Banking on Surveillance:

The Libra Black Paper

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Executive Summary

On April 16, 2020, Facebook, Inc. and twenty-one business partners released a revamped plan to launch their new digital currency, Libra, by the end of the year.[1] Just nine months earlier, Rep. Maxine Waters (D-CA), Chair of the House Financial Services Committee (HFSC), had called for a moratorium on the project, citing concerns regarding surveillance, systemic risk, and corporate power, among a host of other problems.[2] Despite its public relations spin, Facebook and its partners, collectively known as the Libra Association (Association), have failed to sufficiently address these issues. Although the Geneva-based Association characterizes the Libra project as a simple "public good"[3] — a global payment system for use by everyone, everywhere, anytime — an analysis of Libra's design reveals dangerous possibilities.

The Libra project poses three overarching, interrelated threats: (1) mass surveillance of Libra users and business partners, (2) hazardous arbitrage of the financial regulatory system, and (3) the concerted encroachment of Facebook and its partners into the financial services sector, which would violate the traditional separation between commerce and banking, and deepen corporate economic and political dominance.

In order to grapple with these dangers, it is critical for policymakers to understand that our information economy is run by *platforms*: entities like Facebook that generate and intermediate market activity by generating and intermediating data.[4] From the perspective of users, platforms make certain services more accessible or convenient — but they also require legally and technologically complex data collection.[5] As part of this constant harvest, platforms deploy additional services that expand the user base and yield more information, helping the platforms continually accumulate profits and power.[6]

In a fashion familiar to financial regulators, dominant platforms like Facebook produce "tranches" of data with corresponding predictive profiles, which they use to sell products to their users.[7] However, platforms also use these tranches for targeted advertising — essentially, to sell *access to their users* to third parties. Like mortgagors whose claims are bundled into mortgage-backed securities, surveilled users have no control over how our inputs are used for

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[1] *See* Libra Ass'n Members, White Paper v2.0 (2020), https://libra.org/en-US/white-paper// (last visited June 22, 2020) [hereinafter, White Paper 2.0].
[2] Letter from Rep. Waters, et al., to Facebook CEO Mark Zuckerberg, et al., (July 17, 2019), https://financialservices.house.gov/uploadedfiles/07.02.2019_-_fb_ltr.pdf.
[3] White Paper 2.0, *supra* note 1, at 22.
[4] *See* Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 37-47 (2019) (outlining and discussing the historic transition from market-based to platform-based business activity).
[5] *Id.*
[6] *See*, *e.g.*, Bank for Int'l Settlements, BIS Annual Economic Report 2019 62-64 (2019), https://www.bis.org/publ/arpdf/ar2019e3.htm [hereinafter BIS Report]; Wilson C. Freeman & Jay B. Sykes, Cong. Research Serv., R49510, Antitrust and 'Big tech' 10 (2019), https://fas.org/sgp/crs/misc/R45910.pdf.
[7] Cohen, *supra* note 4, at 69.

downstream products.[8] In one way or another, the platforms use our data to manufacture wealth for themselves.[9] Meanwhile, there is mounting evidence that commercial surveillance amplifies organized hate, junk science, and virulent nationalism, creates novel and potent pathways for discrimination, and generally facilitates unprecedented infringement of our rights to privacy, freedom of expression, and freedom of association.[10]

The Libra project adheres to the general platform business model. Indeed, we might best describe it as a *network of platforms*, including already-dominant data collectors like Facebook, Uber, and Spotify, but also the new Libra structure itself. According to the Association's new White Paper (White Paper 2.0), it has created a subsidiary, Libra Networks, to manage the Libra Blockchain (the shared ledger for Libra transactions) and the Libra Reserve (the basket of cash and government securities backing the currency) on behalf of participants.[11] Unlike other blockchain-based systems, the Libra project would not enlist "miners" to unearth coins (as if they were digital gold).[12] Rather, Libra Networks would issue "stablecoins"[13] to sophisticated financial institutions, which would *then* sell these coins to digital currency exchanges, mobile wallet providers, and other over-the-counter (OTC) dealers, which would *then* sell coins to retail users. As we will discuss throughout the report, this ecosystem contains several critical points of control, which present opportunities for steady data extraction, as well as more explicit financial extraction.

All in all, the Libra project design grants the Association a growing pool of Libra users, while offering individual Association members and other participants opportunities to collect payments data from Libra usage, which would illuminate myriad social links between users.[14] Beneath the rhetoric of altruism, the Libra project essentially offers participating businesses more comprehensive, profitable perspectives on o behavior.[15] Indeed, White Paper 2.0 indicates the recent reconfiguration is not intended to scale back the project, but to *"augment"* existing

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[8] *Id.* at 73.
[9] *Id.* at 70-73.
[10] *Id.* at 92, 239-250.
[11] *See* WHITE PAPER 2.0, *supra* note 1, at 5-7, 15, 24-25.
[12] *See*, *e.g.,* Sarah Jeong, *The Bitcoin Protocol as Law, and the Politics of a Stateless Currency* (May 8, 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294124 [https://perma.cc/3DU2-4QMW] (discussing the libertarian, metallist politics behind bitcoin).
[13] "The term stablecoin...has no legal or agreed definition itself. Stablecoins are marketed as having less price volatility than other crypto-assets and, it is argued, are more appropriate for certain use cases." INT'L ORG. OF SECURITIES COMM'NS, GLOBAL STABLECOIN INITIATIVES 3 (2020), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD650.pdf [hereinafter IOSCO REPORT].
[14] COHEN, *supra* note 4, at 69 (describing increasingly dense and complex interplatform affiliations); *see also* Jessica Resnick-Ault, *Facebook's WhatsApp brings digital payment to users in Brazil*, REUTERS (June 15, 2020), https://www.reuters.com/article/us-whatsapp-brazil-payments-idUSKBN23M1MS (noting that Facebook is already expanding WhatsApp payments to users in Brazil and India, without offering a new digital currency).
[15] *See*, *e.g.*, *Bill Black: Facebook's Libra Currency Monetizes Identity and Threatens Privacy,* NAKED CAPITALISM (July 8, 2019), https://www.nakedcapitalism.com/2019/07/Bill-black-facebooks-libra-currency-monetizes-identity-and-threatens-privacy.html (characterizing the financial inclusion rhetoric as a feint; describing the Libra project as a shadow bank bent on monetizing identity).

plans and "support a *wider* range of domestic use cases" and thus, ultimately, more users (emphasis added).[16] In essence, Libra-based payments offer companies a new arena for data collection, wherein it would be easier for them to exercise platform power and "platform privilege" — easier to take over adjacent markets, engage in predatory pricing, self-deal, and generally accrue more power.[17] Analyses focused on the Libra project's capacity to profit from fees, interest, etc., that fail to integrate concerns about surveillance, are missing the big picture.

Knowledge of Facebook's business history reinforces this perspective. For instance, the company already operates a "Free Basics" program, where it offers users in developing countries access to a handful of online weather, news, and education applications, free of monetary charge, but subject to lightly regulated, constant monitoring of user activity.[18] For years, critics have argued that Facebook has consistently violated user privacy by extracting data as "monopoly rent", and moreover, fails to protect that data as required by existing law.[19] Indeed, just six weeks after the initial Libra announcement in June 2019, the Federal Trade Commission (FTC) fined Facebook $5 billion for violating the security and thus privacy of 87 million users — the largest fine ever imposed for a privacy violation.[20]

There is no reason to imagine a Facebook-led campaign into the financial technology *(fintech)* sector would be more respectful of user privacy. Indeed, existing fintech enterprises frequently tout a commitment to financial inclusion, only to turn users into "captive consumers."[21] In general, surveillance makes it easier for marketers to target vulnerable users, especially users of color, with extractive financial products.[22] From the point of view of consumer advocates, the Libra project's promises of empowerment reek of "predatory inclusion" — a

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[16] WHITE PAPER 2.0, *supra* note 1, at 2.

[17] For an analysis of "platform privilege", see *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (Statement of Sally Hubbard, Dir. of Enforcement Strategy, Open Markets Institute), *available at* https://www.judiciary.senate.gov/imo/media/doc/Hubbard%20Testimony.pdf.

[18] MONICA BONILLA ET AL., ADVOX, CAN FACEBOOK CONNECT THE NEXT BILLION? 32 (2017), https://advox.globalvoices.org/2017/07/27/can-facebook-connect-the-next-billion/.

[19] Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 97-98 (2019). Demand Progress officially supports the break-up of Facebook and other tech monopolies. *See* Press Release, Demand Progress, Grassroots Coalition Launches Campaign Calling on 2020 Presidential Candidates to Break Up Amazon, Facebook, Google and Other Big Technology Monopolies (Dec. 18, 2019), https://demandprogress.org/Grassroots-coalition-launches-campaign-calling-2020-presidential-candidates-break-amazon-facebook-google-big-technology-monopolies/.

[20] Tony Romm, *U.S. government issues stunning rebuke, historic $5 billion fine against Facebook for repeated privacy violations*, WASH. POST (July 24, 2019), https://www.washingtonpost.com/technology/2019/07/24/us-government-issues-stunning-rebuke-historic-billion-fine-against-facebook-repeated-privacy-violations/.

[21] *See, e.g.*, Nizan Geslevich Packin & Yafit Lev-Aretz, *Big Data and Social Netbanks: Are You Ready to Replace Your Bank?*, 53 HOUS. L. REV. 1211, 1262-1274 (2016).

[22] *See, e.g.*, Mary Madden et al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U.L. REV. 53, 77 (2017); AARON RIEKE ET AL., UPTURN, CIVIL RIGHTS, BIG DATA, AND OUR ALGORITHMIC FUTURE 8-9 (2014), https://bigdata.fairness.io/wp-content/uploads/2015/04/2015-04-20-Civil-Rights-Big-Data-and-Our-Algorithmic-Future-v1.2.pdf.

process whereby financial institutions offer needed services to specific classes of users, but on exploitative terms that limit or eliminate their long-term benefits.[23]

In fact, the Association has already abandoned many of its prior commitments to the privacy of prospective users. Although the Association initially cloaked the Libra project in a libertarian aesthetic by associating it with buzzwords like *decentralization* and *pseudonymity*,[24] it has now abandoned most of this rhetoric. Experts argue that at this stage, the project includes technological components like blockchain, "for no reason except to say it's on a blockchain."[25] That is to say, Libra marketers may still be talking about privacy, but the engineers are not building the project to safeguard our civil liberties.

As for the Libra Coins themselves, Facebook and its partners have clearly fashioned them to evade substantive regulation. White Paper 2.0 omits crucial details as to the use of the Libra Coins and offers no indication as to how policymakers should meaningfully regulate their usage, aside from subjecting wallet providers and exchanges to compliance with anti-money laundering (AML), Combating the Financing of Terrorism (CFT), and sanctions laws.[26] It is still unclear if Association members would capitalize the project and if Libra growth would generate returns for those members. It is also unclear if or how the Association would allocate interest accrued by the Libra reserve fund (Reserve) to Association members.

Policymakers must demand immediate answers to core questions about the business model. Although the Association claims Libra would merely make transferring funds as "easy and cheap as sending a text message",[27] the project is clearly intended to become much more than an alternative to Venmo. Indeed, regulators should treat Libra as an attempt to create

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[23] Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 199-200 (2017) (describing the targeting of mortgagors and students who borrow to purchase homes or education as "predatory inclusion."). *See also* Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499, 505, 517–21 (2019) (arguing fintech firms may "hardwire predatory inclusion" into financial markets for the "next several generations"); *cf.* Izabella Kaminska, *A pound of flesh for your Libra inclusion*, F.T. ALPHAVILLE (June 24, 2019), https://ftalphaville.ft.com/2019/06/24/1561376706000/A-pound-of-flesh-for-your-Libra-inclusion-/.

[24] LIBRA ASS'N MEMBERS, WHITE PAPER V 1.0 1, 6 (2019) https://libra.org/en-US/white-paper// [https://perma.cc/29QE-D77C]. [hereinafter, WHITE PAPER 1.0].

[25] David Gerard, *Facebook's Libra: national currency tokens, a new white paper — what this means*, ATTACK OF THE 50 FOOT BLOCKCHAIN (Apr. 16, 2020), https://davidgerard.co.uk/blockchain/2020/04/16/Facebooks-libra-national-currency-tokens-a-new-white-paper-what-this-means/.

[26] David Marcus, the CEO of Novi, Facebook's new subsidiary, has insisted Libra Coins are mere "payment tools" that do not require regulation by banking or investment protection authorities. *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 2 (2019) (Statement of David Marcus, Head of Calibra, Facebook), *available at* https://www.banking.senate.gov/imo/media/doc/Marcus%20Testimony%207-16-19.pdf.

[27] Brett Molina, *Would you trust Facebook with your money? What Libra cryptocurrency means for users*, USA TODAY (June 18, 2020), https://www.usatoday.com/story/tech/news/2019/06/18/facebook-libra-what-cryptocurrency-means-users/1485972001/.

something tantamount to corporate *money*.[28] After all, "money is what payment systems do."[29] Moreover, the Libra project architects have already betrayed an ambition to construct an entire "vibrant financial services economy" beyond money transfers.[30] Libra Coins are just the first step in building a parallel financial system, beyond the meaningful reach of U.S. laws.[31]

Experts have variously contended that Libra Coins should be regulated as foreign currency, investment contracts, mutual fund shares, commodities, derivatives, deposits, or some mix of the above. Regardless of the instrument classification, financial history has shown that corporate substitutes for the U.S. dollar tend to become bases of unstable systems that ultimately demand a government bailout.[32] Given this history, policymakers should assume Libra is positioned to facilitate a familiar business: "shadow banking"— or the general mimicking of banking activities beyond the reach of banking regulators, which continues to threaten the financial system and the broader economy.[33] Because Facebook's active-user network alone represents more than a third of the global population, its ambitions raise the spectre of systemic risk not only in the United States, but across jurisdictional lines. Indeed, a global stablecoin system like the Libra project could pose especially substantial risks to certain developing

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[28] *See*, *e.g.*, Lael Brainard, Gov., Fed. Res., The Digitalization of Payments and Currency: Some Issues for Consideration (Feb. 5, 2020), https://www.federalreserve.gov/newsevents/speech/brainard20200205a.htm (describing how, due to its proposed scale, Libra "imparts urgency to the debate over what form money can take...").

[29] Joseph H. Sommer, *Where Is A Bank Account?*, 57 MD. L. REV. 1, 6 (1998).

[30] Nick Statt, *Facebook's Calibra is a secret weapon for monetizing its new cryptocurrency*, THE VERGE (June 18, 2019), https://www.theverge.com/2019/6/18/18682838/Facebook-digital-wallet-calibra-libra-cryptocurrency-kevin-weil-david-marcus-interview. *See also* WHITE PAPER 2.0, *supra* note 1, at 7 (noting the goal of the Blockchain is to serve as a foundation for financial services) (emphasis added).

[31] Indeed, one executive of an Association member has boasted the Libra project would "create a mirror banking system using your money." David Gerard, *Foreign Policy: Facebook's New Currency Has Big Claims and Bad Ideas*, ATTACK OF THE 50 FOOT BLOCKCHAIN (June 6, 2019), https://davidgerard.co.uk/blockchain/2019/06/24/foreign-policy-facebooks-new-currency-has-big-claims-and-bad-ideas-by-me/.

[32] Caitlin Reilly, *Stablecoins would ultimately cost taxpayers, Vanderbilt law professor says*, CQ ROLL CALL WASH. SEC. ENF. & LITIG. BRIEFING (May 3, 2020), 2020 WL 2465361 (citing Prof. Morgan Ricks).

[33] *See generally* Paul McCulley, *Teton Reflections*, GLOBAL CENT. BANK FOCUS 2 (Sept. 1, 2007), http://www.sfindustry.org/images/uploads/pdfs/Paul%20McCulley%C20Teton%C20Reflections%202007.pdf [https://perma.cc/E499-GGM8] (coining the term "shadow banking"). *See also* ZOLTAN POSZAR ET AL., FED. RES. BANK OF N.Y., STAFF REPORT NO. 458: SHADOW BANKING (2010; revised 2012), *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr458.pdf (characterizing shadow banks as financial "intermediaries" that conduct maturity, credit, and liquidity transformation without explicit access to central bank liquidity or public sector credit guarantees); *but cf.* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1175-1194 (2017) (arguing shadow banks are more powerful than "intermediaries", as they generate private credit that is publicly accommodated and monetized via the functional integration of the regulated banking system and capital markets).

economies, where Libra Coins could functionally replace the local currency.[34] The stakes are too high: regulators must demand more information immediately.

Mark Zuckerberg has previously asserted that Facebook is "more like a government than a traditional company."[35] With this business perspective in mind, Libra appears to be squarely geared for dominance beyond accountability.[36] This hubris should especially worry financial regulators. Historically, Congress has determined that commercial-financial conglomerates encourage preferential and reckless financial practices. For instance, commercially-owned banks have made unsound loans to business partners, denied services to competitors, and generally engaged in imprudent activities to spur commercial user purchases.[37] Combinations between data collection and finance firms, specifically, "magnify the excessive levels of concentration, the 'too big to fail' subsidies, and the unhealthy political influence that our technology giants and megabanks already enjoy and exploit."[38]

Policymakers should not permit the establishment and expansion of the Libra project as proposed, especially if it is unmoored from comprehensive regulation of each of its components. Some experts have argued that regulators are poorly situated to discipline the Libra project.[39] It is true that Libra presents novel challenges, some of which are best addressed by legislation. At the same time, this report argues that there are substantive steps regulators can take immediately, drawing on a tradition of preventing undue concentrations of corporate (and thus political) power. Above all, this tradition entails a coordinated approach, treating the project as more than the sum of its parts.[40]

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[34] *See, e.g., Examining Facebook's Proposed Cryptocurrency and Its Impact on Consumers, Investors, and the American Financial System: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 11 (2019) (Statement of Katharina Pistor, Edwin B. Parker Prof. of Comparative Law, Colum. L. Sch.), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-pistork-20190717.pdf; FIN. STABILITY BOARD, ADDRESSING THE REGULATORY, SUPERVISORY AND OVERSIGHT CHALLENGES RAISED BY "GLOBAL STABLECOIN" ARRANGEMENTS: CONSULTATIVE DOCUMENT 6-7 (April 2020), https://www.fsb.org/wp-content/uploads/P140420-1.pdf [hereinafter FSB DOC.].

[35] Henry Farrell et al., *Mark Zuckerberg runs a nation-state, and he's the king*, VOX (Apr. 10, 2018), https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king.

[36] For further discussion of Big Tech governmentality, see, e.g., Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, LAW AND POLITICAL ECONOMY BLOG (Dec. 6, 2017), https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/.

[37] Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN L. REV. 1539, 1598-1606 (2007).

[38] Comment from Arthur E. Wilmarth, Jr., Prof. of Law, Geo. Wash. Univ. L. Sch., to FDIC, (Aug. 20, 2018), https://www.fdic.gov/regulations/laws/federal/2020/2020-parent-companies-of-industrial-banks-3064-af31-c-002.pdf.

[39] *See, e.g.*, Philip Rosenstein, *Facebook's Libra Raising Unique Questions for Lawmakers*, LAW360 (July 22, 2019), https://www.law360.com/articles/1180635/facebook-s-libra-raising-unique-questions-for-lawmakers; *see also* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 25, 33–34 (2020) (describing the difficulty of identifying, measuring, and targeting the specific facets of fintech products' operation and design via familiar regulatory tools and methods).

[40] *See, e.g.*, Saule Omarova & Graham Steele, *There's a Lot We Still Don't Know About Libra*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/opinion/facebook-libra-cryptocurrency.html.

Moreover, it would call on technology and finance experts to work hand-in-hand, upgrading some common premises.[41] For instance, regulators should acknowledge the Association would exercise *platform power* that would exceed some regulators' typical understanding of *market power*, expanding the ways in which the Association (or Facebook) could engage in unfair competition. Regulators should also note Libra Coins and Libra *smart contracts*[42] incorporate malleable technical properties, rendering regulation according to instrument classification more difficult than usual. Finally, because the goal of the Libra project is to constantly harvest more data, Association members and other participants could regularly launch new applications and activities that starkly differ from their previous lines of business. All of these insights should urge bright-line, precautionary regulation, rather than small, surgical tweaks.[43] Policymakers should adopt this perspective from the outset.

This report makes several specific recommendations. Following a more detailed discussion of the Libra project's design and attendant dynamics, we propose that the Internal Revenue Source (IRS) treat Libra transactions as it currently treats other virtual currency transactions. To the extent users would use Libra Coins as investment assets, the IRS should clarify that users would be required to track every purchase and sale of Libra to report capital gains and losses. Although Facebook's new subsidiary, Novi Financial,[44] and other mobile wallet providers might offer automatic reporting tools, IRS scrutiny is appropriate for an endeavor of this magnitude.

Next, the report discusses the Association's plans for compliance with international AML, CFT, and sanctions laws. We argue that the Treasury's Financial Crimes Enforcement Network (FinCEN), its partner agencies, and privacy advocates should all oppose the Association's plans to expand the Libra system to jurisdictions with minimal AML regimes and government identity systems.

