some extent, custodial, which would rid users of the benefits and security that come with non-custodial wallets.

The carve out for "small business concerns"[41] is unlikely to provide much comfort to non-custodial wallet software developers. There are a number of reasons why developers might not qualify for this exception, including that some developers may grow too large to qualify, others may be individual software developers who have not set themselves up as a "business entity organized for profit," as required to qualify as a "small-business concern" under the Small Business Administration regulations, and some may be based abroad, which generally also would preclude qualification under the Small Business Administration regulations.[42]

As the burdens of the Proposed Rule would pressure non-custodial wallet software developers to fundamentally change the nature of both their software and their relationship with users, these developers should be expressly excluded from the definition of a "covered payment functionality."[43] But at minimum, the CFPB should provide an explanation and analysis of why the complexities of non-custodial software do not warrant separate treatment. Under the APA, the CFPB must address all important issues bearing on its proposed regulations. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) if it "fail[s] to consider an important aspect of the problem"). The CFPB is in the business of regulating financial intermediaries like banks, mortgage services, and lenders, not software developers. As mentioned, it previously has recognized that the "complexities" of a particular sub-market can "justif[y] treating that market as a separate market from the [market to be regulated] for purposes of th[e] larger participant rule."[44] And the CFPB has specifically treated "virtual currencies and related products and services" as "outside the scope" of its rulemaking in the past.[45] If it is

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[40] *Id.* at 80215.
[41] *Id.* at 80216.
[42] *See* 13 C.F.R. § 121.105(a)(1).
[43] Otherwise, the Proposed Rule may fail APA review under the arbitrary and capricious standard. For example, a regulation is arbitrary to the extent that "compliance would be unworkable." *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1977); *see* 5 U.S.C. § 706(2)(A).
[44] 88 Fed. Reg. at 80203.
[45] *See* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. at 83934, 83978 (Nov. 22, 2016).

departing from these practices, the CFPB must provide an explanation as to why. *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923–24.

E. The CFPB should revise the Proposed Rule in light of APA requirements.

However the CFPB proceeds, it must ensure that the Proposed Rule complies with the agency's APA obligations.[46] To do this, it is essential that the CFPB revise the Proposed Rule to include a more robust cost-benefit analysis. Under the APA's arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43. Agency action is arbitrary and capricious if it "fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before the agency," *id*., including evidence that undercuts its judgment or discounts evidence without adequate explanation, *see Morall v. DEA*, 412 F.3d 165, 177–80 (D.C. Cir. 2005). In assessing costs and benefits, the CFPB must present the full range of considerations; it cannot "inconsistently and opportunistically frame[] the costs and benefits of the rule." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011). The cost-benefit analysis in the Proposed Rule does not meet this standard.

With respect to the threshold matter of the CFPB's assertion of jurisdiction over digital assets, the Proposed Rule fails to conduct any analysis whatsoever, let alone the required examination of the relevant data and rational explanation. *See State Farm*, 463 U.S. at 43. Instead, as described in Section II.A of this comment, the Proposed Rule assumes without explanation or evidence that the CFPA defines the word "funds" to include digital assets. This assumption does not pass muster under the APA and would require an entirely separate notice of proposed rulemaking to allow the public a fair opportunity to engage.

Putting the CFPB's jurisdiction aside, the Proposed Rule fails to adequately assess the costs of CFPB supervision that covered entities would incur as a result of the finalization of the Proposed Rule. Entities that qualify as "larger participants" within a CFPB-defined market are subject to CFPB supervision under 12 U.S.C. § 5514(b), which allows the CFPB to collect information from and conduct periodic examinations of larger participants to assess their compliance with federal consumer financial law, understand their activities, and identify and assess risks to consumers and consumer financial markets. The CFPB estimates that examinations will last "approximately 8 weeks on average, with an additional two weeks of preparation."[47] The CFPB can also collect information from those it suspects of being larger participants, to determine who qualifies.[48]

In other words: the costs associated with CFPB supervision are both amorphous and potentially exorbitant. Very large market participants that know they are likely to be supervised are going to

[46] *See* 5 U.S.C. § 706.
[47] 88 Fed. Reg. at 80213.
[48] 12 C.F.R. § 1090.103(d).

hire law firms and accountants to facilitate the CFPB's work (and they will cost a lot more than the $25,001 estimated by the CFPB,[49] as any in-house attorney will attest). The CFPB assumes for the purposes of its cost analysis that companies like Google Pay and PayPal will devote "the equivalent of one full-time compliance officer and one-tenth of the time of a full time attorney to assist with an exam."[50] Respectfully, this is wishful thinking that will collapse under APA review. *See Prometheus Radio Proj. v. FCC*, 373 F.3d 372, 408–09 (3d Cir. 2004) (agency may not rely on "unrealistic assumptions"). These companies will devote countless hours of in-house staff time to examinations, and will spend hundreds of thousands of dollars on support services related to the same.

The costs are more complicated for those companies that cannot be sure whether they will qualify for supervision. The CFPB brushes off doing a more complete analysis of these expenses on the basis that it "lacks detailed information with which to predict the extent to which increased costs would be borne by providers or passed on to consumers, to predict how providers might respond to higher costs, or to predict how consumers might respond to increased prices."[51] That excuse does not pass muster. For custodial wallet services and non-custodial wallet software developers alike, these costs would include having to change their entire business model to solicit and verify identifying information and monitor user transactions. This would require, at a minimum, the hiring of new personnel or consultants, all while shedding users as a result of the product change. This, by the way, is only what would be necessary for a developer to know whether or not they are likely to be subject to CFPB supervision under the Proposed Rule. If they were, a whole host of additional costs would follow.