The report then turns to the FTC's power to regulate Libra's surveillance-based business model. The United States desperately needs a federal privacy law prohibiting the sort of data collection Libra participants already conduct as part of their routine business operations.[45] Until

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[41] COHEN, *supra* note 4, at 174 (discussing the need to shift premises must shift to properly regulate the information economy).

[42] Some experts have characterized a "smart contract" as a "misnomer from a legal perspective", as it cannot encode certain elements of a legal contract, such as "reasonable" or "in good faith." Mike Orcutt, *States that are passing laws to govern "smart contracts" have no idea what they're doing*, MIT TECH. REV. (Mar. 29, 2018), https://www.technologyreview.com/s/610718/states-that-are-passing-laws-to-govern-smart-contracts-have-no-idea-what-theyre-doing/.

[43] COHEN, *supra* note 4, at 174, 182-187 (underscoring the importance of understanding the type of aforementioned activities in order to meet systemic threats); Omarova, *supra* note 39, at 27, 34-36 (discussing the problem with "smart" regulation: regulation that is "iterative, flexible, carefully tailored, risk-sensitive, and innovation-friendly.").

[44] Facebook recently changed the name of its subsidiary from "Calibra" to "Novi." Jon Porter, *Facebook renames Calibra digital wallet to Novi*, THE VERGE (May 26, 2020), https://www.theverge.com/2020/5/26/21270437/facebook-calibra-novi-rename-digital-wallet.

[45] Although the California Consumer Privacy Act is functionally the first broad privacy law in the U.S., it has many weaknesses, including the fact that it does not substantially minimize data collection. *See, e.g.*, Woodrow Hartzog &

then, the FTC should invoke underused antitrust authorities, most notably its capacity to adjudicate or promulgate rules preventing unfair methods of competition, to confront unfair surveillance. We argue the FTC should signal that some of Libra's likely business methods — including surveillance-based product tying, predatory pricing, and collusive behavior — are presumptively illegal.

Subsequently, the report discusses the power of various financial regulators to impose compliance burdens on the Association and Libra participants. Unfortunately, we lack sufficient details about the project to make a conclusive recommendation as to which agency should serve as the primary regulator. As discussed, we do not know how the Association would capitalize the project or reward initial investors, including members. The answers to these questions should inform a decision as to whether Libra Coins should be treated as investment assets in addition to payment tools. Under no circumstances should financial regulators allow the Libra project to conduct business absent clarity on these points. U.S. regulators must subject Libra Networks to prudential regulation under the purview of federal securities regulation, derivatives regulation, banking regulation, or some combination therein.[46] In any scenario, Congress has delegated enough authority to financial regulatory agencies that they can require a substantial overhaul of business as usual when faced with a corporate power grab like this.[47]

First, the report contemplates Libra Coins as securities. The Securities and Exchange Commission (SEC) could successfully argue that Libra Coins might function as investment assets. In doing so, it could change the fundamental character of the Libra user interface, potentially triggering capital gains taxation, requiring an initial coin offering (ICO), and imposing substantial supervisory requirements on intermediaries. Most importantly, the SEC could regulate Libra Networks, the Association's subsidiary directly responsible for managing the Libra Blockchain (Blockchain) and the Reserve,[48] as a securities clearing agency or as an investment fund, forcing it to comply with substantive restrictions on its operations and limit Libra Coin trading to national securities exchanges.

Additionally, the Commodity Future Trading Commission (CFTC) could classify Libra Coins as commodities in order to regulate Libra-based secondary markets. Under a more creative approach, the CFTC could determine some Libra transactions are *novel derivatives* transactions, allowing the CFTC and SEC to jointly regulate the Libra ecosystem more forcefully, constraining transactions to specific types of regulated facilities, as in the securities regulation

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Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1, 1687, 1711–12 (2020).

[46] *See* Letter from Ams. for Fin. Reform to HFSC (July 17, 2019), https://ourfinancialsecurity.org/wp-content/uploads/2019/07/AFR-Education-Fund-Statement-for-the-Record-Libra-Hearing-7-17-HFSC.pdf (arguing that exempting the Libra project from U.S. regulations because of its Swiss incorporation would be equivalent to exempting Credit Suisse from U.S. regulations) [hereinafter AFR LIBRA LETTER].

[47] *See, e.g.,* Graham Steele, *Overhaul the Business of Wall Street*, THE AM. PROSPECT (Sept. 23, 2019), https://prospect.org/day-one-agenda/overhaul-the-business-of-wall-street/.

[48] WHITE PAPER 2.0, *supra* note 1, at 5.

scenario. The Commissions could also treat Libra Networks as a derivatives clearing organization (DCO), directly imposing prudential requirements.

Next, the report addresses banking regulation. Allowing Big Tech companies to engage in shadow banking activity jeopardizes financial stability and also threatens the aforementioned separation of banking and commerce.[49] Unfortunately, U.S banking law offers no direct path for classifying nonbank companies as banks *per se*. Given this gap in the law, the report details how the Financial Stability Oversight Council (FSOC) could designate Libra Networks as a Systemically Important Financial Market Utility (SIFMU), by virtue of its responsibility for operating, monitoring, and managing the Blockchain and the Reserve.[50] In doing so, FSOC could subject Libra Networks to regulation by the Federal Reserve System, as well as the SEC or CFTC. FSOC could take this approach regardless of whether other financial regulators considered Libra Coins to be securities, commodities, derivatives, deposits, or any other type of instrument. By designating Libra Networks as a SIFMU, FSOC would be adopting recommendations made by international regulatory organizations.

The report concludes by offering notes on the potential of other Big Tech companies to take over various pieces of the financial sector. We then suggest a set of bright-line, federal, legislative fixes, corresponding to the three overarching threats: a comprehensive privacy law to constrain corporate data collection, a banking law to prohibit shadow banking by dominant platforms, and a fair competition law barring Big Tech, surveillance-oriented companies from engaging in financial services in general. Most importantly, however, the conclusion calls on Congress, the Federal Reserve System, and the U.S. Treasury to create public options for basic financial services with mobile access.

Overall, this report aims to lay the most powerful tools available to regulators on the table, based on current information available to the public. The political economy surrounding the Libra project will certainly evolve. The efficacy of regulation is inseparable from the mobilization of public disapproval. As of the publication of this report, Facebook and similar companies are attempting a reputational reset in the context of the COVID-19 pandemic.[51] Moreover, the Libra project could launch on either side of the 2020 U.S. elections, meaning that different regulators with different philosophies could exercise authority in the future.[52] In many

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[49] For relevant background, see, e.g., L. Randall Wray, *Global Financial Crisis: Causes, Bail-Out, Future Draft*, 80 UMKC L. REV. 1101, 1107 (2012) (describing how the shift of economic power to shadow banks triggered the operation of "Gresham's Law", whereby safer and stabler financial firms were driven out of business).

[50] *See* WHITE PAPER 2.0, *supra* note 1, at 5, 15, 24-25.

[51] *See, e.g.*, Salvador Rodriguez, *Facebook has moved fast during coronavirus outbreak, and it could restore the company's reputation,* CNBC (Mar. 23, 2020), https://www.cnbc.com/2020/03/20/facebook-coronavirus-moves-could-help-restore-its-reputation.html.

[52] Even if the Democratic Party were to assume a majority in Congress and win the White House, the current heads of the Consumer Financial Protection Bureau (CFPB) and the Federal Deposit Insurance Corporation (FDIC) both have terms that extend until 2023. Steele, *supra* note 47.

ways, "personnel is policy."[53] Taking all of these facts into account, this report is addressed to policymakers interested in a robust response to the Libra Association and its aspirational competitors, who are already waiting in the wings.

Background

Libra as a Surveillance System

With knowledge of the business models of Facebook and other Association members, we can confidently anticipate Libra project participants are banking on surveillance. Scale is everything and Facebook's user base alone grants the project the power to grow at a uniquely rapid clip. Around two-thirds of people in the United States use Facebook, three-quarters of us on a daily basis.[54] Overall, Facebook accounts for 77% of mobile social networking traffic in the country.[55] Many people consider a Facebook account a requirement for a job and other social necessities.[56] Having dominated social media and digital advertising, payments is the next frontier for Facebook, in particular. Through Libra and Novi, Facebook could easily take advantage of integrated, intimate information to better sell existing products like targeted advertising.[57] It could also build on existing services (like consumer reporting) to offer enhanced services (like credit scoring) or entirely new products.[58]

Policymakers should acknowledge Facebook's power over the Libra project. Over the past several months, the company has taken great pains to optically distance itself from the Association. Indeed, White Paper 2.0 characterizes Facebook's role within the project as equal to that of its peers.[59] But this denies the reality of the conglomerate's platform power and its clear

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[53] Jeff Hauser & David Segal, *Personnel is Policy*, Democracy Journal (Feb. 6, 2020), https://democracyjournal.org/magazine/personnel-is-policy/.
[54] Letter from Open Markets Institute to FTC (Oct. 31, 2017), https://openmarketsinstitute.org/testimony_letter/open-markets-letter-to-ftc-regarding-facebook/.
[55] *Id.*
[56] Comment from Freedom from Facebook to FTC (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0051-d-0008-147767.pdf.
[57] *See, e.g.,* Nikhilesh De, *Libra Payments Can Boost Facebook's Ads Business, Zuckerberg Says,* CoinDesk (May 28, 2020), https://www.coindesk.com/libra-payments-can-boost-facebooks-ads-business-zuckerberg-says.
[58] BIS Report, *supra* note 6, at 62-65 (discussing incentives for Big Tech in financial services). *See also* Astra Taylor & Jason Sadowski, *How Companies Turn Your Facebook Activity Into a Credit Score*, The Nation (May 27, 2015), https://www.thenation.com/article/archive/how-companies-turn-your-facebook-activity-credit-score/ (arguing Facebook and other Big Data companies already generate unregulated consumer reports despite protestations otherwise); Tamara K. Nopper, *Digital Character in the "Scored Society": FICO, Social Networks, and the Competing Measurements of Creditworthiness, in* Captivating Technology: Race, Carceral Technoscience, and Liberatory Imagination in Everyday Life 170, 170-188 (Ruha Benjamin ed., 2019) (illuminating how scoring by fintech lenders construct 'digital character' in a manner than can be opaque and discriminatory).
[59] White Paper 2.0, *supra* note 1, at 6.

role in steering Libra thus far.[60] Moreover, Novi — which participates in the Association on Facebook's behalf, shielding its parent company from liability[61] — is likely to dominate the collective. The Association is governed by the Libra Association Council (Council), composed of one representative per Association member.[62] Each representative is entitled to one vote and two-thirds of Council members must agree to most significant decisions.[63] That being said, previous iterations of the Association's governing documents have indicated members could delegate their votes, suggesting Facebook could pressure other members to surrender their decision-making power to Novi.[64] White Paper 2.0 is silent on this matter.

In any case, most Council members are connected to Facebook in direct or semi-direct ways, sharing investors or board members, or employing former Facebook executives.[65] The Association could also always include more members with more ties to Facebook over time, granting Novi further sway over the Council. We could easily imagine Facebook pushing Libra Coins and Association membership on developers, advertisers, and content producers, who already depend on Facebook as a platform. In any scenario, Facebook stands to profit by exercising disproportionate control over Libra infrastructure while simultaneously competing to collect data from within that infrastructure.[66]

Despite protestations otherwise, the technological design of the Blockchain does not mitigate against concerns of centralized surveillance. Purportedly, the Blockchain would bolster privacy and security for users. Yet critics from the blockchain community have accused Facebook of engaging in "security theater" — touting user protections while actively cementing control over data collection.[67] Like most distributed ledger technology, the Blockchain is not decentralized in the sense that certain actors cannot exercise concentrated power over others.[68] In

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[60] The Blockchain software was initially built by a group of Facebook engineers. Steven Levy & Gregory Barber, *The Ambitious Plan Behind Facebook's Cryptocurrency, Libra*, WIRED (June 18, 2019), https://www.wired.com/story/ambitious-plan-behind-facebooks-cryptocurrency-libra/.

[61] Pistor, *supra* note 34, at 5-6.

[62] WHITE PAPER 2.0, *supra* note 1, at 6, 24.

[63] *Id.* at 24. The Council also delegates executive functioning to a Board of Directors and staff. The Board includes David Marcus, Matthew Davie of Kiva Microfunds, Patrick Ellis of PayU, Katie Haun from Andreessen Horowitz, and Wences Casares from Xapo Holdings Ltd. Steven Levy & Gregory Barber, *Libra claims 180 potential replacements for 7 mutineers,* TECHCRUNCH (Oct. 14, 2019), https://techcrunch.com/2019/10/14/libra-meeting/.

[64] LIBRA ASS'N MEMBERS, THE LIBRA ASSOCIATION (2019) 5, https://libra.org/en-US/wp-content/uploads/sites/23/2019/06/TheLibraAssociation_en_US-1.pdf [hereinafter, ASSOCIATION PRINCIPLES].

[65] Elise Thomas, *The Ties That Bind Facebook's Libra*, WIRED (Oct. 7, 2019), https://www.wired.com/story/ties-bind-facebooks-libra/.

[66] Novi would be the *only* wallet that could be embedded directly into WhatsApp and Facebook Messenger apps. *See* Manuel Orozco et al., REMITTANCE INDUSTRY OBSERVATORY, SEPT. 2019 NEWSL. (Oct. 2019), https://www.thedialogue.org/wp-content/uploads/2019/10/RIO-NL-Oct-2019.pdf.

[67] Tor Bair, *Facebook's Blockchain Move Could Checkmate The Internet*, BREAKER MAG (Mar. 6, 2019), https://breakermag.com/facebooks-blockchain-move-could-checkmate-the-internet/.

[68] *See* Angela Walch, *Deconstructing 'Decentralization': Exploring the Core Claim of Crypto Systems*, *in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 39, 39-69 (Chris Brummer ed., 2019) (arguing misleading claims of "decentralization" function as a liability shield for developers operating the systems, creating a "Veil of Decentralization").

contrast to some "permissionless" distributed ledger systems, Libra Networks actively manages the Blockchain.[69] Moreover, as a general matter, *node validators* in a distributed ledger system can still collaborate to change it.[70] Specifically, White Paper 2.0 indicates that Libra node validators — who would definitionally be Association members — could work together to reconfigure the Blockchain.[71] Most importantly, Association members could take advantage of contextual "off-chain" data, or otherwise collude with third parties to determine the true identities of transacting parties and better monitor their behavior.[72]

These scenarios should greatly trouble policymakers. At times, U.S. consumers have been more insistent on the need to curb commercial data collection than government data collection.[73] Perhaps anticipating resistance, the Association has very carefully claimed that the only data the group would be able to access on the Blockchain is the "same data that would be visible to anyone (i.e., public wallet addresses, the time stamp of the transaction, the amount of Libra Coins transferred, and certain compliance certifications)."[74] But this is only true in a narrow sense. Individual Libra Virtual Asset Service Providers (VASPs) — currency exchanges, OTC dealers, and mobile wallet providers like Novi — would collect government identification in order to legally provide accounts and thus be able to re-identify users on the Blockchain. And the Association explicitly states that it plans to collect information from VASPs to comply with AML, CFT, and sanctions laws.[75] Indeed, the Association is now establishing a Financial Intelligence Function (FIU-function) to monitor the Libra network for suspicious activity and "work with both government authorities and service providers to seek to detect and deter inappropriate use of the platform."[76] This means constant user surveillance, in one form or another.

Moreover, the Association now claims it would restrict access to the Libra system to VASPs registered in jurisdictions that are members of the Financial Action Task Force on

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[69] *See* WHITE PAPER 2.0, supra note 1, at 5, 15, 24-25.
[70] *See, e.g.*, Angela Walch, *The Path of the Blockchain Lexicon (and the Law)*, 36 REV. BANKING & FIN. L. 713, 735–45 (2017) (discussing various ways in which prominent blockchains have been mutated).
[71] WHITE PAPER 2.0, *supra* note 1, at 8 ("Libra Networks will define policies and procedures for reconfiguring the Libra Blockchain in the case of critical errors or the need for upgrades.").
[72] *See, e.g.*, Rainey Raitman, *In Foreshadowing Cryptocurrency Regulations, U.S. Treasury Secretary Prioritizes Law Enforcement Concerns*, ELECTRONIC FRONTIER FOUND. (Feb. 13, 2020), https://www.eff.org/deeplinks/2020/02/foreshadowing-cryptocurrency-regulations-us-treasury-secretary-prioritizes-law (noting that even pseudonymous wallet systems can still reveal a "huge number" of identities and financial transactions); Gregory Barber, *Everyone Wants Facebook's Libra to Be Regulated. But How?*, WIRED (July 18, 2019), https://www.wired.com/story/Everyone-wants-facebooks-libra-regulated-but-how/ (arguing companies that offer Libra services could use the same tools as law enforcement to re-identify users); Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 394 (2016) (describing how reidentification creates large unsecured data reservoirs).
[73] *See*, *e.g.*, Justin Brookman, *Protecting Privacy in an Era of Weakening Regulation*, 9 HARV. L. & POL'Y REV. 355, 356 (2015).
[74] *See* LIBRA ASS'N MEMBERS, COMMITMENT TO COMPLIANCE AND CONSUMER PROTECTION (April 2020), https://libra.org/en-US/compliance-consumer-protection/#overview [hereinafter, LIBRA COMPLIANCE COMMITMENT].
[75] *See* WHITE PAPER 2.0, *supra* note 1, at 15-21.
[76] *Id.* at 21.

Money Laundering (FATF), an intragovernmental AML organization.[77] Yet the Association still intends to extend licenses to wallet providers in additional jurisdictions, subject to transaction and address balance limits, as well as additional monitoring, including the provision of off-chain data. Overall, this means that if Libra were to expand into some developing economies, it would likely be on terms unacceptable to privacy advocates,[78] for instance, by offering wallets to users in exchange for biometric data harvesting.[79]

Libra wallet providers, of course, would conduct their own surveillance, beyond what the Association or AML authorities require, recording "some transactions internally on their own books..." and potentially sharing that data.[80] For instance, the Novi customer commitment indicates Novi may share user data with third parties to prevent fraud, comply with law enforcement, and process transactions.[81] More importantly, though, Novi would share account information and financial data with Facebook and other parties given "customer consent" — but privacy advocates are arguing that this concept has been manipulated by marketing technology.[82] Historically, Facebook has tended to find a way to sell access to its users to other companies no matter the barrier.[83] Indeed, Facebook has previously made vows to regulators regarding data firewalls between subsidiaries and quickly broken those promises.[84] Other wallet providers could adopt a similarly cavalier attitude toward data integration, especially if Libra users were deemed unentitled to the few privacy protections afforded to the customers of traditional depository institutions.[85]

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[77] *Id.* at 19-21. The FATF currently comprises 37 member jurisdictions (Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, Kingdom of New Zealand, Norway, Portugal, Russian Federation, Saudi Arabia, Singapore, South Africa, Spain Sweden, Switzerland, Turkey, United Kingdom, and the United States) as well as two regional organizations (European Commission, Gulf Co-operation Council). *FATF Members and Observers*, FATF, https://www.fatf-gafi.org/about/membersandobservers/ (last visited Jun. 22, 2020).

[78] *See, e.g.*, Michael Del Castillo, *Libra Compromises Undermine Original Facebook Promise*, FORBES (April 16, 2020), https://www.forbes.com/sites/michaeldelcastillo/2020/04/16/libra-compromises-undermine-original-facebook-promise/#60a668932737 (noting the FIU function is already undesirable for privacy advocates).

[79] S*ee* Ian Allison, *How Anti-Money-Laundering Rules Hinder Libra's Mission to Reach the Unbanked*, COINDESK (Oct. 9, 2019), https://www.coindesk.com/how-anti-money-laundering-rules-hinder-libras-mission-to-reach-the-unbanked.

[80] WHITE PAPER 2.0, *supra* note 1, at 18.

[81] NOVI: CUSTOMER COMMITMENT 2 (2020), https://www.novi.com (follow hyperlink to "Learn more about security and privacy on Novi") (last visited June 22, 2020).

[82] *See*, *e.g.*, COHEN, supra note 4, at 262 (noting the abuse of the concept of "rolling consent" to evade European usage restrictions); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1461-1478 (2019) (surveying relevant issues).

[83] *See*, *e.g.,* Kurt Wagner, *This is how Facebook uses your data for ad targeting*, VOX (Apr. 11, 2018), https://www.vox.com/2018/4/11/17177842/facebook-advertising-ads-explained-mark-zuckerberg.

[84] Natasha Lomas, *Facebook fined $122M in Europe over misleading WhatsApp filing*, TECHCRUNCH (May 18, 2017), https://techcrunch.com/2017/05/18/facebook-fined-122m-in-europe-over-misleading-whatsapp-filing/.

[85] For a brief description of these protections, see Marshall Lux & Matthew Shackelford, *The New Frontier of Consumer Protection: Financial Data Privacy and Security* 11-16 9 135, (M-RCBG Assoc. Working Papers Series

Finally, it would be unwise to separate the spectre of increased corporate surveillance from government surveillance,[86] which also disproportionately impacts vulnerable communities. [87] Historically, Big Tech has been quick to share data with the National Security Agency (NSA) and other law enforcement agencies.[88] Indeed, dominant platforms have a long history of spying on users at the behest of the government, for compensation, whether compelled to do so by the Foreign Intelligence Surveillance Act (FISA) or not. For instance, even while Facebook denied knowledge of the endeavor, the NSA obtained direct access to Facebook server data (including search history, message content, and live video chats) through its notorious PRISM program (now known as the Upstream program).[89] There is also little evidence of hostile relations between Facebook and the NSA as a result of these activities. Indeed, Facebook recently hired a co-architect of the PATRIOT Act as its General Counsel.[90] The Association itself has also hired two former Treasury officials appointed by President George W. Bush to serve as General Counsel and CEO.[91]

For nearly two decades, the government has increasingly worked with tech companies to facilitate mass surveillance, with the FBI and NSA exploiting corporations' growing troves of records and the diminished privacy protections that attach to such data. Today, Congress is debating the contours of these relationships under the PATRIOT Act, which undermined the privacy protections within FISA. Specifically, Congress is discussing whether the government

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No. 135, 2020) *available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Lux_Final_March2020.pdf.

[86] *See*, *e.g.,* COHEN, *supra* note 4, at 93 (describing a "surveillance-innovation complex", wherein the state and private sector producers of surveillance technologies form a "symbiotic relationship").

[87] *See*, *e.g., id.* at 61 (noting law enforcement agenices have conducted prolonged, intrusive surveillance of Muslim and Latino communities, relying on corporate communications metadata); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 10-29 (2015) ("Surveillance is nothing new to black folks. It is the fact of antiblackness."); VIRGINIA EUBANKS, AUTOMATING INEQUALITY 1-38 (2017) (detailing how programs have demanded poor people sacrifice their rights to privacy and self-determination); *The Color of Surveillance: Monitoring of Poor and Working People*, GEO. L. CTR. ON PRIVACY & TECH. (NOV. 17. 2019), https://www.law.georgetown.edu /privacy-technology-center/events/color-of-surveillance-2019/ (for additional reading on this subject matter).

[88] *See, e.g.,* COHEN, *supra* note 4, at 238-242 (arguing that bulk collection and analysis of data generated by networked communications intermediaries have become "pillars" of state surveillance).

[89] Glenn Greenwald & Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and Others*, THE GUARDIAN (June 7, 2013), https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data; *see also Upstream vs. PRISM*, ELECTRONIC FRONTIER FOUND. (Dec. 28, 2010), https://www.eff.org/pages/upstream-prism.

[90] Ari Levy, *Facebook hires top State Department lawyer as general counsel,* CNBC (Apr. 22, 2019), https://www.cnbc.com/2019/04/22/facebook-hires-top-state-department-lawyer-as-general-counsel.html.

[91] Daniel Palmer, *Libra Taps Another Former FinCEN Official as General Counsel*, COINDESK (May 19, 2020), https://www.coindesk.com/libra-facebook-former-fincen-official-hire-general-counsel. *See also* Brian Baxter, *Libra Association Hires Treasury, HSBC Vet as First Legal Chief*, BLOOMBERG LAW (May 19, 2020), https://news.bloomberglaw.com/corporate-governance/libra-association-hires-treasury-hsbc-vet-as-first-legal-chief (noting that both Levey and Werner worked at HSBC in 2012, the same year the company agreed to pay a record $1.92 billion in fines to U.S. authorities for allowing itself to be used to launder drug money for Mexico's Sinaloa cartel and Colombia's Norte del Valle cartel); *cf.* Aruna Viswanatha & Brett Wolf, *HSBC to pay $1.9 billion U.S. fine in money-laundering case*, REUTERS (Dec. 11, 2012), https://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211.

may lawfully conduct dragnet surveillance of internet browsing and search activity, as facilitated by the businesses that route that activity.[92] Meanwhile, the NSA's Upstream program still requires companies to turn over any data that match certain identifiers, including the content of communications. The FBI and NSA have consistently engaged in surveillance that courts have later determined to be unauthorized.[93] Moreover, it often requires the threat of criminal sanctions for the government to remedy violations.[94] In essence, this means the U.S. government is likely to push for a "backdoor" into the Libra project.[95] Indeed, Attorney General William Barr, an experienced opponent of encryption, has recently renewed demands that Facebook provide *general* backdoor access to U.S. law enforcement.[96] Moreover, as the U.S. government regularly gains access to sensitive personal data under the cover of compliance with AML requirements, privacy advocates should pay close attention.[97]

Experts argue the U.S. data protection and federal privacy framework is fundamentally broken, and will face imminent revision.[98] Consequently, it is possible that the business models and objectives of Libra partners might evolve considerably in the near future. All this being said, regulators, especially the FTC, must prevent Libra from becoming another mass surveillance program, to which only the Association, members like Facebook, and the Department of Justice (DOJ) would hold the key. Before the National Banking Act, railway and canal companies used their platform power to issue their own currencies, which some states even accepted in payment of taxes, granting them durability as parallel payment tools in a parallel system.[99] But modern financial technology renders corporate currency even more dangerous.

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[92] *See, e.g.,* Janus Rose, *Activists Are Trying to Stop the FBI From Snooping on Your Web History*, MOTHERBOARD (May 18, 2020), https://www.vice.com/en_us/article/y3zgmj/activists-are-trying-to-stop-the-fbi-from-snooping-on-your-web-history.

[93] *See* SEAN VITKA, DEMAND PROGRESS, "INSTITUTIONAL LACK OF CANDOR" A PRIMER ON RECENT UNAUTHORIZED ACTIVITY BY THE INTELLIGENCE COMMUNITY (Sept. 27, 2017), https://s3.amazonaws.com/demandprogress/reports/FISA_Violations.pdf.

[94] *Id.* at 2.

[95] Dan Goodin, *NSA official: Support of backdoored Dual_EC_DRBG was "regrettable"*, ARS TECHNICA (Jan. 14, 2015), https://arstechnica.com/information-technology/2015/01/nsa-official-support-of-backdoored-dual_ec_drbg-was-regrettable (describing previous support for backdoor access).

[96] Brian Fung, *Facebook clashes with Justice Department over encryption*, CNN BUSINESS (Dec. 10, 2019), https://www.cnn.com/2019/12/10/tech/facebook-doj-encryption/index.html; *see also* Tim Cushing, *After FBI Successfully Breaks Into IPhones, Bill Barr Says It's Time For Legislated Encryption Backdoors,* TECHCRUNCH (May 21, 2020), https://www.techdirt.com/articles/20200519/12513944529/after-fbi-successfully-breaks-into-iphones-bill-barr-says-time-legislated-encryption-backdoors.shtml.

[97] *See, e.g.*, Maria A. de Dios, *The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy*, 10 BROOK J. CORP. FIN & COM. L. 495, 501 (2016); Darlene Storm, *EFF: Government plans to pry into your privacy if you send any money overseas*, ELECTRONIC FRONTIER FOUND. (Dec. 28, 2010), https://www.eff.org/deeplinks/2020/02/foreshadowing-cryptocurrency-regulations-us-treasury-secretary-prioritizes-law.

[98] Hartzog & Richards, *supra* note 45, at 1687-88.

[99] John Haskell & Nathan Tankus, *Virtual Currency (in the Shadows of the Money Markets),* JUST MONEY (Apr. 9, 2020), https://justmoney.org/j-haskell-n-tankus-virtual-currency-in-the-shadows-of-the-money-markets/.

Libra as a Shadow Banking System

Facebook's power over the Association is critical, as the Association not only monitors user activity, but manages the payment system and its broader infrastructure. As indicated previously, the Association's subsidiary, Libra Networks would issue Coins to sophisticated, well-capitalized financial institutions. These institutions, called Designated Dealers (DDs), would then sell Libra Coins to the aforementioned VASPs,[100] which would exchange Coins with the wider world.

Theoretically, Libra Networks would only issue Libra Coins in direct response to DD demand. That is to say, for Libra Networks to *mint* a coin for a retail user, that user would have to swap fiat currency for Libra Coins with a DD, through a VASP, at a given exchange rate. Inversely, in order for Libra Networks to *burn* a coin for a retail user, that user would have to swap Libra Coins for fiat currency with a DD, through a VASP, at a given exchange rate. The funds exchanged for Libra Coins would become the core of the Reserve, which Libra Networks would manage as a distributed network of securities and money market accounts, denominated in the same currencies that DDs swap for Libra.[101]

From this perspective, the Libra project seems to mimic the structure of an Exchange-Traded Fund (ETF), wherein *authorized participants* served roles akin to that of the DDs.[102] Alternatively, Libra Networks looks like a mock central bank with the DDs acting as *primary dealers* — making markets for certain Libra use-cases, and generally serving as gatekeepers, price administrators and troubleshooters.[103] In any case, the design is intended to ensure Libra Coins are always "backed" by the non-Libra funds used to purchase the coins. This would ostensibly grant the *stablecoins* their stable value.

Of course, the devil is in the details. The Libra project now includes two different types of Libra Coins. Specifically, White Paper 2.0 adds "single-currency stablecoins", which would initially be tethered to especially stable currencies (e.g., LibraUSD or ≋USD).[104] Presumably, these stablecoins would trade near a 1:1 ratio with local currencies (subject to mark-ups, fees,

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[100] The Association aspires to include additional categories of direct providers. *See infra* pp. 22-25; WHITE PAPER 2.0, *supra* note 1, at 18-21.

[101] "...we will require the Reserve to consist of at least 80 percent very short-term (up to three months' remaining maturity) government securities issued by sovereigns that have very low credit risk (e.g., A+ rating from S&P and A1 from Moody's, or higher) and whose securities trade in highly liquid secondary markets. The remaining 20 percent will be held in cash, with overnight sweeps into money market funds that invest in short-term (up to one year's remaining maturity) government securities with the same risk and liquidity profiles." *See* WHITE PAPER 2.0, *supra* note 1*,* at 2. The Association has also proposed limits on custodians ability to rehypothecate or otherwise use the Libra in custody for ulterior motives. *Id.* at 13.

[102] *See* FSB, SHADOW BANKING: STRENGTHENING OVERSIGHT AND REGULATION 1 (2011), http://www.financialstabilityboard.org/wp-content/uploads/r_111027a.pdf (characterizing exchange-traded funds (ETFs) as a new form of "shadow bank"). *See infra* pp. 45-46.

[103] *Cf.,* KENNETH GARBADE, THE EARLY YEARS OF THE PRIMARY DEALER SYSTEM, FED. RES. BANK OF N.Y. (June 2016), https://www.newyorkfed.org/research/staff_reports/sr777.html.

[104] WHITE PAPER 2.0, *supra* note 1, at 5-6.

and other costs imposed by Libra Networks, DDs, and VASPs).[105] Yet the project would still include a "multi-currency stablecoin" (≋LBR) intended for worldwide usage, but especially for retail usage in countries that would lack a single-currency Libra Coin corresponding to their local currency.[106]

In contrast to previous iterations of this synthetic coin, the Association now insists that ≋LBR would not be a "separate digital asset" from the single-currency stablecoins.[107] Rather, ≋LBR would be implemented as a "smart contract" that "aggregates single-currency stablecoins using fixed nominal weights (e.g., ≋USD 0.50, ≋EUR 0.18, ≋GBP 0.11, etc.)."[108] Concretely speaking, retail users could swap their local fiat currency for ≋LBR at something more akin to a true exchange rate (subject to administration by DDs and VASPs) as retail users would have no contractual relationship with Libra Networks or the Association.[109] As the value of the single-currency stablecoins and their underlying currencies would fluctuate, so would the value of one ≋LBR in any local currency.

These values would also respond to forces exogenous to the Libra ecosystem. But the relative stability of the value of Libra Coins still hinges on the material business practices of Libra Networks, DDs, and VASPs. For instance, DDs would have the contractual right to sell Libra Coins to Libra Networks at a price equal to the underlying fiat value,[110] and they would be expected to keep market prices for Libra Coins near that of the underlying fiat currency. However, regulators should expect DDs to capitalize on a bid-ask spread where possible, especially with respect to ≋LBR. In similar arrangements, spreads are meant to cover the cost to the dealer of having the reserve fund liquidate assets to redeem coins. Yet as of now, there does not appear to be any concrete barrier prohibiting DDs from modulating the price of Libra Coins for users across multiple jurisdictions as they see fit.

Overall, this arrangement creates some familiar regulatory conundrums. First, Novi and other wallets would not simply transfer funds, but *store* funds, potentially in long-term custody, without deposit insurance. Experts have referred to this sort of set-up as a "shadow payment system."[111] In the event of crisis, Libra wallet balances could become dangerously insecure. This

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[105] *See* Izabella Kaminska, *A Stablecoins as a collateral sinkhole*, F.T. ALPHAVILLE (May 6, 2020), https://ftalphaville.ft.com/2020/05/06/1588764474000/Stablecoins-as-a-collateral-sinkhole-/ (arguing the Reserve management policy creates a funding disadvantage for Libra Networks, which might cause the Association to hike fees).

[106] WHITE PAPER 2.0, *supra* note 1, at 5-6.

[107] *Id.* at 2.

[108] WHITE PAPER 2.0, *supra* note 1, at 4, 25. The Association compares these instruments to Sovereign Drawing Rights (SDR), a synthetic reserve asset issued by the International Monetary Fund (IMF) (primarily during times of crisis). Extending this metaphor, we might consider single-currency coins as offering sophisticated users fiat currency swap lines.

[109] "...save for certain contingent contractual rights that may exist in the context of Emergency Operations." *Id.* at 5.

[110] *Id.* at 25.

[111] *See* Dan Awrey & Kristin van Zwieten, *The Shadow Payment System*, 43 J. CORP. L. 775, 777–78 (2018) (defining shadow payment systems as institutions performing the same core payment functions as conventional

creates a larger *shadow banking* problem: without sufficient regulation, Libra Networks might be unable to accommodate short-term liability claims. Although the White Paper 2.0 suggests that consumer protections are in place for Libra Coin holders,[112] it does not actually specify any such safeguards. Instead, the Association has added a "loss-absorbing capital buffer" to the Reserve model, without delineating any sort of framework for it.[113] Although the Reserve would ostensibly grow and accrue interest over time, it is unclear how this initial capital buffer would be constructed (although some have suggested that Facebook would front its own money for the Reserve).[114]

This is a dangerous design. Runs could ensue from various parts of the ecosystem, especially the Reserve, which would be exposed to general turbulence in foreign exchange markets, sovereign debt markets, and money markets.[115] An operational failure, such as a hack on the Novi wallet or a breach of a data firewall between Facebook and Novi, could also prompt massive redemption requests.[116] White Paper 2.0 indicates that in the context of stress, the Association would attempt to liquidate securities as quickly as possible, but eventually consider delaying, suspending, or imposing fees on redemptions.[117] Like most financial systems, Libra is designed to be legally elastic at the apex and legally rigid at the peripheries.[118] In the event of a full-blown crisis, the ecosystem would likely shift losses to DDs, which would shift them to VASPs, which would shift them retail users, who would have little recourse. The G20 Financial Stability Board (FSB) has highlighted that this nakedly hierarchical arrangement is likely to undermine confidence in the entire payment system.[119]

The Libra project could expand quickly and pose threats to financial stability almost immediately. ≋LBR, especially, could become important quickly by subverting weaker currencies in countries where it becomes available.[120] Although the Association contends that the

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deposit-taking banks outside the perimeter of the regulated banking system and thus consumer protections; citing mobile money platforms like M-Pesa and crypto-currency exchanges like Mt. Gox as examples).

[112] LIBRA COMPLIANCE COMMITMENT, supra note 74.

[113] WHITE PAPER 2.0, *supra* note 1, at 12-13.

[114] *See, e.g.,* Gerard, *supra* note 25.

[115] WHITE PAPER 2.0, *supra* note 1, at 10-14.

[116] *See*, *e.g.*, *Examining Facebook's Proposed Cryptocurrency and Its Impact on Consumers, Investors, and the American Financial System: Hearing Before the H. Comm on Financial Services*, 116th Cong. 5 (2019) (Statement of Chris Brummer, Williams Research Prof., Geo. Univ. L. Ctr.), *available at* https://financialservices.house.gov/uploadedfiles/Hhrg-116-ba00-wstate-brummerc-20190717.pdf; for a discussion of cybersecurity failures at critical financial institutions, see Kristin N. Johnson, *Cyber Risks: Emerging Risk Management Concerns for Financial Institutions*, 50 GA. L. REV. 131, 132–33, 137–39 (2015).

[117] WHITE PAPER 2.0, *supra* note 1, at 14.

[118] *See generally* Katharina Pistor, *A Legal Theory of Finance*, 50 J. COMP. ECON. 315 (2013).

[119] FSB DOC., *supra* note 34, at 12-14.

[120] *See*, *e.g.*, IOSCO REPORT, *supra* note 13, at 13; Pistor, *supra* note 34, at 11; Claire Jones & Izabella Kaminska, *Libra is imperialism by stealth*, F.T. ALPHAVILLE (Sept. 13, 2019), https://ftalphaville.ft.com/2019/09/13/1568370798000/Libra-is-imperialism-by-stealth/.

risk of undermining monetary sovereignty is unlikely, it expects VASPs to manage compliance with foreign exchange limitations and capital controls rather than directing that process itself.[121]

Libra Coins could also present monetary policy problems in jurisdictions with strong currencies. Investors in the U.S. and elsewhere are facing a global shortage of safe assets for investors; money managers who want relative safety, but some return, could flock to ≋LBR.[122] By changing the composition of ≋LBR, the Council would essentially be conducting monetary policy. The price of ≋LBR could also become a benchmark for investment and insurance products in secondary markets, potentially leading to abuse and manipulation of existing financial systems.[123] Finally, the Association aspires to actively integrate central bank digital currencies (CBDCs) into the ecosystem, potentially increasing its interconnectedness with major financial systems and exposing them to operational Libra risk.[124] In the context of crisis, the "tail could wag the dog" — there are myriad ways Libra could become "too big to fail."

As of now, the Libra Association has indicated that it will apply to the Swiss Financial Market Supervisory Authority (FINMA) for a payments license and that body will serve as the primary regulator.[125] Although the Association claims to welcome the input of other regulatory bodies, White Paper 2.0 says little to nothing about how the Libra project should be regulated in the United States.[126] This is unacceptable, especially from a safety and soundness perspective. As discussed, commercial firms that also engage in financial services tend to use such enterprises to fund other risky business activities, heightening the moral hazard of bailout.[127] If the Libra project were to launch and successfully reach the billions of users of Facebook, WhatsApp, Instagram, Spotify, Uber, Coinbase, and the other Association members, it would be difficult for financial regulators to play catch-up.

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[121] WHITE PAPER 2.0, *supra* note 1, at 11.

[122] *See, e.g.*, Haskell & Tankus, *supra* note 99; *see also* MITSUTOSHI ADACHI ET AL., EUR. CENT. BANK, A REGULATORY AND FINANCIAL STABILITY PERSPECTIVE ON GLOBAL STABLECOINS 4 (2020), https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/html/ecb.mpbu202005_1~3e9ac10eb1.en.html#toc1 (arguing the Libra project could potentially become "one of Europe's largest MMFs.")

[123] *See. e.g.,* Omarova & Steele, *supra* note 40; IOSCO REPORT, *supra* note 13, at 13.

[124] *See* WHITE PAPER 2.0, *supra* note 1, at 11.

[125] WHITE PAPER 2.0, *supra* note 1, at 12. *See also* Howell E. Jackson, *The Nature of the Fintech Firm*, 61 WASH. U. J.L. & POL'Y 9, 14–15 (2020) (describing how the choice to form a new legally distinct non-U.S. entity illustrates a "push-out strategy" to accommodate fintech innovations beyond traditional regulatory perimeters); Paddy Baker, *Switzerland Softens Tone on Libra After Ex-President Says Project 'Failed'* (Jan. 21, 2020), https://www.coindesk.com/switzerland-softens-tone-on-libra-after-ex-president-says-project-failed (suggesting FINMA has backtracked on its commitment to apply "strict banking rules" to the Libra project).

[126] Brady Dale, *Libra Scales Back Global Currency Ambitions in Concession to Regulators,* COINDESK (Apr. 16, 2020), https://www.coindesk.com/libra-scales-back-global-currency-ambitions-in-concession-to-regulators (noting the Association intends to register as a money services business with FinCEN).

[127] *See, e.g,* Wilmarth, *supra* note 37, at 1569; Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1411 (2018); Graham Steele, *Facebook's Libra cryptocurrency is part of a disturbing financial trend,* WASH. POST (Aug. 12, 2019), https://www.washingtonpost.com/outlook/2019/08/12/facebooks-libra-cryptocurrency-is-part-disturbing-financial-trend/.