The fact that the CFPB not only failed to do a cost-benefit analysis for an entire swath of potentially covered companies but also admitted that one cannot be done based on available information, makes clear that (1) the CFPB does not intend the Proposed Rule to cover these participants, and (2) the option is unavailable, regardless of intent. That analysis is required by law, as the CFPB acknowledges in the Proposed Rule.[52]

More generally, the Proposed Rule must be revised to include a discussion of all "reasonable alternatives to [the CFPB's] decided course of action." *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984). Therefore, at a minimum, the CFPB must consider alternatives along the lines of those discussed in the preceding sections, which would exclude or limit the Proposed Rule's application to digital assets. Given the unique considerations involved in including digital assets in the CFPB's market definition, a full consideration of digital asset-specific costs and benefits is appropriate. The Proposed Rule recognizes that the cost-benefit analysis requirements of 12 U.S.C. § 5512(b)(2)(A) may be applicable to this rulemaking.[53] And these

[49] 88 Fed. Reg. at 80213.
[50] *Id.*
[51] *Id.* at 80212.
[52] *Id*. at 80211 n.95.
[53] *See id.*

requirements—including that the CFPB "consider … the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule"—raise different concerns in the digital asset context than in the more traditional consumer payment sector. For example, the Proposed Rule is poised to deter growth in the digital asset industry, including by potentially signaling to overseas creators and investors that they should withdraw from or avoid serving the United States—leading to an inevitable "reduction of access by consumers."[54] These are significant costs that demand attentive consideration.

F. <u>In revising the Proposed Rule, the CFPB should exercise caution where the scope of its legal authority is uncertain.</u>

The CFPB should also tread cautiously where its regulatory authority is unsettled, so as not to accidentally impose regulatory burdens that it may not have the right to impose or to preempt ongoing congressional examination of the proper regulatory framework.

The CFPB should take care not to displace ongoing congressional consideration of the regulatory framework governing digital assets, which is currently unsettled. *See In re Voyager Digital Holdings*, 649 B.R. 111, 119 (Bankr. S.D.N.Y. 2023) (the regulatory environment for digital assets is "at best … highly uncertain," and its future "virtually unknowable"). As the Supreme Court has recognized in the "major questions" context, questions of "'earnest and profound debate' across the country" are properly resolved by Congress, not agencies. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). Consequently, the CFPB should not seek to impose any regulatory burdens on the digital market industry that would preempt Congress's decision-making about what is permissible in the sector.

For example, given the nature of digital assets, digital asset wallet software developers or service providers would not be able to readily discern whether they are "larger participants" or otherwise comply with the Proposed Rule were it applied mechanically. So if it is adopted, the Proposed Rule might have the unintended effect of forcing these developers to abandon their projects or shut down U.S. operations, or fundamentally change the nature of their software, even if Congress would never have supported such a result.[55]

Furthermore, to the extent the Proposed Rule would curtail how software developers creating payment functionalities can code their technology, it would also raise First Amendment concerns. It is well-established that computer code is expressive and entitled to First Amendment protection. *See, e.g.*, *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1099 (N.D. Cal. 2004) (citing cases). As written, the Proposed Rule effectively obligates developers to include

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[54] *Id.*

[55] *See, e.g.*, Press Release, McHenry Slams CFPB Digital Payments Proposed Rule, House Financial Services Committee (Nov. 7, 2023), https://tinyurl.com/yc5upc6w ("Congress and regulators must work together toward a regulatory environment that embraces innovation in our payments system.").

code in their products that would reveal customer data, to determine whether they meet the transaction threshold.[56] That is expressive speech that goes to the very heart of decentralized technology. *See Bernstein v. U.S. DOJ*, 176 F.3d 1132, 1141 (9th Cir. 1999), *reh'g granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999). Compelling coders to write new language that violates that core principle is, in every sense of the term, viewpoint discrimination that violates the First Amendment. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

At a minimum, the CFPB should be cautious not to chill the exercise of First Amendment rights by dissuading developers from making certain coding choices, such as in developing non-custodial or open-source payment mechanisms. After all, because "the First Amendment needs breathing space," a regulation can be unconstitutional if it "cause[s] [parties] … to refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 611–12 (1973).

G. The Proposed Rule's implementation period is insufficient.

The CFPB has proposed that the Proposed Rule should go into effect just 30 days after its publication in the Federal Register.[57] But the CFPB should provide an implementation period long enough for entities to reasonably determine whether they count as "larger participants." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]").

This is true even though the Proposed Rule would not necessarily require affirmative action by any larger participant.[58] Providers should be given an adequate opportunity to determine whether they are covered participants, as regulated parties reasonably want to know which regulations apply to them and whether they may be the subject of intrusive agency examinations. 30 days is insufficient to ensure that regulated parties can make such a determination, particularly for parties that would need to build systems to analyze transaction data that they do not already collect or that they collect in ways that do not align with the CFPB's ultimate regulatory definitions. The CFPB should extend the compliance period to reasonably accommodate all potentially impacted participants.

III. Conclusion

The Association encourages the CFPB to revise the Proposed Rule in light of the considerations outlined above. We welcome the opportunity to discuss our comments with the CFPB and its staff

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[56] *See* 88 Fed. Reg. at 80214.
[57] *Id.* at 80199.
[58] *See id.* at 80214 ("A larger-participant rule does not require nonbanks to assess whether they are larger participants.").

and stand ready to work together with the agency to develop a constructive regulatory regime for this industry that fosters innovation and protects consumers and market participants.

Respectfully submitted,

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