Taxation

As White Paper 2.0 does not mention taxation, it is unclear how the Association and Libra Networks plan to pay taxes in each jurisdiction where they conduct business. This is an impressive omission, as the "not-for-profit" Association may yet yield dividends or other monetary "incentives" for its members.[128] Furthermore, it is unclear how each wallet provider would pay tax on profits derived from cross-border Libra transactions, especially between countries with minimal reporting infrastructure.

In this section, however, we are more concerned with reporting requirements that could apply to retail Libra users and thereby alter the general character of the project. For their own part, Facebook and Association executives have stipulated Libra usage would incur sales taxation. We can expect that each time retail users would purchase a good or service with Libra Coins, whether through a personal computer or by using a mobile QR Code, sales taxes would apply in the same manner as when one pays for goods and services with a credit card.[129]

The application of other taxes is less clear. On the surface, both types of Libra Coins fit the IRS definition of "virtual currency": a "medium of exchange that operates like a currency in some environments, but lacks all the attributes of real currency", most notably legal tender status in any jurisdiction.[130] As far as income taxation goes, the IRS should treat Libra Coins as it treats other virtual currencies, requiring taxpayers receiving payment for services in Libra to report the dollar value of Libra Coins at the date of receipt.

Capital gains taxation is trickier. As of now, it is unclear to what extent taxpayers would use Libra Coins as investment assets: a question that problematizes regulation of the Libra project, generally. If taxpayers were to stockpile Libra Coins in anticipation of a short sale or as a hedge on foreign exchange risk, rather than for consumptive use, capital gains taxes should apply. Given its applications for investors, it is especially likely taxpayers might hold onto ≋LBR and use it in this way. On the other hand, businesses that would hold Libra Coins merely by virtue of retail exchange should be able to classify their Coins as inventory and thus avoid capital gains taxes.[131] But in any context where the Coins are used as investment assets, the IRS should require retail users to determine and report the fair market value of their Libra Coins (in U.S. dollars) as of the date of both the purchase and sale.[132]

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[128] WHITE PAPER 2.0, *supra* note 1, at 24, 25.
[129] John Constine, *Facebook answers how Libra taxes & anti-fraud will work,* TECHCRUNCH (July 12, 2019), https://techcrunch.com/2019/07/12/facebook-libra-taxes-trump/.
[130] *See* I.R.S. Notice 2014-21 (Mar. 25, 2014), *available at* https://www.irs.gov/pub/irs-drop/n-14-21.pdf.
[131] That being said, the IRS currently keeps a long list of types of property not considered to be capital assets: Libra does not fall squarely into any of the relevant categories. *See* IRS, *Publication 544: Sales and Other Dispositions of Assets* (Dep't of the Treas., Feb. 3, 2015), *available at* https://www.irs.gov/publications/p544.
[132] *See* JAMES T. FOUST, COIN CENTER, A DUTY TO ANSWER: SIX BASIC QUESTIONS AND RECOMMENDATIONS FOR THE IRS ON CRYPTO TAXES (Apr. 2019), https://coincenter.org/files/crypto-tax.pdf (describing ways in which the IRS might tax cryptocurrency and calling on the IRS to clarify how users should calculate "fair market value.").

In order to avoid this general scenario, Libra executives have asked the IRS to apply a *de minimis* election to personal Libra transactions, creating a $200 threshold for reporting requirements.[133] This would essentially shield Libra transactions with protections currently reserved for foreign currency transactions, even though the IRS, FinCEN, and the CFTC, have all refused to classify digital currencies as foreign currency. Moreover, it is unclear how granting such status to Libra Coins f would serve broader public policy goals. Indeed, it could foster a general perception that Libra Coins are equivalent to fiat currencies.

As of yet, the IRS has refrained from imposing a general requirement that digital currency businesses send a Form 1099 or similar forms to all their users. However, in late 2016, the DOJ compelled Coinbase — an Association member that would almost certainly serve as a Libra wallet provider — to produce documentation identifying all U.S. taxpayers who used its services between 2013 and 2015.[134] Some experts have analogized this campaign to the clampdown on offshore bank and brokerage accounts.[135] If Libra Coins are used for broad-scale tax evasion, the IRS should apply similar scrutiny.[136]

It is difficult to overestimate the impact of IRS vigilance. If it were to impose capital gain taxes on Libra transactions, users would have to track *each and every* purchase and sale of each specific Libra coin in order to report gains and losses. No matter the diligence exercised by retail users, this tax bill would be fundamentally unpredictable.[137] Moreover, some businesses already forced to comply with blockchain audits might abandon the Libra ecosystem in response to additional burdens.[138] But the IRS would simply be mandating compliance. There is no reason for the U.S. Treasury to impose lighter burdens on Libra VASPs than smaller virtual currency competitors.

From the perspective of the Libra architects, the most obvious balm for user burden is to incorporate automatic reporting tools into mobile wallets. Indeed, Novi executives have already suggested their wallets would have to track sales using tools similar to those Coinbase now provides to bitcoin traders.[139] Given the complexity of managing such tools for multiple digital

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[133] *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. (2019) (Statement. of David Marcus, Head of Calibra, Facebook), *available at* https://www.c-span.org/video/?462671-1/lawmakers-question-facebook-official-proposed-digital-currency.

[134] United States v. Coinbase, Inc., No. 17-CV-01431-JSC, 2017 WL 5890052, at *8 (N.D. Cal. Nov. 28, 2017).

[135] *See, e.g.*, Robert Green, *Watch Out Cryptocurrency Owners, The IRS Is On The Hunt*, FORBES (July 31, 2019), https://www.forbes.com/sites/greatspeculations/2019/07/31/watch-out-cryptocurrency-owners-the-irs-is-on-the-hunt.

[136] DANIEL NEIDLE & ROBERT SHARPE, CLIFFORD CHANCE, FACEBOOK'S LIBRA CURRENCY — WILL UNEXPECTED TAX COMPLICATIONS SCARE OFF USERS? 2 (July 2019), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/07/facebooks-libra-currency-will-unexpected-tax-complications-scare-off-users.pdf.

[137] *Id.*

[138] *See, e.g.*, Jay Schulman et al., *Tax and audit considerations for Facebook's Libra currency,* RMS USA (June 20, 2019), https://rsmus.com/what-we-do/services/blockchain-consulting/tax-and-audit-considerations-for-facebook-s-libra-currency.html.

[139] Constine*, supra* note 129.

assets and cross-currency transactions,[140] it is unclear if other wallet providers could easily follow suit or if taxation would benefit sophisticated players like Novi and Coinbase at the expense of other VASPs (potentially creating a market dominance issue). In either case, if the broader Libra ecosystem were to present a tax compliance problem, Facebook and its partners would find themselves in an unappealing position. In July 2019, the IRS began to send letters *directly* to taxpayers they believed had transacted in virtual currency.[141] These letters demanded further reporting under the penalty of perjury. If the IRS were to create a choice between criminal law enforcement and burdensome self-reporting, it is difficult to imagine Libra drawing an enthusiastic user base.

Money Transmitter Regulation

AML, CFT, and Sanctions Law

It is no secret that digital currency outfits have historically struggled to comply with AML laws.[142] Predictably, the majority of recent changes to the White Paper address regulatory concerns regarding financial integrity.[143] White Paper 1.0 touted the principle of "pseudonymity" to its users and claimed individual wallet providers would bear responsibility for AML compliance, rather than the Association.[144] Indeed, in the context of the initial rollout, it appeared Facebook wanted to "conform the specific requirements in the regulations implementing AML laws to blockchain technology," creating an entirely new AML paradigm.[145] The Association has now removed language suggesting such lofty aspirations.

Indeed, the extent to which Libra can even truly be called a "cryptocurrency" is now debatable. Libra users creating a wallet account would immediately establish a connection between their real identity and "on-chain" behavior.[146] Novi has clarified it would require the provision of government ID for use.[147] Libra users would conduct transactions using

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[140] *See* WHITE PAPER 2.0, *supra* note 1, at 7.
[141] Press Release, IRS, IRS has begun sending letters to virtual currency owners advising them to pay back taxes, file amended returns; part of agency's larger efforts (July 26, 2019), https://www.irs.gov/newsroom/irs-has-begun-sending-letters-to-virtual-currency-owners-advising-them-to-pay-back-taxes-file-amended-returns-part-of-agencys-larger-efforts.
[142] Although illicit flows comprise only 1.1% of all cryptocurrency activity, almost all crypto-crime involves money laundering. CHAINALYSIS, THE 2020 STATE OF CRYPTO CRIME 5-7 (Jan. 2020), https://go.chainalysis.com/rs/503-FAP-074/images/2020-Crypto-Crime-Report.pdf.
[143] For background on regulatory pressure, see, e.g., *Financial Action Task Force Keeping Tabs On Libra*, PYMNTS (Sept. 10, 2019), https://www.pymnts.com/cryptocurrency/2019/libra-faces-strict-standards-prevent-money-laundering-terrorism-financing/.
[144] WHITE PAPER 1.0, *supra* note 24, at 6.
[145] Robert Kim, *Facebook Hints at New AML/CFT Paradigm For Libra*, BLOOMBERG LAW (July 15, 2019), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-facebook-hints-at-new-aml-cft-paradigm-for-libra.
[146] *See, e.g.*, Bair, *supra* note 67.
[147] NOVI: CUSTOMER COMMITMENT, *supra* note 81.

cryptographic keys,[148] but the Blockchain would maintain records of those transactions in unencrypted "clear text", allowing law enforcement and other third parties to review them.[149] There would be no truly private transactions within the Libra payment system.

The Association itself has now taken on new responsibilities — if not clear liabilities — that regulators might welcome. That being said, the Association's plans to eventually include wallet providers in lightly regulated jurisdictions should still cause concern. More specifically, FinCEN should refuse to accept plans to use new surveillance technologies for alternative AML and CFT compliance.

Housed within the Treasury, FinCEN implements and enforces the AML framework established by the Bank Secrecy Act (BSA), as well as supplementary provisions like Title III of the USA PATRIOT Act, which requires financial institutions to implement robust customer identification programs, commonly labeled "know your customer" (KYC) provisions.[150] In order to enforce this framework, as well as CFT and sanctions laws, FinCEN coordinates with the IRS, state counterparts, and the Treasury's Office of Foreign Asset Control (OFAC).[151]

As the AML framework extends to every financial institution,[152] the Libra project would not be able to escape FinCEN jurisdiction by reconfiguring again. Thus far, FinCEN has regulated all virtual currency enterprises as "money services businesses" (MSBs), regardless of the type of technology deployed.[153] In addition to submitting to regular IRS examinations, MSBs must verify sender and recipient identification by examining ID cards, and recording names and addresses, as well as taxpayer identification numbers, alien identification numbers, or passport numbers.[154] Furthermore, MSBs must provide specific information to law enforcement agencies, including by filing suspicious activity reports (SARs) for transactions over the $2,000 threshold [155] and tracking transfers over $3,000 as they travel through intermediary financial institutions (the "Travel Rule").[156] In 2019, the FATF adopted its own requirement patterned after the Travel

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[148] WHITE PAPER 2.0, *supra* note 1, at 4.
[149] *See* LIBRA COMPLIANCE COMMITMENT, *supra* note 74.
[150] For a history of the relevant PATRIOT Act amendments, see, e.g., Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism,* 55 BAYLOR L. REV. 955 (2003).
[151] Under Presidential emergency powers, OFAC can also freeze any assets under U.S. jurisdiction. In general, compliance with U.S. sanctions law could create problems in other jurisdictions where the Association is pushing for adoption. *See, e.g.*, Steven Erlanger, *Nuclear Deal Traps E.U. Between Iran and U.S.*, N.Y. TIMES (May 8, 2019), https://www.nytimes.com/2019/05/08/world/europe/eu-iran-nuclear-sanctions.html.
[152] 31 U.S.C. § 5312(a)(2). *See also* 31 C.F.R. § 1020.100.
[153] APPLICATION OF FINCEN'S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES, FIN-2019-G001, at p. 5 (May 9, 2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf.
[154] *See* 31 C.F.R. § 1020.410.
[155] 31 C.F.R..§ 1022.320.
[156] 31 C.F.R § 1010.410(f).

Rule, harmonizing U.S. and international standards for all financial institutions, including cryptocurrency services.[157] FinCEN has made it crystal clear that it will enforce FATF rules.[158]

Perhaps more importantly for our purposes, the Secretary of the Treasury may impose "special measures" on any jurisdiction, institutions, or transactions that are of "primary money laundering concern."[159] This means FinCEN consistently carries a trump card: it could determine that Libra transactions in jurisdictions beyond the U.S. threaten the integrity of U.S. payment systems and shut down the entire project.

Novi has already registered with FinCEN as an MSB and the Association intends to follow suit.[160] Moreover, the Association has stated it will monitor and conduct periodic due diligence on participants for compliance with the AML, CFT, sanctions regime.[161] Finally, the Association intends to automatically prevent transactions involving sanctioned addresses, enforce certification renewals on VASPs, and require VASPs to attest to compliance with the Travel Rule.[162]

As discussed in the Background section, the ability to exchange Libra Coins with DDs and retail users would initially be limited to businesses registered or licensed as a VASP within a FATF member jurisdiction.[163] These ecosystem participants would be known as "Regulated VASPs."[164] The project would then expand to "Certified VASPs" — entities that would not qualify as regulated VASPs, but might nevertheless be "consistent in principle" with requirements imposed under the FATF Guidance.[165] Finally, the Association aspires to include "Unhosted Wallets", applications created by developers to comply with Libra's AML protocol, so that users could access Libra subject to stringent balance and address limitations. Ostensibly, this last step would allow the Libra payment system to finally reach users on global financial peripheries.

Yet the Unhosted Wallets would still raise multiple AML concerns. While the Association plans to use an off-chain protocol to facilitate compliance for Unhosted Wallets, it is

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[157] Tom Kierner et al., *Developments in the Laws Affecting Electronic Payments and Financial Services*, 75 BUS. LAW. 1695, 1707 (2020).
[158] Kenneth A. Blanco, Dir., FinCEN, "Prepared Remarks" Chainalysis Blockchain Symp. (Nov. 15, 2019), https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-chainalysis-blockchain-symposium#_ftn2.
[159] 31 U.S.C. § 5318A. This provision has been used to impose sanctions on Iran. Press Release, FinCEN, Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern (Oct. 25, 2019), https://www.treasury.gov/press-center/press-releases/Documents/Iran311Finding.pdf. It has also been applied to corporations. For instance, the Secretary has designated a Costa Rican web-based money transfer system as a § 5318A threat, eliminating its access to the U.S. financial system (and thus most of the global financial system). *See* Notice of Finding That Liberty Reserve S.A. Is a Financial Institution of Primary Money Laundering Concern, 78 Fed. Reg. 34169 (June 6, 2013).
[160] Dale, *supra* note 126.
[161] *See* WHITE PAPER 2.0, *supra* note 1, at 5 (noting DDs would conduct due diligence on downstream counterparties).
[162] *Id.*
[163] WHITE PAPER 2.0, *supra* note 1, at 18 (for U.S. VASPs, this would mean registration as an MSB).
[164] *Id.*
[165] *Id.* at 18-19.

not immediately clear what this would accomplish. KYC almost always requires that users present some form of *government-issued ID*, as well as proof of address.[166] Many people outside FATF jurisdictions live in countries without government ID systems, much less AML regimes.[167]

However, like other tech enterprises,[168] the Association is attempting to create a "decentralized and portable digital identity" to substitute for government ID or functionally become the government ID in some places.[169] Although Association members have advocated for the use of new technologies to build these ID systems,[170] the tools in question have proven to be of limited value for financial services provision. For instance, even popular biometric-based electronic IDs contained in a central registry, such as those used in India, are not considered legal identification for KYC purposes.[171] Furthermore, biometric tools like facial recognition technology, iris-scanning, and palm prints are vehemently opposed by many privacy advocates.[172] With these new technologies, the Association would increase the risk of civil liberties violations by governments, as discussed in the Background section,[173] as well as security breaches by competitors and hackers.[174] Both regulators and privacy advocates should remain wary of Facebook and the Association's plans to expand beyond FATF-member jurisdictions.

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[166] Leon Perlman & Nora Gurung, Focus Note: The Use of eKYC for Customer Identity and Verification and AML 11 (May 14, 2019), *available at* https://ssrn.com/abstract=3370665 (last visited June 22, 2020).

[167] Over 1 billion people live without an official proof of identity. 81% live in Sub-Saharan Africa and South Asia. WORLD BANK, ID4D DATA: GLOBAL IDENTIFICATION CHALLENGE BY THE NUMBERS (2018), https://id4d.worldbank.org/global-dataset (last visited Jun. 22, 2020).

[168] Perlman & Gurung, *supra* note 166, at 8.

[169] WHITE PAPER 2.0, *supra* note 1, at 25.

[170] Allison, *supra* note 79.

[171] ET Bureau, *Aadhaar verdict: Telcos, banks & financial companies may feel the pinch*, THE ECON. TIMES (Sept. 27, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/aadhaar-verdict-telcos-banks-financial-companies-may-feel-the-pinch/articleshow/65973414.cms.

[172] *See, e.g.*, *A Biometric Backlash Is Underway — And A Backlash To The Backlash*, PYMNTS (May 17, 2019), https://www.pymnts.com/authentication/2019/biometric-backlash-privacy-law/; *Mandatory National IDs and Biometric Databases*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/national-ids (last visited Apr. 25, 2020); COHEN, supra note 4, at 247 (noting how facial recognition software is likely to mislabel or misrecognize members of racial minority groups); de Dios, *supra* note 97, at 501 (describing how prior to September 11, 2001, even non-biometric KYC data collection was widely considered an unacceptable, "massive invasion of financial privacy.").

[173] *See supra* text accompanying notes 86-97.

[174] *See, e.g.*, Jason Leopold & Jessica Garrison, *US Intelligence Unit Accused Of Illegally Spying On Americans' Financial Records*, BUZZFEED (Oct. 6, 2017), https://www.buzzfeednews.com/article/jasonleopold/Us-Intelligence-unit-accused-of-illegally-spying-on (reporting that FinCEN employees have accused colleagues at the Office of Intelligence and Analysis of illegally collecting and storing private financial records); Aaron Mackey & Andrew Corker, *Secret Court Rules That the FBI's "Backdoor Searches" of Americans Violated the Fourth Amendment*, ELECTRONIC FRONTIER FOUND. (Oct. 11, 2019), https://www.eff.org/deeplinks/2019/10/secret-court-rules-fbis-backdoor-searches-americans-violated-fourth-amendment; Chen Han & Rituja Dongre, *Q&A. What Motivates Cyber-Attackers?*, TECH. INNOV. MGMT. REV. 40, 40-41 (2014), https://timreview.ca/article/838 (describing economic motivations for hacking).

Consumer Protection

In addition to AML regulation, federal MSB designation provides a shallow consumer protection arrangement, primarily in the form of mandated disclosure.[175] As far as privacy goes, like all other financial institutions, MSBs must comply with the Gramm-Leach-Bliley Act (GLBA). Under the "Privacy Rule", MSBs must notify consumers of third-party data distribution unmentioned in a privacy policy.[176] Under the "Safeguards Rule", they must develop an information security plan and keep certain measures in place to maintain data security.[177] Fifty different state MSB regulators also apply a mix of minimum net worth requirements, surety bond, and other security and investment requirements.[178] Even taken in concert, though, these laws have proven ineffective in keeping MSBs afloat.[179] Simply put, state regulators should certainly regulate Novi and the Libra system to the best of their ability, but federal regulators should not expect the states to handle an enterprise as aggressive in scope and volume as Libra.[180]

It is worth noting that one state regulator, the New York Department of Financial Services (DFS), applies a fairly unique set of money transmitter laws. Ostensibly, DFS would require all Libra ecosystem participants to obtain a New York BitLicense to conduct business in the state.[181] This should subject them to regular compliance obligations calibrated for digital currency businesses, most notably capital requirements calibrated by the DFS Superintendent.[182] Licensees should also have to gain DFS approval to offer materially new products, services, or activities, or to make material changes to existing products, services, or activities offered in New York State.[183]

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[175] 12 C.F.R. § 1005.3. *See also* Dan Awrey, *Bad Money,* 106 CORNELL L. REV. 1, 34 (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532681.

[176] 12 C.F.R. § 1016.3(q)(1).

[177] 16 C.F.R. §§ 314.4(a)–(e).

[178] *See* Awrey, *supra* note 175, at 34-41 (surveying the various requirements).

[179] *Id.* at 39-41 (arguing state money transmitter laws do not provide "robust prudential regulation, deposit guarantee schemes, lender of last resort facilities, or special resolution regimes" equivalent to conventional deposit-taking banks" and often fail to protect consumer funds, rendering them insufficient to regulate peer-to-peer payment platforms and aspiring stablecoin issuers).

[180] Some experts have argued that if Libra Coins prove as popular as Facebook, the Reserve could reach nearly $3.7 trillion in assets under management. *See* Kaminska, *supra* note 105.

[181] Novi has already applied for this license. Anna Irrera & Katie Paul, *Facebook's Libra coin likely to run a regulatory gauntlet*, REUTERS (June 28, 2019), https://www.reuters.com/article/us-facebook-crypto-regulation/facebooks-libra-coin-likely-to-run-a-regulatory-gauntlet-idUSKCN1TT30A.

[182] *See* N.Y. COMP. CODES R. & REGS. tit. 23, § 2003. *See also* Sarah Jane Hughes & Stephen T. Middlebrook, *Advancing A Framework for Regulating Cryptocurrency Payments Intermediaries*, 32 YALE J. ON REG., 495, 517 (2015) (arguing the BitLicense imposes more onerous prudential regulatory requirements on cryptocurrency intermediaries than New York State imposes on legacy payment providers).

[183] In clarifying the threshold for this sort of approval, former Superintendent Ben Lawsky once suggested that switching from the provision of wallets to exchange, for example, would constitute a material change. Ben Lawsky, Sup., N.Y. DFS, NYDFS Announces Final Bitlicense Framework for Regulating Digital Currency Firms (June 3,

Journalists have argued the Consumer Financial Protection Bureau (CFPB) could become a powerful regulator of Novi and other VASPs.[184] Indeed, the CFPB's existing Prepaid Rule would cover wallet providers, mainly requiring them to disclose certain information about fees and protections and refrain from linking to credit products for an initial period of time.[185] Furthermore, the CFPB exercises supervisory powers over nonbank remittance providers,[186] which would allow it to examine Novi and other VASPs to ensure they disclose certain information to users. The CFPB also retains broad enforcement authority with respect to electronic money transfers and data privacy (per the GLBA).[187]

If the Libra project were to ever reach its secondary stages of development, the CFPB would become an especially important watchdog. The Libra project would almost certainly facilitate unregulated consumer reporting.[188] Given that White Paper 1.0 opened by suggesting the Libra project would provide an alternative to payday and other high-cost loans, Libra-denominated loans are a likely development.[189] Although we cannot say for certain which companies would originate the loans, some Association members are clearly aspiring to micro-lending in the global south.[190] Another partner, Uber, has recently extended payday type credit to its own drivers in the United States.[191]

Consumer advocates have argued the CFPB should promulgate a rule authorizing it to supervise all "data aggregators" for compliance with consumer financial protection laws.[192]

2015), *available at* www.davispolk.com/files/speech-june-3-2015_nydfs_announces_final_bitlicense_framework_regulating_digital_currency_firms.pdf.

[184] *See*, *e.g.*, Evan Weinberger, *CFPB Could Be Powerful Libra Regulator, If It Chooses*, BLOOMBERG LAW (July 19, 2019), https://news.bloomberglaw.com/banking-law/cfpb-could-be-powerful-libra-regulator-if-it-chooses.

[185] *See* 12 C.F.R. § 1005; §1026. *See also* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83934-01 (Nov. 22, 2016).

[186] *See* 12 C.F.R. § 1090.107; *see also* Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56631 (Sept. 23, 2014).

[187] The CFPB may bring enforcement actions against any entity providing a "consumer financial product or service," or any entity materially assisting that provider. *See* 12 U.S.C. § 5536(a)(1); 12 U.S.C. § 5481(6)(A); 12 U.S.C. § 5481(15); 12 U.S.C. § 5481(26)(A). *See also* Packin & Lev-Aretz, *supra* note 21, at 1260 (noting the CFPB and FTC currently assume concurrent responsibility of online nonbanking consumer protection).

[188] *See* Taylor & Sadowski, *supra* note 58 (arguing Facebook and other Big Tech companies already generate consumer reports outside of FCRA regulation).

[189] WHITE PAPER 1.0, *supra* note 24, at 1.

[190] *See, e.g.*, Allison, *supra* note 79; Nikhilesh De, *Heifer International Joins Libra Association to 'Support Financial Inclusion',* COINDESK (Apr. 20, 2019), https://www.coindesk.com/heifer-international-joins-libra-association-to-support-financial-inclusion.

[191] Veena Dubal, *Uber's new loan program could trap drivers in cycles of crushing debt*, THE GUARDIAN (Dec. 5, 2019), https://www.theguardian.com/commentisfree/2019/dec/05/uber-loan-program-debt. *See also* COHEN, *supra* note 4, at 33 (describing Uber and similar businesses as converting the labor of workers into flows of monetizable data to which they enjoy privileged access).

[192] *See, e.g.*, EDITH RAMIREZ ET AL., FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY i-ix (2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf?utm_source=govdelivery (suggesting the CFPB could define "large data brokers" as subject to its examination authority under 12 U.S.C. § 5514(a)(1)(B)); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Lauren Saunders, Assoc. Dir., Nat'l Consumer

Under existing privacy and data protection laws, such supervision could only entail compliance with the aforementioned disclosure, notice-and-consent, and minimal information security rules, which many experts argue do nothing to curb mass surveillance,[193] but would benefit consumers in some respects.

The CFPB should also recognize that "the potential financial losses for consumers holding, transacting or trading Libra could be unlimited."[194] When the Bureau updated the regulations for the Electronic Funds Transfer Act in 2019, it declined to opine on whether error resolution rights and related protections apply to virtual currency wallets.[195] It must extend such safeguards now. This is especially important with respect to the Libra project. Although the Association claims that the Libra consensus protocol would make transaction finality clear,[196] distributed ledger technology struggles with finality as a general matter.[197] Moreover, it is unclear how the Blockchain could be amended to resolve transaction errors as a general matter. The White Paper does not address this issue.

In general, the CFPB should promulgate rules to fill gaps in its relevant statutory enforcement and supervisory powers. However, the CFPB's organic rulemaking authority is constrained to defining certain acts and practices as unfair, deceptive, or abusive, mandating disclosures, requiring registration of certain nonbanks, and restricting pre-dispute arbitration.[198] This combination of factors and minimal consumer privacy laws means that we cannot rely on even a proactive CFPB to affirmatively regulate the Libra project as a whole.

Law Center), *available at* https://www.nclc.org/images/pdf/cons-protection/testimony-lauren-saunders-data-aggregator-nov2019.pdf (arguing the same point).

[193] *See, e.g.*, Packin & Lev-Aretz, *supra* note 21, at 1279–81; Nathan Newman, *How Big Data Enables Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population*, 18 J. INTERNET L. 11, 19 (2014); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Dr. Christopher Gilliard, PhD), *available at* https://democrats-financialservices.house.gov/UploadedFiles/HHRG-116-BA00-Wstate-GillardC-20191121.pdf (arguing privacy policies mainly serve to protect companies and that credit scoring companies necessarily operate without the express consent of the consumers they claim to serve).

[194] Letter from Consumer Reports to U.S. S. Comm. on Banking, Hous., and Urban Affairs (July 1, 2019), https://advocacy.consumerreports.org/wp-content/uploads/2019/10/CR-letter-to-Senate-on-Libra-FINAL-.pdf.

[195] *Id. See also Is Cash Still King? Reviewing the Rise of Mobile Payments Testimony: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 8 (2020) (Statement of Christina Tetreault, Sr. Policy Counsel, Consumer Reports), *available at* https://advocacy.consumerreports.org/wp-content/uploads/2020/01/Hhrg-116-ba00-wstate-tetreaultc-20200130-u1-1.pdf (arguing that what protections exist are threatened by litigation initiated by PayPal).

[196] WHITE PAPER 2.0, *supra* note 1, at 7.

[197] *See* Ryan Surujnath, *Off the Chain! A Guide to Blockchain Derivatives Markets and the Implications on Systemic Risk*, 22 FORDHAM J. CORP. & FIN. L. 257, 298 (2017).

[198] *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 344 (2013).

Antitrust

As the country's primary antitrust regulator, the FTC is arguably most capable of disciplining the Libra project.[199] Indeed, the Commission and at least forty-seven state attorneys general are already investigating Facebook due to concerns about its dominance of social networking and digital advertising.[200] Demand Progress and other grassroots and netroots groups have previously argued the FTC held the power to spin off Instagram, WhatsApp, and Messenger,[201] as the Cambridge Analytica scandal violated a 2011 consent decree in which Facebook pledged to protect user privacy.[202]

Here, however, we will not rehash the persuasive arguments for breaking up Facebook. Rather, this section focuses on the FTC's ability to prevent Facebook, Novi, or even the Association from using the Libra system to engage in unfair competition. In addition to preventing specific business methods in the "embryonic stage", the FTC could divide the Libra system or a dominant participant like Novi into multiple entities, cabinining certain business activities to separate firms.[203]

The FTC retains expansive authority to interpret the antitrust provision of Section 5 of the FTC Act, which prohibits "unfair competition," as it sees fit.[204] In 2015, the FTC formalized guidance for Section 5, championing an interpretation centered on "economic efficiency" that is unhelpful for our purposes.[205] Yet under more ambitious leadership, the FTC could change course and establish presumptions of illegality for Libra's competitively suspect practices, either through enforcement activity or through rulemaking.[206] Although policymakers often wrongfully assume that because the FTC lacks specific authority to issue general information privacy rules,

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[199] *See* Rory Van Loo, *Technology Regulation by Default: Platforms, Privacy, and the CFPB*, 2 GEO. L. TECH. REV. 531, 536 (2018) (arguing the DOJ's antitrust division "lacks rulemaking authority, has no real finance-specific expertise, and defers to banking regulators.").

[200] Annie Palmer, *47 attorneys general are investigating Facebook for antitrust violations*, CNBC (Oct. 22, 2019), https://www.cnbc.com/2019/10/22/47-attorneys-general-are-investigating-facebook-for-antitrust-violations.html.

[201] Sarah Miller & David Segal, *Break up Facebook: Latest hack proves it's a dangerous monopoly that a fine won't fix*, USA TODAY (Oct. 5, 2018), https://www.usatoday.com/story/opinion/2018/10/05/facebook-dangerous-monopoly-divest-instagram-whatsapp-messenger-column/1512215002/.

[202] *See* Mem. from Comm'r Rohit Chopra to Comm'n Staff and Comm'rs 3-5 (May 14, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf (arguing recidivist misconduct should trigger a ban from engaging in relevant business practices altogether).

[203] Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. 645, 687–88, 698 (2017).

[204] *See* 15 U.S.C. § 45.

[205] Vaheesan, *supra* note 203, at 650–51, 690-94.

[206] In either case, the interpretations would be entitled to *Chevron* deference and thus offered relatively substantial protection from adverse court rulings. Moreover, the Court has stated that the FTC can consider public values beyond those enshrined in the letter or encompassed in the spirit of existing antitrust laws. *Id.* at 653.

it must rely solely on adjudication to regulate unfair surveillance, this is not the case.[207] Rather, the FTC may engage in participatory rulemaking with respect to privacy, so long as it aims to prohibit unfair methods of competition.[208]

Given the business models of dominant platforms involved in the Libra project, and the design of the payment system itself, it is likely that many of the Libra project's unfair methods would feature surveillance. As discussed in the Background section, dominant digital platforms capture highly precise and nuanced data about their users. As U.S. legal scholars and European antitrust authorities have concluded, this data collection begets platform power, which allows Big Tech to continually extract additional data in unfair ways, creating a feedback loop.[209]

Indeed, today, engaging with Facebook as a user or business partner means accepting ubiquitous surveillance. In the early days, competition with MySpace and other alternatives restrained Facebook's surveillance activities.[210] Since 2014, however, Facebook has leveraged its code presence on third-party applications to track user behavior across the internet.[211] Today, Facebook uses technology like "social plug-ins" (most notoriously, Facebook "Like" buttons), to consistently identify user behavior, even if a user has not clicked the Like button and even if we have logged out of Facebook.[212] Facebook also collects data from non-Facebook users.[213]

All Novi would have to do in order to track its own users across the internet is mimic its parent company: embedding its code in third-party websites and opening backdoor communication between users' devices and Novi's servers. It could easily mimic Facebook's general surveillance practices through use of a payment button, allowing Novi to more precisely target users when selling targeted ads or engaging in other business.

Absent new laws, Novi is also likely to surveil users more directly. Novi's Customer Commitment states that financial data would not be linked to Facebook social data or shared with third parties without "customer consent",[214] but given the company's history, there is no reason to imagine that Facebook is dedicated to a meaningful definition of that term.[215] Moreover, the very notion of digital consent has been complicated by "dark patterns" and other

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[207] *See, e.g.*, *id.* at 677; Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 369–70 (2020); Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 232-233 (2014).

[208] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697-98 (D.C. Cir. 1973) (holding that the FTC has rulemaking authority under Section 5).

[209] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 518 (2019).

[210] Srinivasan, *supra* note 19, at 46-48.

[211] *Id.* at 70–71.

[212] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1003-1005 (2019).

[213] Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 85 (2019).

[214] *See* NOVI: CUSTOMER COMMITMENT, *supra* note 81.

[215] For instance, consent could be gained by inserting a clause in extensive terms and conditions. *See* Thibault Schrepel, *Libra: A Concentrate of 'Blockchain Antitrust',* 118 MICH. L. REV. ONLINE 160, 166 (2020).

technologies platforms use to exploit limits in user cognition and understanding.[216] Consumers typically have no knowledge of what they are consenting to on the internet; currently, more than 60% of American are unaware that Facebook even owns Instagram.[217]

Dominant platforms also collect highly precise and nuanced data about their business partners and business customers.[218] App developers, in particular, rely on Facebook even though they compete with the social media giant. To incentivize developers to invest in building its ecosystem, Facebook regularly offers them access to its application programming interfaces (APIs). However, Facebook has used this relationship to appropriate business plans and other ideas from rivals.[219] If not properly regulated, Novi could expropriate from other wallet providers. Facebook also has a history of acquiring the companies it monitors, suggesting Novi could aim to simply acquire other Libra wallet providers down the road.[220]

European antitrust regulators are particularly concerned that the automatic integration of Novi wallets into WhatsApp and Messenger services could create "competition restrictions" regarding data collection.[221] Unfortunately, U.S. antitrust regulators have often failed to scrutinize similar practices properly.[222] Moreover, no overarching federal privacy law governs the collection, use, and sale of personal information among private-sector corporations — not even Big Data brokers.[223] Until legislation addressing the general issue passes, the FTC should invoke its unfair competition authority to challenge user and competitor surveillance as anti-competitive business practices.

Although the FTC could establish a long list of presumptively unfair, uncompetitive practices that might arise within the Libra ecosystem, this list should at the least include: *product tying, predatory pricing,* and general *collusive behavior.*

Product Tying

Some unfair competition principles prevent *tying*: conditioning the sale of a product over which a company exercises monopoly power on the sale of a related product in order to sell the

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[216] *See, e.g.*, Richards & Hartzog, *supra* note 82 (borrowing a definition of dark patterns as "'tricks used in websites and apps that make you buy or sign up for things that you didn't mean to.'").
[217] Freedom from Facebook, *supra* note 56.
[218] Khan, *supra* note 212, at 1066-67.
[219] *Id.* at 1001-03.
[220] K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms As the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 245–46 (2018) (noting how dominant platforms like Facebook and Google leverage control over data to buy out competitors control additional markets).
[221] *See, e.g.*, Jon Porter, *EU antitrust regulators have Facebook's Libra currency in their sights*, THE VERGE (Aug. 21, 2019), https://www.theverge.com/2019/8/21/20826290/facebook-libra-digital-currency-european-union-commission-regulators-antitrust-competition.
[222] *See, e.g.*, Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1010 (2013); Day & Stemler, *supra* note 213, at 89 (in two scholars' review, case law contained zero instances of antitrust liability premised on remedying privacy injuries).
[223] *See generally* Hartzog & Richards, *supra* note 45.

related product.[224] For instance, the European GDPR explicitly bans the conditioning of certain consumer contracts on the provision of additional, unnecessary user data.[225] By contrast, the modern FTC presumes product tying, in general, is a rare occurrence.[226] Nevertheless, U.S. antitrust scholars have called for the FTC to resuscitate its previous Sherman Act approach to tying arrangements.[227] In *Jefferson Parish Hosp. Dist. No. 2. v. Hyde*,[228] the Court affirmed that forcing customers to purchase products together, through the sellers' market power, is illegal *per se.*

One can easily imagine Facebook or the Association running afoul of *Jefferson's* tying principles. As mentioned, European regulators are already investigating Facebook's plans to embed Novi wallets within the WhatsApp and Messenger apps and presumably integrate data.[229] To the extent Facebook were to force its users to accept Novi's code presence and surveillance as a condition of using WhatsApp and Messenger, this could constitute a tying violation. Automatically creating a Novi account for each Facebook user, or limiting Novi technical support to Facebook users, could also qualify as illegal tying.[230]

Given that Libra Coins are literally means of paying for other products, the potential for Facebook and the Association to bundle the Coins with other products would be almost limitless. Indeed, Facebook has already run into trouble for monopolizing means of payment. Business partners have alleged that Facebook used an older payment system, Facebook Credits, to instigate *per se* unlawful tying arrangements, conditioning participation in social network gaming on the use of Facebook Credits.[231] One could easily imagine Facebook and Novi engaging in similar behavior. Would companies that already allow Facebook to watch and monitor their own customers sufficiently push back against a demand for payment in Libra? Facebook could once again flex its muscle to make app developers use its infrastructure. It could also coerce advertisers to denominate targeted advertisement contracts in Libra.

Predatory Pricing

Some scholars have argued Facebook could use its platform power to steer Libra users to Novi, even forcing them to pay relatively higher fees, mimicking problematic practices plaguing the credit card industry.[232] However, in order to expand their user bases, dominant firms can also resort to "predatory pricing", whereby they use periods of below-cost pricing to monopolize

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[224] FREEMAN & SYKES, *supra* note 6, at 15-17.
[225] *See* Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 143 (2017).
[226] *See* Cohen, *supra* note 72, at 376.
[227] *See, e.g.*, Vaheesan, *supra* note 203, at 680.
[228] 466 U.S. 2, 15-18 (1984).
[229] Daniel Palmer, *Facebook Libra Already Facing an EU Antitrust Probe: Report,* COINDESK (Aug. 21, 2019), https://www.coindesk.com/facebook-libra-already-facing-an-eu-antitrust-probe-report.
[230] Schrepel, *supra* note 215, at 165.
[231] Kickflip, Inc. v. Facebook, Inc., 999 F. Supp. 2d 677, 689 (D. Del. 2013).
[232] Schrepel, *supra* note 215, at 167. *See also* Ohio v. Am. Express Co.*,* 138 S. Ct. 2274, 2281, 201 L. Ed. 2d 678 (2018).

market share and deter competitors from entering markets.[233] Indeed, in 2012, Zuckerberg explicitly stated he wanted to create a payment product to gain pricing power over third-party developers.[234] Overall, the Libra project would allow Facebook to create infrastructure for financial service providers and then compete with them within that same infrastructure on terms it controls. Given Facebook's comparatively large user base, Novi would immediately become the dominant wallet and could more easily charge transaction fees lower than its competitors. If Facebook were to surveil other Libra wallet providers, it could garner Novi additional advantages. As the Chinese conglomerate TenCent has demonstrated through WeChat Pay, combining a payments network with a massive social media platform quickly generates extreme pricing power.[235] As mentioned in the Background section, these integrated, intimate data are extremely valuable and can be used to enhance financial services, such as credit scoring.[236]

Indeed, Facebook could eventually steer the Association into pricing financial products and services within the Libra ecosystem based upon some form of social scoring engineered by Facebook or its affiliates. The company has already patented an algorithm that determines creditworthiness based on one's social media circles.[237] In some cases, Facebook could wield Novi's power on the Association Council so as to engage in "exclusive dealing": the use of penalties or rebates to prevent rivals from accessing essential distribution channels or consumer groups.[238]

Collusive Behavior

Facebook could ultimately use its position in the Association to collaborate with some competitors rather than punishing them, establishing a "cartel between independent firms eager to coordinate their market behavior when such practices create a negative effect on trade."[239] The FTC already explicitly presumes some types of conspiracies — including agreements to fix prices or generally divide up customers, suppliers, territories, or lines of commerce — to constitute *per se* violations of antitrust law.[240] The DOJ prosecutes companies engaged in these violations. Beyond this list, joint FTC & DOJ guidance suggests agreements must be "reasonably

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[233] *See, e.g.*, COHEN, *supra* note 4, at 42 (noting "supracompetitive pricing" is the most reliable sign of platform entrenchment).
[234] MATT STOLLER, OPEN MKTS INST., LIBRA BASICS: WHAT IS FACEBOOK'S CURRENCY PROJECT? (updated July 19, 2019), https://openmarketsinstitute.org/reports/libra-basics-facebooks-currency-project/.
[235] Jacky Wong, *The Next Level for China's Tencent: Global Domination*, WALL ST. J (Nov. 13, 2019), https://www.wsj.com/articles/the-next-level-for-chinas-tencent-global-domination-11573655785.
[236] BIS REPORT, *supra* note 6, at 61-62.
[237] *See, e.g.*, Robinson Meyer, *Could a Bank Deny Your Loan Based on Your Facebook Friends?*, THE ATLANTIC (Sept. 25, 2015), https://www.theatlantic.com/technology/archive/2015/09/facebooks-new-patent-and-digital-redlining/407287/.
[238] FREEMAN & SYKES, *supra* note 6, at 17-18.
[239] Schrepel, *supra* note 215, at 164.
[240] *See* 15 U.S.C. § 1. *See also* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362-63 (5th Cir. 2008). Virtually every state has similar unfair competition laws. *See* Toby G. Singer, *Antitrust Implications of the Affordable Care Act*, 6 J. HEALTH & LIFE SCI. L. 57, 60–61 (2013).

related" to "efficiency-enhancing integration" in order to be permitted.[241] But the principles in this guidance could be altered to further protect users and competitors.

Under Libra's current design, a consortium of multinational corporations and NGOs would share access to a ledger that could reflect the financial transactions of billions of people. In common parlance, blockchains are often considered to be decentralized ledgers by default, but the Libra Blockchain is still a *single* data structure that records the history of transactions and states over time.[242] It is "not hard to imagine" Facebook colluding to connect transactions with true identities.[243]

As a general matter, blockchain technology cannot prevent collusion among members of a settlement consortium.[244] Like many distributed ledger projects, the Libra system is vulnerable to what is known as a "control attack" — with sufficient power, a group of node validators could manipulate the shared ledger.[245] Indeed, the Association has clarified that the Blockhain can only mitigate control attacks if less than a third of the network is compromised.[246] This means node validators could conspire to take control of the ledger in order to amend it. Theoretically, a group of node validators under Facebook's substantial influence could commandeer the Blockchain.

Experts are also concerned that the Association itself could use Libra to gain monopolistic power over emerging digital markets. For instance, some experts are concerned about the Association's ability to lock out certain rivals from Association membership. As the Association is in charge of recruiting and approving additional members, setting minimum thresholds for financial contributions to the Reserve, and generally manipulating compliance requirements, it could easily establish anti-competitive barriers to entry. Although the Supreme Court has generally held that companies are free to choose business partners, certain restrictions may apply to monopolists.[247] Moreover, the prohibitions against this sort of practice may interweave with other court-established prohibitions. For instance, the *essential-facilities doctrine* prohibits monopolists from denying competitors access to market structures that cannot be practically or reasonably duplicated.[248]

Myriad questions remain. Who would own any intellectual property produced via the Libra project? What is to prevent node validators from secretly re-identifying payment transaction data and sharing it with each other? What protections would exist to prevent the

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[241] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 12 (2000), http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf.
[242] WHITE PAPER 2.0, *supra* note 1, at 8.
[243] Michele Benedetto Neitz, *The Influencers: Facebook's Libra, Public Blockchains, and the Ethical Considerations of Centralization*, 21 N.C. J. L. & TECH. 41, 53-58 (2019).
[244] Surujnath, *supra* note 197, at 320.
[245] *See* Walch, *supra* note 70, at 738–39.
[246] WHITE PAPER 2.0, *supra* note 1, at 8.
[247] FREEMAN & SYKES, *supra* note 6, at 12-13.
[248] *Id.* at 13-15.

members from collectively using that data for discriminatory purposes? Overall, these open-ended inquiries and others should inform a strong prophylactic response from the FTC.

Securities Regulation

Immediately following the Libra project announcement, some experts were quick to say that Libra Coins would be securities and the subsidiary managing the Reserve would be an investment company. However, some of this analysis hinged on the inclusion of a now retired instrument, the Libra Investment Token, which would have entitled Association members to Reserve interest.[249] Just before Zuckerberg's October 2019 Congressional testimony, the Association struck any mention of the Investment Token from the White Paper, replacing it with vague language about distributing "incentives" in the form of standard Libra Coins to "reward members for producing growth in usage of the Libra network."[250] While White Paper 2.0 retains the reference to "incentives",[251] it offers no details as to their composition. It also refrains from offering any details as to capitalization, leaving open the possibility that the stability of the Reserve actually rests on the balance sheets of Facebook or other Association members. The general lack of information obscures the extent to which the Association or Libra Networks would function like an investment fund.

Although important factual questions remain, the Supreme Court has granted the SEC significant discretion in classifying assets as securities insofar as the SEC determines them to be instruments that *might* be used for investment purposes.[252] Under its existing mandate, the Commission could designate Libra Coins as securities, encouraging capital gains taxation by the IRS, which would curb retail usage. For instance, it is laughable to envision the general public using Libra Coins to buy coffee at a bodega if they had to track and report that exchange to the SEC or another body. Moreover, by classifying the Coins as securities, the SEC could impose substantive regulatory burdens on DDs and some VASPs as securities broker-dealers, node validating Association members as securities transfer agents, and Libra Networks as a securities clearing agency. The SEC could also regulate Libra Networks as a money market fund (MMF),

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[249] *See, e.g.*, Brummer, *supra* note 116; *Examining Facebook's Proposed Cryptocurrency and Its Impact on Consumers, Investors, and the American Financial System: Hearing Before the H. Comm on Fin. Services*, 116th Cong. 6 (2019) (Statement of Gary Gensler, Prof. of the Practice of Global Econ. & Mgmt., MIT Sloan Sch. of Mgmt.), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-genslerg-20190717.pdf.

[250] Raúl Carrillo, *Don't buy what Zuckerberg's selling on Libra*, AM. BANKER (Oct. 22, 2019), https://www.americanbanker.com/opinion/dont-buy-what-zuckerbergs-selling-on-libra.

[251] WHITE PAPER 2.0, *supra* note 1, at 23, 25.

[252] *See, e.g.*, SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946) (explaining that defining a contract for securities "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."); Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990) (emphasizing that "Congress enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be sold as investment.").

ETF, or other kind of investment company, forcing the Association to constrict Coin trading to more sophisticated platforms and users, and satisfy prudential requirements.

When contemplating these measures, the Commission should bear in mind that should it permit Libra Coins to operate as unregistered securities, or permit Libra Networks to operate as an unregistered investment company, then it would likely encourage further arbitrage by similar enterprises, especially within the digital currency industry. It is especially important that Coins that might function as investment assets not go unregulated simply because they would allegedly improve the ease of money transfer for some retail users.

Securities Designation

The Securities Act of 1933, which undergirds federal securities regulation, encompasses a wide spectrum of instruments within its definition of "securities", but does not contemplate every contemporary guise.[253] First, we consider Libra Coin contracts as *investment contracts,* then as *notes*, then briefly as *transferable shares, evidence of indebtedness,* or *instruments commonly known as securities.*

In 2017, the SEC issued an investigative report (DAO Report)[254] indicating that it would apply investment contract analysis to digital currency transactions. According to the SEC's interpretation of the test from *SEC v. Howey*,[255] a digital asset is an "investment contract", if it involves "an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[256]

Thus far, the SEC has sent "No Action letters" to two companies (a private jet leasing service and an online video game start-up) indicating their stablecoins will not be treated as

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[253] *See* 15 U.S.C. § 77b(a)(1) (The term "security" means any *note, stock*, treasury stock, security future, security-based swap, bond, debenture, *evidence of indebtedness*, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, *transferable share, investment contract*, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, *option*, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or *instrument commonly known as a "security"*, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing) (emphases mine, italicizing forms of securities discussed in this Report). *See also* Steven J. Cleveland, *Resurrecting Court Deference to the Securities and Exchange Commission: Definition of "Security"*, 62 CATH. U. L. REV. 273, 301–03 (2013) ("...each of the twenty-plus congressionally enumerated instruments generates its own definitional dilemma).

[254] SEC, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: THE DAO, Securities Act Release No. 81207 (2017), https://www.sec.gov/litigation/investreport/34-81207.pdf. [hereinafter DAO REPORT].

[255] *See Howey*, *supra* note 252.

[256] *See* DAO REPORT, *supra* note 254, at 11; Jacob Gregory Shulman, *ICOs, Cryptos, Blockchain, Oh My!: A Primer on ICOs*, 22 RUTGERS COMPUTER AND TECH. L.J. 53, 68 (2020) (noting that although the circuits are split on whether the *Howey* test includes three or four elements, the substance of the tests is sufficiently similar for our purposes).

securities under the DAO framework.[257] The SEC granted these exemptions given fact-specific circumstances and imposed narrow conditions like limiting the coins to a short list of consumptive use-cases.[258] Given this precedent, we can anticipate an investment contract analysis of the Libra Project would apply the DAO framework to Libra's unique design and dynamics.

Courts disagree as to what constitutes investment in a "common enterprise."[259] They agree that *horizontal commonality*, which looks at the relationships between an individual investor and the pool of other investors, meets the *Howey* test.[260] However, courts are split as to whether *vertical commonality,* which looks to the relationship between the investors and the promoters, is sufficient to satisfy the test.

Circuits that focus solely on *horizontal commonality* ask whether there is "a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors."[261] Libra Networks would clearly pool funds from DDs to support the issuance of Libra Coins, but Libra Coin holders would not receive a distribution of profits and losses on a pro-rata basis. (Coin holders are not entitled to any interest accrued on the Reserve). Absent emergency operations, retail users would not have any contractual rights whatsoever vis-a-vis Libra Networks.[262]

Courts that also focus on *vertical commonality* ask whether the success of the investors depends upon the efforts of promoters.[263] In this context, it is almost self-evident that the financial success of DDs, VASPs, and retail users would depend upon the efforts of the Association and powerful members like Facebook to scale the ecosystem so the currency would become viable. Courts are currently hearing arguments as to whether *vertical commonality* is sufficient to constitute a common enterprise in a digital currency context given an absence of contractual rights for retail users.[264]

In any case, the touchstone question for the Court's investment contract analysis has consistently been whether the circulation of the instruments in question triggers a "reasonable

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[257] SEC, Response of the Div. of Corp. Fin. Re: Turnkey Jet, Inc. Letter dated Apr. 2, 2019, https://www.sec.gov/Divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm; SEC, Response of the Div. of Corp. Fin Re: Pocketful of Quarters, Inc. Letter dated July 25, 2019, https://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1.

[258] Lilya Tessler et al., *Beyond* Howey*: Is stability a security? The evolving digital asset framework*, 25 No. 16 Westlaw J. Sec. Litig. & Reg. 5 (2020) (inquiring as to whether the SEC will issue no-action letters addressing other design features common amongst stablecoin systems).

[259] A.B.A. Derivatives and Futures Law Comm., Innovative Digital Products and Processes Subcomm. Jurisdiction Working Group, *Digital and Digitized Assets: Federal and State Jurisdictional Issues* 109-112 (2019), https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/committees/CL620000pub/digital_assets.pdf. [hereinafter A.B.A. Report].

[260] Usha R. Rodrigues, *Embrace the SEC*, 61 Wash. U. J. L. & Pol'y 133, 154 (2020).

[261] SEC v. Infinity Grp. Co., 212 F.3d 180, 188 (3d Cir. 2000).

[262] White Paper 2.0, *supra* note 1, at 17.

[263] *See, e.g.*, SEC v. SG Ltd., 265 F.3d 42, 49−50 (1st Cir. 2001).

[264] Jonathan L. Marcus et al., *Recent Cryptocurrency Regulatory Developments*, Banking & Fin. Services Pol'y Rep., September 2019, at 4.

expectation of profit."[265] Courts have previously defined "profit" as that derived from "capital appreciation resulting from the development of the initial investment," or "a participation in earnings resulting from the use of investors' funds."[266] When confronting the existence of multiple or competing user expectations, courts have attempted to distinguish between primary versus incidental usage. More specifically, they have asked whether the purchase of an instrument usually looks more like a "bet" or an attempt to use an instrument to exchange goods and services.[267]

This is a fact-intensive inquiry. It is also an especially difficult question for the Libra project. Some facts are missing: as mentioned in the Background section, it is still unclear if Association members would earn dividends from Reserve interest. On the front end, the Association is explicitly marketing the Coins for consumptive use, and telling users not to expect profits. The Coins do not entitle holders to the interest earned on the Reserve's investments. Libra Coin holders have no rights to exercise against Libra Networks in general. Yet some retail users might still expect to indirectly benefit from the gradual appreciation of the Reserve.

Based on the profit expectation question, the SEC could also determine that ≋LBR is a security, but single-currency stablecoins like ≋USD are not securities. As a "managed stablecoin" pegged to widely referenced fiat currencies and government securities, ≋LBR presents regulators with a different set of facts.[268] While ≋USD holders would bear operating and counterparty risks, ≋LBR holders would also bear market, credit, and interest rate risks, subject to the management of Libra Networks and intermediation by DDs and VASPs.[269] In short, because of its utility in hedging foreign exchange risk, users might have a more reasonable expectation of profit with respect to ≋LBR than the single currency stablecoins. However, this profit would derive from foreign exchange fluctuations rather than a share in the profits of Libra Networks.

Theoretically, Libra Coins could also be securities at one stage of their lifecycle, but cease to be securities at a later stage. For instance, the SEC enforcement chief has previously suggested that a digital currency may be sold via an investment contract in an offering, and thus

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[265] United Hous. Found. v. Forman, 421 U.S. 837, 852 (1975).
[266] *Id.*
[267] William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When* Howey *Met Gary*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.
[268] The Managed Stablecoins Are Securities Act (H.R. 5197), sponsored by Reps. Sylvia Garcia (D-TX) and Lance Gooden (R-TX), defines a "managed stablecoin" as a digital asset that does is not otherwise a registered security and satisfies one of two criteria: (1) the digital asset's value is determined by the value of a reference pool or basket of assets that is managed by one or more persons; and/or (2) one or more holders of a digital asset are entitled to consideration or assets in exchange for the digital asset in an amount fixed in significant part by the value of a reference pool or basket of assets (including digital assets) that are managed by one or more persons. BIPARTISAN BILL WOULD BRING MANAGED STABLECOINS WITHIN DEFINITION OF 'SECURITY', Sec. Exch. Comm'n. Today 7842728.
[269] For discussion of such risk, see, e.g., Gensler, *supra* note 249 at 8.

constitute a security, but become a non-security in the context of retail circulation.[270] The SEC could adopt this approach by claiming that the minting and burning of Libra Coins by Libra Networks must be subject to federal securities regulation, even if the transactions between DDs and VASPs and between VASPS and retail users need not be.

Overall, the DAO framework presents a complicated web of analyses that can only be fully addressed given further certainty regarding the Libra business model. The SEC might find stronger footing under *notes* analysis. *Reves v. Ernst & Young*[271] is the seminal case for defining whether notes are considered securities under federal law. Under a *Reves approach*, the SEC would first have to demonstrate that Libra Coins are in fact, notes. A note is generally a "written promise by one party (the *maker*) to pay money to another party (the *payee*) or to bearer."[272] Although this term may apply to Libra Coins in the context of transactions between Libra Networks and DDs, it would not apply to broader retail usage, except via contracts between users and VASPs, of which we have no knowledge. Indeed, some experts have argued that because a note represents a "continuing obligation between the note-maker, and the note-holder...", the term is inapplicable to most virtual currencies.[273] That being said, *Reves* does not define the term "note" and courts could create or borrow other definitions.

Once the SEC has established that Libra Coins are notes, courts would presume that the notes are securities.[274] However, the Association could rebut this presumption by showing that Libra Coins "bear a strong family resemblance" to an item on a judicially crafted list of exceptions.[275] As the Coins could not be said to readily resemble any instruments on that list, courts would then assess family resemblance via a four factor test: 1) the seller's and buyers' motives; 2) the plan of distribution, 3) the reasonable expectations of the investing public; and 4) the availability of a regime other than securities law to regulate the enterprise.[276]

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[270] Petal Walker, *The Legend of the "Secumodity": Can the Same Coin Be a Security or Commodity at Different Points in its Evolution?*, 39 NO. 5 WESTLAW J. FUTURES & DERIVATIVES L. REP. 3 (2020) (citing Hinman, *supra* note 269).

[271] *Reves*, *supra* note 252.

[272] NOTE, Black's Law Dictionary (11th ed. 2019).

[273] *See, e.g.*, Laura D. Pond, *Schrödinger's Currency: How Virtual Currencies Complicate the RIC and REIT Qualification Requirements*, 9 COLUM. J. TAX. L. 229, 245 (2018).

[274] *Reves*, *supra* note 252, at 67 ("...a note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument.").

[275] Julia Dimitriadis et al., *Securities Fraud*, 56 AM. CRIM. L. REV. 1379, 1399–400 (2019) (providing a list of notes deemed non-securities under this test are: short-term unsecured notes issued by a bank to institutional investors; notes based on viatical contracts; notes packaged as consumer loans with enhancements; defaulted municipal bonds; leveraged derivative transactions with values based on the yield from five-year Treasury notes and the price of thirty-year Treasury bonds; and notes issued to investors in exchange for bridge loans).

[276] *Reves*, *supra* note 252, at 63–64. *See also* Marco Dell'Erba, *Stablecoins in Cryptoeconomics: From Initial Coin Offerings to Central Bank Digital Currencies,* 22 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 47 (2020); Thomas Lee Hazen, *Tulips, Oranges, Worms, and Coins - Virtual, Digital, or Crypto Currency and the Securities Laws*, 20 N.C. J.L. & TECH. 493, 504–05 (2019) (noting money transmitter regulation does not mitigate against the need for investor protection regulation).

Some experts have suggested that contracts for fiat-backed stablecoins may function as "demand notes" — two-party negotiable instruments obligating a debtor to pay the noteholder at any time upon request — which the *Reves* court explicitly classified as securities.[277] Applying the four *Reves* factors to the Libra project, however, we still confront the same central questions as the *Howey* test.[278]

The treatment of Libra Coins under the first factor is unclear. Libra Networks would be selling the Coins for the "general use of its business enterprise" and some users would be interested in profiting from Coin trading if not appreciation of the Reserve. These factors would mitigate toward securities designation.[279] On the other hand, the use of Coins to serve consumption purposes would mitigate against it.[280] Under the second factor, courts would have to determine whether Libra Coins are instruments in which there is "common trading for speculation or investment." If the category of instrument in question were "digital currency", then the factor would seem to be met. If the instruments were a narrower category, like "stablecoins", or "managed stablecoins", this might be less clear. The third factor is most difficult, as it returns us once again to questions about promotion of the coins and Libra Coin holders' expectations. Finally, the fourth factor calls into question derivatives regulation.[281]

As with the *Howey* approach, a court applying *Reves* could still determine that ≋LBR is a security, but single-currency stablecoins like ≋USD are not securities. It could also decree that Libra Coins exchanged between Libra Networks and DDs are securities, while Coins in retail usage are not securities. However, unlike *Howey*, the *Reves* test never states that all its factors have to be present to meet the test.[282] The notes approach provides more flexibility than the investment contract approach for successfully defining Libra Coins as securities, especially concerning questions around profit expectations.

On the surface, it also appears that Libra Coins function like *transferable shares*. However, courts that have been asked to rule on whether an instrument fits the definition of a "transferable share" have defined the term to mean an instrument providing certain rights equivalent to corporate share ownership.[283] Within the Libra system, even DDs holding Libra Coins would not be entitled to typical shareholder rights (dividends, voting, rights to access books, etc). Moreover, although Libra Coins are backed 1:1 by the Libra Reserve, their value does not necessarily increase along with the Reserve's returns.

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[277] *See*, Dell'Erba, *supra* note 276 at 32; Jake Chervinsky & Benjamin Sauter, *Will Fiat-Backed Stablecoins Pass Legal Muster With the SEC and CFTC?*, COINDESK (Mar. 2, 2019), https://www.coindesk.com/will-fiat-backed-stablecoins-pass-legal-muster-with-the-sec-and-cftc.

[278] *See Reves*, supra note 252, at 66 (noting that the family resemblance test borrowed from the 2nd Circuit applied the same factors the Court defined in *Howey)*.

[279] *Id.*

[280] *Id.*

[281] *See infra* pp. 48-53.

[282] *See* Brummer, *supra* note 116, at 13.

[283] *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336–40 (1967).

The argument for Libra Coins as *evidence of indebtedness* (a term included in the Securities Act and ICA definitions of a security, but not the Exchange Act definition) is stronger. An evidence of indebtedness includes all "contractual obligations to pay in the future for consideration presently received."[284] One could argue that given the redemption requirement, Libra Networks indebts itself to DDs. The SEC has argued that certain repurchase agreements, firm commitments, and other contracts constitute "evidence of indebtedness" for the purposes of the ICA regulation.[285] However, it has explicitly refused to define those instruments as securities in general. Yet courts that have grappled with "evidence of indebtedness" have tended to treat "evidence of indebtedness" and "notes" synonymously. For instance, the Second Circuit has determined whether an instrument constitutes "evidence of indebtedness" for the purposes of federal securities should also be determined by the *Reves* test.[286]

Finally, the SEC could rely on a broad argument that Libra Coins are instruments commonly known as a securities. The phrase "commonly known as a security"" has not generated much litigation and the federal courts have not provided much guidance on how to interpret the phrase.[287] Indeed, if anything, the Court has indicated that if facts are similar, it does not perceive a distinction between the test for "investment contract" and the test for "an instrument commonly known as a security."[288] By adopting this angle, the SEC would be arguing that the public understood the Coins to be securities despite their marketing as simple payment tools.[289] Alternatively, the Commission could argue that digital currencies, in general, are commonly known as securities, and thus Libra Coins meet this definition.

Regardless of which path it took, the SEC could point to its aforementioned judicial mandate to regulate "virtually any instrument that *might* be sold as investment" (emphasis added).[290] Were it to become clear that the Libra project yields returns for the "not-for-profit"

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[284] *See* United States v. Austin, 463 F.2d 724, 763 (10th Cir. 1972) (concluding that a traditional repurchase agreement should not be deemed a security).

[285] *See* Sec. Trading Practices of Registered Inv. Co., Inv. Co. Act Release No. 10666, 44 F.R. 25131-32 (Apr. 18, 1979).

[286] Aiena v. Olsen, 69 F. Supp. 2d 521, 534 (S.D.N.Y. 1999).

[287] *See* Elaine A. Welle, *Limited Liability Company Interests As Securities: An Analysis of Federal and State Actions Against Limited Liability Companies Under the Securities Laws*, 73 DENV. L. REV. 425, 478 (1996) (also noting the Securities Act and Uniform Securities Acts list any interest or instrument commonly known as a security, while the Exchange Act lists only any instrument commonly known as a security).

[288] Forman, *supra* note 265 ([w]e perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a 'security.'" In either case, the basic test for distinguishing the transaction from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."). *See also* Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943) ("Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'").

[289] *See* Lewis D. Lowenfels & Alan R. Bromberg, *What Is A Security Under the Federal Securities Laws?*, 56 ALB. L. REV. 473, 492 (1993) (for a characterization of what analysis of this term might involve in the context of litigation).

[290] *Reves*, *supra* note 252.

Association's members or other initial investors, the SEC could more strongly argue that all Coins function as securities within the same investment pool and should be subject to federal securities regulation throughout their lifecycle.[291]

Following a securities designation, the SEC could require Libra Networks to register and sell Coins as part of an ICO or seek an exemption.[292] In this scenario, Libra Networks could seek refuge in Regulation D,[293] perhaps through a Simple Agreement for Future Tokens (SAFT), a special mechanism requiring Libra Networks to only sell Coins to "accredited investors."[294] Although this would not change the design of the system, it would render the Libra Coins "restricted securities" meaning the DDs could not sell the Coins for at least six months or a year without registering them.[295] Moreover, the Association would have to change its marketing strategy so as not to suggest the Coins were immediately purchasable by retail investors.[296] At the minimum, this would postpone the sale of Libra Coins to the broader public.[297]

Intermediary Regulation

If the SEC successfully designated Libra Coins as securities, it could impose several concomitant regulatory and supervisory burdens on the Libra project.[298] For instance, the SEC has already suggested that participants in digital asset enterprises might need to register as broker-dealers, transfer agents, and clearing agencies.[299]

The Securities Exchange Act of 1934 (the "Exchange Act") defines a "broker" as a person "engaged in the business of effecting transactions in securities for the account of others."[300] Brokers tend to identify potential purchasers, take custody of securities, and profit from transaction-based fees. A dealer is any company "engaged in the business of buying and selling securities...for such person's own account…"[301] Dealers tend to make money by making markets. Under these criteria, the SEC could designate DDs as broker-dealers. It could do the same for VASPs that would promote Libra Coins, identify recipients, store funds, and generally expand

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[291] *See, e.g.*, Gensler, *supra* note 249, at 15.
[292] *See* 15 U.S.C. § 77b(a)(3).
[293] *See* 17 C.F.R. §§ 230.500−508; *see also* FAST ANSWERS: RULE 506 OF REGULATION D, SEC, https://www.sec.gov/fast-answers/answers-rule506htm.html (last visited May 31, 2020); Usha R. Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 725–26 (2019).
[294] *See* 17 C.F.R. § 230.501 (defining accredited investors).
[295] *See* "'RESTRICTED' SECURITIES: REMOVING THE RESTRICTIVE LEGEND", SEC, https://www.sec.gov/fast-answers/answersrestrichtm.html.
[296] *See* FAST ANSWERS, *supra* note 293.
[297] *See* Rodrigues, *supra* note 293, at 725 (noting how Swiss nonprofits have tried to skirt ICO regulations by excluding U.S. investors, a tactic that seems unhelpful for the Libra project despite its domicile).
[298] It could also impose a few basic privacy rules under the GLBA. *See* SEC, GUIDE TO SEC PRIVACY RULES: BROKER-DEALERS, INVESTMENT COMPANIES AND ADVISORS (2001).
[299] Public Statement, SEC, Statement on Potentially Unlawful Online Platforms for Trading Digital Assets (Mar. 7, 2018), https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading.
[300] 15 U.S.C. § 78(a)(4)(A).
[301] 15 U.S.C. §§ 78c(a)(5)(A)−(B).

the Libra market. By doing so, it could subject these entities to reporting, auditing, and supervision requirements. Under the "Net Capital Rule", the SEC could require Libra DDs and some VASPs to maintain net capital in excess of 1/15th of their aggregate indebtedness.[302] Under the "Customer Protection Rule", the SEC could prevent the same entities from re-hypothecating more than 100% of total client debits to finance proprietary trading activities.[303] (It is possible that most DDs would already be sophisticated, well-capitalized financial institutions and these requirements would not meaningfully increase their regulatory burdens. That being said, applications of these rules could further constrain the number and type of institutions in the ecosystem.)

If the SEC designated Libra Coins as securities, it could also regulate the Libra node validators as "transfer agents," requiring them to comply with minimum recordkeeping and reporting rules.[304] Similarly, the SEC could determine that Libra Networks is acting as a securities clearing agency. The Exchange Act defines clearing agencies broadly as "any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities."[305]

Thus far, the SEC has identified one stablecoin blockchain settlement service, Paxos Trust, as a securities clearing agency. Although the Commission has granted Paxos a two-year exemption from registration, it has limited the number of broker-dealers involved to seven participants, and constrained its trading to publicly traded equity securities.[306] Moreover, the SEC has generally indicated that entities that facilitate the clearance and settlement of transactions in digital asset securities may be required to register as a clearing agency.[307] In the context of exchange-based Coin trading, at least, Libra Networks would be facilitating trade settlement via its management of the Blockchain.[308] The SEC has indicated that many clearing agencies function as central counterparties.[309] CCPs act as the buyer to every seller and the seller to every buyer, as Libra Networks would act with respect to DDs. Although Libra Networks may not entirely resemble a CCP, like many distributed ledger systems the Libra Blockchain is intended to substitute for existing clearing systems,[310] and Libra Networks manages the Blockchain. As a

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[302] *See* 17 C.F.R. § 240.15c3-1.
[303] *See* 17 C.F.R. § 240.15c3-3.
[304] *See* 15 U.S.C. § 78c(a)(25) (defining "transfer agent" as any person who engages on behalf of an issuer of securities to monitor, exchange, convert, or changes in ownership of securities).
[305] 15 U.S.C. § 78c(a)(25).
[306] SEC, Response of the Div. of Markets Re: Paxos Trust Company Letter dated Oct. 28, https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.
[307] Public Statement, SEC & FINRA, Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities (July 8, 2019), https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities#_ftnref9.
[308] WHITE PAPER 2.0, *supra* note 1, at 5, 15, 24-25.
[309] *See* 17 CFR § 240.17Ad-22(a)(2).
[310] *See, e.g.*, Surujnath, *supra* note 197, at 281 (arguing blockchain technology "threatens to eliminate CCPs in securities transactions."); Iris H-Y Chiu, *Fintech and Disruptive Business Models in Financial Products,*

permissioned system with relatively centralized control, the Libra Blockchain would function more like a CCP than other ledger systems the SEC has previously considered.[311]

Among other burdens, SEC clearing agency regulations could subject Libra Networks to daily stress testing, capital requirements sufficient to withstand a default by its most significant counterparty DD, enhanced liquidity requirements, and a special resolution regime.[312] Although White Paper 2.0 indicates Libra Networks already intends to maintain a capital buffer, the SEC's requirements could trump the Association's nebulous plans.

Interestingly, the SEC also requires that these CCPs make "membership" available to any person that maintains net capital equal to or greater than $50 million.[313] This suggests that a clearing agency designation would mean the Association would have to once again change the way it selects DDs, potentially complicating its negotiations with other regulators and forcing it to revamp its governance design.

Investment Company Regulation

Finally, the Investment Company Act of 1940 (ICA) imposes additional regulations on certain securities firms.[314] Under the ICA, an "issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities" qualifies as an investment company.[315] Additionally, the SEC can designate a firm as an investment company if it proposes to engage in the securities business and 40% or more of its assets would be invested in securities (exclusive of U.S. government securities).[316]

It is difficult to imagine the SEC deeming securities trading secondary to Libra Networks' business activities so long as it considered Libra Coins to be securities. The Reserve composition issue is more complicated. White Paper 2.0 indicates the Reserve would consist of at least 80% short-term government securities.[317] So long as more than 50% of these securities were U.S. government securities, Libra Networks would avoid triggering an investment company designation in this way. That being said, Libra Networks would have little control over the relative balance of U.S. government securities versus foreign government securities, as this mix

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Intermediation and Markets - Policy Implications for Financial Regulators, 21 J. TECH. L. & POL'Y 55, 86 (2016) (noting blockchain technology is intended to bypass existing financial intermediation infrastructure).

[311] Conrad G. Bahlke & Marija Pecar, *Unblocking the Blockchain: Regulating Distributed Ledger Technology*, 36 No. 10 WESTLAW J. FUTURES & DERIVATIVES L. REP. (2016) (noting that permissioned distributed ledger systems might more readily be regulated as clearing agencies).

[312] *See* 17 C.F.R. § 240.17Ad-22(e).

[313] 17 C.F.R. § 240.17Ad-22(b)(7).

[314] *See* 15 U.S.C. § 80a-2(a)(36). As a general matter, courts have analyzed the slightly differing definitions of a security under the ICA, Securities Act, and Exchange Act similarly. *See, e.g.*, SEC v. Banner Fund Int'l, 211 F.3d 602, 614 n.* (D.C. Cir. 2000) (applying the *Howey* analysis). *See also* Henry T. C. Hu & John D. Morley, *A Regulatory Framework for Exchange-Traded Funds*, 91 S. CAL. L. REV. 839, 868 (2018) (noting the ICA generally supplants the requirements of the Securites Act and Exchange Act).

[315] 15 U.S.C. § 80a-3(a)(1)(A).

[316] *See* 15 U.S.C. § 80a-3(a)(1)(C).

[317] WHITE PAPER 2.0, *supra* note 1, at 12.

would be determined by user demand. In other words, if global demand for ≋EUR were to eclipse global demand for ≋USD, Libra Networks could unintentionally trigger an investment company designation. In any case, the SEC could rely on the first criterion for classification.

Crucially, the SEC can prohibit a foreign investment company Libra Networks from publicly offering its securities in the U.S. unless it applies for special permission.[318] Moreover, the ICA imposes "substantive restrictions on virtually every aspect of the operations of investment companies, including governance, investments, debt issuance, investments, securities sales, redemption rights..." and their dealings with service providers and other affiliates.[319]

It is beyond the scope of this report to fully analyze how ICA requirements might apply to a novel entity like Libra Networks, but as in other cases, we can look to existing arrangements for guidance. Investment companies fall into a series of subclassifications. Within this framework, Libra Networks most closely resembles an "open ended company" (a diversified mutual fund).[320] Like an MMF, Libra Networks would issue highly liquid liabilities to customers, ostensibly backed by investments in relatively safe assets. However, unlike MMF shares, the Coins would not necessarily entail short-term obligations. Moreover, unlike MMFs, Libra Networks would not issue securities that are redeemable on request by retail users. The SEC could ultimately require Libra Networks, as a foreign investment company, to operate more like an MMF and sell redeemable Coins directly to users or to refrain from doing business in the country. MMF-like regulation would not provide Libra holders with protections equivalent to deposit insurance, but could subject Libra to liquidity regulation[321] intended to maintain a stable Coin value.[322] The Commission could also mandate that Coins trade at or very near a fixed Net Asset Value (NAV). For instance, it could adopt measures to prevent the ≋USD from "breaking the buck."[323]

Because of the ways in which Coins are created and redeemed, some analysts have argued the Libra project more closely resembles an ETF.[324] The SEC regulates ETF shares based on their qualities as *shares* of *stocks*.[325] The Libra project does not involve instruments issued by

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[318] *See* 15 U.S.C. § 80a–7(d).
[319] Paul F. Roye, Dir., Div. Inv. Mgmt., SEC, Remarks Before ALI/ABA Investment Company Regulation and Compliance Conference (June 19, 2003), https://www.sec.gov/news/speech/spch061903pfr.htm.
[320] *See* 15 U.S.C. § 80a–5.
[321] *See* 17 C.F.R. § 270.2a-7(d)(4) (Libra Networks may already be planning to satisfy similar requirements,but MMF regulation would impose federal obligations the Association could not change.)
[322] *See* 17 C.F.R. § 270.2a–7. *See also* Awrey, *supra* note 175, at 24-29 (noting that in the context of a crisis, MMFs might be obligated to impose liquidity fees or redemption gates on investors, as the Association already plans to do, per White Paper 2.0).
[323] Awrey, *supra* note 175, at 25-27 (also noting that capital gains taxes do not apply to MMF shares).
[324] *See, e.g.*, Dave Nadig, *Most Interesting ETF Filing Ever: Libra*, ETF.COM (June 25, 2019), https://www.etf.com/sections/blog/most-interesting-etf-filing-ever-libra; Izabella Kaminska, *Treating stablecoins like ETFs*, F.T. ALPHAVILLE (December 9, 2019), https://ftalphaville.ft.com/2019/12/06/1575648915000/Treating-stablecoins-like-ETFs/.
[325] *See* 17 C.F.R. § 270.6c-11(a) (Exchange-traded fund share means a share of stock issued by an exchange-traded fund); 17 CFR § 270.8b-2 ("The term 'share' means a share of stock in a corporation or unit of interest in an unincorporated person.").

other private corporations or familiar shareholder rights (dividends, voting rights, accounting transparency rights, etc). However, the institutional design and dynamics of the project do mimic an ETF. Like hypothetical Libra users, ETF investors bear no contractual rights vis-a-vis the fund itself and do not engage with the fund.[326] Rather, they buy shares from intermediaries known as *authorized participants* (APs), which hold the stocks (and shareholder rights) underlying the ETF shares.[327]

The APs are theoretically incentivized to keep the fund running smoothly for downstream investors, by keeping prices for shares aligned with its NAV, the pro rata value of the fund's underlying assets.[328] When the trading price of an ETF share is higher than the *basket price*, which corresponds to the NAV, APs should create or buy large blocks of new ETF shares to sell at a premium, driving the price back down toward the NAV until arbitrage becomes unprofitable. [329] Inversely, when the trading price of ETF shares is lower than the basket price, the APs should buy up shares and redeem them from the fund at NAV, driving the price back up until the arbitrage becomes unprofitable.

ETFs operate outside of the traditional ICA regime. Historically, the SEC has granted special exemptive orders for ETFs to operate.[330] However, in 2019, the SEC adopted a rule to retire the special order process and streamline compliance.[331] Thus far, the SEC has rejected proposals for digital-asset-based ETFs and effectively imposed a moratorium on their development.[332] If it were to eventually subject the Libra project to ETF-like regulation, the SEC could slow down the Libra project or fundamentally change its nature. The Commission could require Libra Networks to maintain sufficiently liquid assets in order to meet daily redemptions and honor its promise to "fully back" outstanding Coins.[333] But far more importantly, the SEC could limit the sales of Libra Coins to national securities exchanges. It could even directly link the value of the Coins to the value of the Reserve fund and force DDs to stabilize the exchange prices of Libra Coins as APs do.[334] In any case, investment company regulation would drastically change the user interface for Libra Coins, rendering them more like stocks than payment tools and mitigating their appeal to end users who simply want to transfer or store money.

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[326] Henry T. C. Hu & John D. Morley, *The SEC and Regulation of Exchange-Traded Funds: A Commendable Start and A Welcome Invitation*, 92 S. CAL. L. REV. 1155, 1173–74 (2019).
[327] Within the Libra project, the AP anaologues (DDs) only hold rights of redemption. They are unable to vote or receive dividends.
[328] Hu & Morley, *supra* note 314, at 845.
[329] APs are required to become members of clearing agencies. *See* 17 C.F.R. § 270.6c-11.
[330] Hu & Morley, *supra* note 326, at 1156-1163.
[331] *See* 17 CFR §§ 239, 270, 274. *See also* Exchange-Traded Funds, 83 Fed. Reg. 37, 332 (June 28, 2018).
[332] *See* SEC, Staff Letter: Engaging on Fund Innovation and Cryptocurrency-related Holdings (Jan. 18, 2018), https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm. *See also* Marcus et al., *supra* note 264; Matthew R. Lyon, *The Trump Administration's Response to the Blockchain Era*, 70 MERCER L. REV. 641, 661 (2019) (noting the SEC's concerns regarding the difficulty in valuing cryptocurrencies, the ability of virtual currencies to comply with the SEC's fund liquidity rule, and the potential for market manipulation).
[333] *See* Exchange-Traded Funds, 84 Fed. Reg. 57162-01 (Oct. 24, 2019).
[334] *See id.;* Hu & Morley, *supra* note 314, at 870.

Derivatives Regulation

Like securitization markets, derivatives markets featured prominently in the 2008 global financial crisis, and are often primary sites of risky shadow banking.[335] If the CFTC were to designate Libra Coins as commodities, it could exercise its general regulatory authority over Libra-based derivatives, including futures, options, and swaps.[336] Additionally, a commodities designation would provide the CFTC with enforcement authority over retail Libra transactions to the extent they contributed to fraud or price manipulation in the secondary markets.[337] This is especially important considering the White Paper itself implies secondary markets would evolve via the programming of smart contracts.[338] Indeed, some experts argue that DDs would have to develop Libra-based derivatives in order to conduct arbitrage effectively.[339] Finally, as discussed in the Background section, Libra could become a systemically important benchmark that could serve as the foundation for creating new derivative products.[340]

There is an alternative, more robust approach: the CFTC and SEC could work together to designate Libra Coins themselves as *novel derivative products.* This would allow the CFTC and SEC to jointly tailor regulation of the Libra ecosystem, potentially leading them to restrict Libra transactions to swap execution facilities (SEFs), designated contract markets (DCMs), or national securities exchanges. They could also limit the kinds of entities that could serve as DDs, or even VASPs to sophisticated financial institutions registered as eligible derivatives contract participants (ECPs) or securities broker-dealers. Moreover, as in the securities regulation scenario, the CFTC and SEC could compel Libra Networks to register as a clearing organization, imposing burdensome prudential requirements, and further constraining the expansion of the ecosystem.

Commodities Designation

Because the Commodity Exchange Act of 1936 (CEA) does not explicitly grant the CFTC jurisdiction over virtual currencies, the Commission's jurisdiction has historically hinged on whether the CFTC has interpreted the virtual currency in question to be a commodity.[341]

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[335] Saule T. Omarova, *New Tech v. New Deal: Fintech As A Systemic Phenomenon*, 36 YALE J. ON REG. 735, 753 (2019).
[336] *See* 7 U.S.C. § 2(a). For insight into the minimal privacy rules enforced by the CFTC, *see* CFTC Staff Letter No. 01-70 (July 6, 2001) (discussing the CFTC's obligations under the GLBA).
[337] *See* FINAL INTERPRETIVE GUIDANCE ON ACTUAL DELIVERY FOR DIGITAL ASSETS, RIN NUMBER 3038-AE62, at p. 7 (Mar. 23, 2020), https://www.cftc.gov/media/3651/votingdraft032420/download.
[338] *See* WHITE PAPER 2.0, *supra* note 1, at 19 (...smart contracts allow participants to agree on more complex business logic that is executed directly by the Libra network, enabling innovative applications.").
[339] Barry Eichengreen & Ganesh Viswanath-Natraj, *Libra still needs more baking*, VOXEU (Apr. 25, 2020), https://voxeu.org/article/libra-still-needs-more-baking.
[340] *See* Omarova & Steele, *supra* note 40.
[341] *See* Marcus et al., *supra* note 264, at 1, 6.

Given that the CEA's definition of a commodity encompasses a wide range of physical products and natural resources, as well as foreign currencies and interest rates, this categorization has not proven particularly difficult.[342] Indeed, in 2015, the CFTC found that the usual regulations applicable to the trading of commodities also apply in the virtual currency context.[343] Courts have generally approved of this approach.[344]

If the CFTC designated Libra Coins as commodities, it could also designate Libra Networks as a "commodity pool operator" (CPO), subjecting it to a set of limited disclosure, recordkeeping, and reporting requirements.[345] Market participants dealing in Libra-based derivatives would need to register with the CFTC.

Unfortunately, the CFTC lacks regulatory authority over commodity *spot* or *cash* markets.[346] This means that if the Commission designated the Libra Coins as commodities, it would only be able to exercise enforcement jurisdiction over wallet-level Libra transactions if it suspected VASPs or users of engaging in fraud to manipulate secondary markets.[347] Without comprehensive oversight, however, the CFTC would lack crucial data and might leave wallet-level regulation to the FTC and CFPB.

Several analysts have argued that commodity sub-designations could affect virtual currency regulation. Although case law doese not specify whether the CFTC considers virtual currencies to broadly be "exempt" or "excluded" commodities (like foreign currency),[348] this distinction would likely matter less for Libra Coins than for other virtual currencies.[349]

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[342] *See* 7 U.S.C. § 1a(9).

[343] *In the Matter of: Coinflip, Inc.,* CFTC Docket No. 15–29, [2015-2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33, 538, at 77, 854 (Sept. 17, 2015) ("Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.").

[344] Robert A Schwinger, *Federal court holds that CFTC can regulate virtual currencies as commodities*, NORTON ROSE FULBRIGHT (Mar. 14, 2018), https://www.nortonrosefulbright.com/en-us/knowledge/publications/6c7bcc30/federal-court-holds-that-cftc-can-regulate-virtual-currencies-as-commodities.

[345] *See* 7 U.S.C. §1a(11). *See also* Gregory Scopino, *Preparing Financial Regulation for the Second Machine Age: The Need for Oversight of Digital Intermediaries in the Futures Markets,* 2015 COLUM. BUS. L. REV 439, 483 (2015).

[346] For discussion of these limitations, see, e.g., TIMOTHY G. MASSAD, BROOKINGS INST., IT'S TIME TO STRENGTHEN THE REGULATION OF CRYPTO-ASSETS 32-33 (Mar. 18, 2019), https://www.brookings.edu/wp-content/uploads/2019/03/Economis-Studies-Timothy-Massad-Cryptocurrency-Paper.pdf; *Virtual Currencies: The Oversight Role of the U.S. SEC and U.S. CFTC: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs,* 115th Cong. 101, 102 (2018) (Statement of J. Christopher Giancarlo, Chair, CFTC), *available at* https://www.banking.senate.gov/download/giancarlo-testimony-2-6-18bpdf.

[347] *See, e.g.*, CFTC v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y.), *adhered to on denial of reconsideration*, 321 F. Supp. 3d 366 (E.D.N.Y. 2018); Michael C. Tomkies & Lindsay P. Valentine, *Virtual Currency: A Commodity, Property, Security, or Payment Substitute?*, BANKING & FIN. SERVICES POL'Y REP., JULY 2018, at 1.

[348] *FAQs on Virtual Currency and CFTC Jurisdiction*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 1, 3 (2017), https://www.skadden.com/insights/publications/2017/11/faqs-on-virtual-currency-and-cftc-jurisdiction.

[349] "Spot" foreign exchange transactions are exempt from swap regulation. As such, if Libra Coins were interpreted to be foreign currency, the mere exchange of Libra Coins for fiat currency would not trigger more substantive regulation by the CFTC. A.B.A. REPORT, *supra* note 259, at 51-55. Moreover, derivative contracts swapping Libra Coins for U.S. dollars could find safe harbor in a Treasury exemption for "foreign exchange swaps." *See*, *e.g.*, Paul M. Architzel et al., *United States: The New Swaps Regime: A Primer For Nonfinancial Companies,* WILMERHALE

Commodity sub-designations can only trigger heightened authority over *margined, leveraged or otherwise financed* commodity transactions.[350] As of now, it does not appear that Libra Networks, DDs, or VASPs would lend or otherwise provide funds for downstream users to purchase Libra Coins. The real regulatory bite could lie in classifying the Coins themselves as derivatives.

Derivatives Designation

Some analysts have argued Libra Coins could function as commodity, foreign exchange, or otherwise synthetic derivatives,[351] which would prompt the CFTC to directly regulate transactions between wallet providers, exchanges, and retail users. This approach asks regulators to grapple with the distinction between a token and the contract by which it is sold.[352] Indeed, some CFTC staff have already adopted this approach, arguing that the smart contracts attached to virtual tokens could serve as derivatives contracts given certain circumstances,[353] and that a "smart contract could be a...futures contract, option on futures contract, [or] swap."[354] When we view Libra Coins, especially ≋LBR, through the prism of the smart contract, we arrive at stronger conclusions regarding the CFTC's proper regulatory role.

The technological clarifications in White Paper 2.0 lend support to such an approach, at least as far as ≋LBR is concerned. The Association has clarified ≋LBR would not be a separate digital asset from the single-currency stablecoins, but rather a "composite" of some of those single-currency stablecoins.[355] Crucially, ≋LBR would be implemented as a "smart contract that aggregates single-currency stablecoins using fixed nominal weights."[356] Essentially, this means

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(Jan. 10, 2013), https://www.mondaq.com/unitedstates/Finance-and-Banking/215574/The-New-Swaps-Regime-A-Primer-For-Nonfinancial-Companies.

[350] A.B.A. REPORT, *supra* note 259, at 51-55.

[351] *See, e.g.,* IOSCO REPORT, *supra* note 13, at 13; Gerard, *supra* note 31; STOLLER, *supra* note 234; Dirk A. Zetzsche et al., *Regulating Libra: The Transformative Potential of Facebook's Cryptocurrency and Possible Regulatory Responses* 8 (Univ. of New S. Wales L. Res. Paper Series 19-21, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414401.

[352] *See*, *e.g.,* Hester Pierce, Comm'r, SEC, "Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization" (Feb. 6, 2020), https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06.

[353] CFTC, A CFTC PRIMER ON VIRTUAL CURRENCIES 14 (2017), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf ("...virtual tokens may be commodities or derivatives contracts depending on the particular facts and circumstances.").

[354] CFTC, PRIMER ON SMART CONTRACTS 22 (2018), https://www.cftc.gov/sites/default/files/2018-11/LabCFTC_PrimerSmartContracts112718.pdf (characterizing a 'smart contract' as a "set of coded comput; tions" that may incorporate the elements of a binding contract, or may simply execute certain terms of a contract, but can unlawfully circumvent rules and protections in either case). For an example of the role of smart contracts in other digital currency systems, see James Ray, *Design Philosophy, Ethereum Builder's Guide*, https://ethereumbuilders.gitbooks.io/guide/content/en/design_philosophy.html (last visited June 12, 2020) ("Want to invent your own financial derivative? With Ethereum, you can. Want to make your own currency? Set it up as an Ethereum contract.").

[355] WHITE PAPER 2.0, *supra* note 1, at 2, 5-6.

[356] *Id.* at 11, 25.

≋LBR purchasers would be exchanging fiat currency for a contractual claim on several underlying assets, which would constantly fluctuate in value in response to endogenous and exogenous forces discussed in previous sections. Given these facts, one could argue ≋LBR would accomplish the basic functions of a derivative.[357]

Even before the recent White Paper changes, some experts suggested that Libra Coin purchases, like similar stablecoin purchases, would entail a swap.[358] Under this theory, the Libra Coins might most intuitively be considered "mixed swaps" — options for the purchase of a combination of securities and foreign currencies.[359] The CFTC and SEC share jurisdiction over mixed swaps and jointly determine how they should be regulated. Companies must request a joint order from the Commissions allowing them to list, trade, and clear mixed swaps by adhering to an amalgamation of certain CFTC regulations and certain SEC regulations.[360] The CEA definition of swap excludes contracts for future delivery of the underlying commodity.[361] If DDs exchanging ≋LBR with Libra Networks would actually be entitled to the delivery of a basket of securities and foreign currency upon redemption, as in an ETF model, they might be excluded from swap designation.

However, there may be an even simpler route to designating Libra Coins as derivatives that does not require the CFTC to classify an instrument based on existing types. The CFTC and SEC are authorized to jointly determine the status of "novel derivative products" and craft appropriate solutions.[362] In accordance with this sort of discretion, the CFTC has previously allowed options on indexes of securities and commodities to trade on national securities exchanges rather than derivative exchanges, and be cleared by securities clearing organizations rather than DCOs.[363] In the Libra derivatives regulation scenario, the CFTC could invite the SEC to serve a greater role in oversight. Regardless of the eventual distribution of labor between Commissions, regulations would likely be substantively similar, and could chill the growth of the Libra ecosystem.[364] Perhaps most importantly, if the CFTC or SEC were to regulate Libra

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[357] Indeed, the Cryptocurrency Act of 2020, proposed by Rep. Paul Gosar (R-AZ), includes a definition of a "synthetic derivative" that squarely applies to ≋LBR. Jason Brett, *Congress Considers Federal Crypto Regulators In New Cryptocurrency Act Of 2020*, FORBES (Dec. 19, 2019), https://www.forbes.com/sites/jasonbrett/2019/12/19/congress-considers-federal-crypto-regulators-in-new-cryptocurrency-act-of-2020/#716eff165fcd (synthetic derivatives are "determined by decentralized oracles or smart contracts and collateralized by crypto-commodities, other crypto-currencies or crypto-securities.").

[358] *See, e.g.,* Dell'Erba, *supra* note 276, at 34; Chervinsky & Sauter, *supra* note 277.

[359] *See* 7 U.S.C. § 1a(47)(D).

[360] 17 CFR § 1.9(c).

[361] *See* 7 U.S.C. § 1a(47)(B)(i).

[362] *See* 7 U.S.C. § 8306.

[363] The first exemption was granted in 2008. Although the instruments exempted in the previous case were options on gold ETF shares, we might anticipate similar coordination here given the structural similarities between ETFs and the Libra project described in the Securities Regulation section. SPDR Exemption Order, 73 Fed. Reg. 31, 981 (June 5, 2008).

[364] *See* Ryan Clements, *Evaluating the Costs and Benefits of A Smart Contract Blockchain Framework for Credit Default Swaps*, 10 WM. & MARY BUS. L. REV. 369, 388–89 (2019) (describing how making lawyers responsible for legally binding code would send a "collective shudder" throughout the derivatives transactional bar).

transactions in the way they regulate other derivative transactions, they could restrict many Libra exchanges to sophisticated platforms, thus constraining which sorts of entities could become DDs.

Intermediary Regulation

As with securities regulation, it is not entirely clear how derivatives regulators should approach Libra intermediaries, but we can look to the CFTC's history and mandate for guidance. The CFTC has the authority to mandate that certain derivative transactions be executed on trading facilities; for instance, it requires most swaps be traded on an SEF or DCM.[365] SEFs and DCMs must establish and maintain effective oversight programs to detect and prevent manipulation, price distortion, and settlement disruptions.[366] Effectively, SEFs and DCMs must police trading conduct on their platforms.[367]

If the CFTC required exchange-based VASPs to register as SEFs or equivalent institutions, those companies would have to adopt position limitations and refrain from imposing any "material anticompetitive burden" on trading or clearing.[368] In 2017, the CFTC issued a registration order to LedgerX LLC, granting it SEF status as a trading platform for Bitcoin options.[369] However, it also ordered LedgerX to limit access to ECPs, which are typically regulated financial institutions or persons who have at least $10 million in investable assets.[370] By contrast, compliance burdens for DCMs are comparatively minimal.[371] CFTC staff perform regular DCM audits and check compliance with trade practice surveillance, disciplinary mechanisms, and dispute resolution programs. In either scenario, however, regulators would still be centralizing or mitigating retail Libra usage. Wallet providers exempted from exchange

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[365] *See* 7 U.S.C. § 2; 17 C.F.R. pt. 37-38 (2019) (establishing regulations governing SEFs & DCMs); *but see also* 7 U.S.C. § 2(h)(7)(B) (indicating the clearing requirement shall not apply to a *swap* if one of the counterparties to the swap: "(i) Is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.).

[366] *See* 7 U.S.C. § 7(d)(3); 7 U.S.C. §§ 7b-3(f)(3)-(4).

[367] Ilya Beylin, *Designing Regulation for Mobile Financial Markets*, 10 UC IRVINE L. REV. 497, 513 (2020).

[368] 17 C.F.R. § 37.2; DENNIS KELLEHER ET AL., BETTER MKTS., POLICY BRIEF, STOPPING WALL STREET'S DERIVATIVES DEALERS CLUB: WHY THE CFTC MUST ACT NOW TO PREVENT ATTEMPTS TO UNDERMINE DERIVATIVES TRADING REFORMS THAT THREATEN SYSTEMATIC STABILITY AND HARM CONSUMERS 2 (2016), https://bettermarkets.com/sites/default/files/Better%20Markets%20Policy%20Brief%20-%20Stopping%20Wall%20Street%E2%80%99s%20Derivatives%20Dealers%20Club.pdf (arguing Congress created SEFs precisely to offer "impartial access" to market participants).

[369] Order of Registration, In Re LedgerX LLC, Comm. Fut. L. Rep. (CCH) ¶ 34,069 (July 6, 2017), *available at* https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/orgledgerxord170706.pdf.

[370] *See* 7 U.S.C. § 1a(18).

[371] *See, e.g.*, Olga Kharif, *Retail Derivatives That Pay Out With Bitcoins Approved by CFTC*, BLOOMBERG LAW (June 25, 2019), https://news.bloomberglaw.com/banking-law/retail-derivatives-that-pay-out-with-bitcoins-approved-by-cftc.

trading might still have to register as a swap dealer (SD) or major swap participant (MSP) if dealing above certain volume thresholds.[372]

Via another route, the SEC and CFTC could agree that the SEC should regulate Libra transactions as it does options for securities or security-based swaps, triggering the SEC's comprehensive regulatory authority over trading of such instruments.[373] The SEC currently requires most options on securities to be traded on stock exchanges.[374] In terms of regulating the Libra project, this could mean forcing Novi and other wallet providers to develop major trading infrastructure or move all trading to a cryptocurrency exchange registered as a national securities exchange. Facebook and other tech companies might find this undesirable. Most importantly, only registered Broker-Dealers may become members of a national securities exchange, meaning that if the SEC regulated Libra transactions like security-based options, it could restrict the types of companies that could participate in the ecosystem even further.[375]

Finally, the CFTC and SEC could treat Libra Networks as a securities clearing agency or DCO. Just as the SEC has authority to mandate security-based swaps be subject to mandatory clearing,[376] the CFTC has the authority to designate certain types of derivatives for mandatory clearing.[377] Historically, the CFTC has taken the view that a CCP that clears derivatives for U.S. persons must register as a DCO. As discussed in the Securities Regulation section, Libra Networks may not squarely fit the existing understanding of a CCP. Although it may function as the buyer and seller for every DD, it is not necessarily inserting itself between two other counterparties. Rather, it is the counterparty to every creation and redemption. However, the statutory definition of a DCO includes any entity that "arranges or provides, on a multilateral basis, for the settlement or netting of obligations" resulting from the derivatives contracts. It seems Libra Networks could fit this definition.[378] Organizations cannot be considered DCO's solely because they provide for the settlement of obligations resulting from a sale of a commodity in a spot market.[379] But if ≋LBR were considered to be derivatives, then Libra Networks would not merely be settling spot commodity transactions when it transacted in ≋LBR with DDs.

It is worth considering that distributed ledger technology is attractive to the derivatives industry precisely because it accomplishes similar functions to CCPs, including valuing contracts

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[372] Beylin, *supra* note 367, at 514–17. *See also* Capital Requirements of Swap Dealers and Major Swap Participants, 81 Fed. Reg. 91, 252 (Dec. 16, 2016).
[373] *See* 15 U.S.C. 78c(a)(10), 78(i).
[374] *See An Overview of Options Trading and Other Derivatives*, 4 LAW SEC. REG. § 14:4 (Thomas Hazen, May 2020 ed.).
[375] *See* 15 U.S.C. § 78f(c)(1).
[376] *See* 7 U.S.C. § 78c-5.
[377] *See* 7 U.S.C. § 2(h). *See also* 7 U.S.C. § 7a-1(h) (the CFTC may exempt non-U.S. swap clearing organizations that are subject to comparable, comprehensive supervision and regulation by their home country authorities).
[378] *See* 7 U.S.C. § 1a(15).
[379] *Id.*

and facilitating custody.[380] (Indeed, if the Libra project were to reach its later stages of development, and a derivatives market arose, Libra Networks might have to be regulated as a DCO regardless if Libra Coins were considered to be derivatives.)

The prudential requirements associated with a DCO designation can be onerous, as with a securities clearing agency designation. For instance, a DCO must maintain sufficient financial resources to cover its exposures with a high degree of confidence, including in the context of a default by the clearing member to which the DCO would be most exposed in "extreme but plausible market conditions."[381] It is not entirely clear what this might entail in the context of Libra, but the Commissions could take advantage of their broad mandates over novel derivatives products to impose appropriate requirements on Libra Networks.

In 2017, the CFTC granted a DCO designation to LedgerX. Because LedgerX already planned to fully collateralize all trades and would only allow trades on its own SEF, it was exempted from many requirements.[382]The CFTC could also subject Libra Networks to a tailored approach.. Although it ostensibly backs every ≋LBR Coin 1:1:, Libra Networks bears its own kind of credit risk in the sense that it is obligated to buy back every ≋LBR at its face value in local currency. Libra Networks is thus subject to foreign exchange rate fluctuations, not to mention general exposure to money markets and sovereign debt, for which yield have recently dipped below the zero-lower-bound in many jurisdictions.[383] In a stressful scenario, it might not be able to honor redemption promises. Even if the CTFC does not designate ≋LBR as a derivative, it needs to carefully monitor the growth of any Libra-based derivatives markets and regulate Libra Networks as appropriate.

Banking Regulation

Despite the backlash,[384] the Association is still quick to boast that Libra would help "bank the unbanked."[385] As discussed in the Background section, the Libra project raises the familiar

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[380] *See, e.g.,* John W. Bagby et. al., *An Emerging Political Economy of the Blockchain: Enhancing Regulatory Opportunities*, 88 UMKC L. Rev. 419, 439 (2019) (arguing the financial sector has embraced blockchain technology as a way to eliminate clearinghouses); Harold Primm, *VII. Regulating the Blockchain Revolution: A Financial Industry Transformation*, 36 Rev. Banking & Fin. L 75, 83 (2016) (arguing smart contracts could eliminate the need for clearinghouses); Christoph Henkel, *Using Central Counterparties to Limit Global Financial Crises*, 88 U. Cin. L. Rev. 397, 459 (2019) (discussing whether three blockchain companies, SynSwap, Clearable, and Clearmatics, should be subject to DCO regulation).

[381] *See* 17 CFR § 240.17Ad-22.

[382] Conor O'Hanlan et al., *From ICOs to DCOs: The Dawn of Cleared Crypto Derivatives,* CoinDesk (Aug. 18, 2017), https://www.coindesk.com/icos-dcos-dawn-cleared-crypto-derivatives.

[383] *See* Kaminska, *supra* note 105.

[384] *See*, *e.g.*, Press Release, Rep. Ayana Pressley, Rep. Pressley Stands Up for the Underbanked at Facebook Hearing, (Oct. 23, 2019), https://pressley.house.gov/media/press-releases/rep-pressley-stands-underbanked-facebook-hearing.

[385] White Paper 2.0, *supra* note 1, at 19. For their own part, banking regulators have made clear that their commitment to financial inclusion applies to regulated depository institutions. *See, e.g.*, Mehrsa Baradaran, *Banking and the Social Contract*, 89 Notre Dame L. Rev. 1283, 1303 (2014).

spectre of a private deposit-substitution scheme.[386] Novi and other VASPs would not simply transfer funds. Rather, they would store wallet balances unprotected by federal deposit insurance, or any equivalent mechanism, rendering them precarious.[387] By avoiding custody agreements with depository institutions insured by the Federal Deposit Insurance Corporation (FDIC), Libra VASPs would avoid most banking regulation, constituting a "shadow payment platform."[388] In essence, this platform would constitute a base layer for broader shadow banking infrastructure. Just as runs on existing shadow banks pose a threat to financial stability, so would runs on the Libra payment system. Moreover, given the proposed complexity and scale of the project, runs could result from the financial or operational failures of virtually any large and interconnected participant. The Association might attempt to keep Libra Networks afloat, in the event of disaster, the last line of defense is general corporate bankruptcy law, rather than a central bank balance sheet.[389] This is especially dangerous when distributed ledger technology is involved, as a lack of clear transaction finality may make it difficult to determine liability if an ecosystem participant were to become insolvent.[390]

Given the nature of the predicament, and the potential difficulties of classifying Libra Coins as investment assets, some analysts have argued the Libra project should be subject to banking regulation.[391] Although the prospect of bringing Libra Networks, Novi, and Facebook under banking and bank holding company regulation is enticing,[392] regulators lack the authority to simply designate a nonbank company, let alone an entire network of platforms like the Libra project, as a bank. This is partially why shadow banking persists, generally. In fact, federal laws contain several different and potentially conflicting definitions of a "bank",[393] limiting regulators ability to constrain banking activities to institutions with banking charters.

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[386] Rep. Katie Porter (D-CA) has likened Libra to pre-Civil War wildcat banks that made and took deposits in dollars and issued private notes in return. Marc Hochstein, *Lawmakers Amp Up Pressure on Facebook to Halt Libra Cryptocurrency Development,* CoinDesk (July 17, 2019), https://www.coindesk.com/lawmakers-amp-up-pressure-on-facebook-to-halt-libra-cryptocurrency-development.

[387] Federal deposit insurance programs only protect deposits in commercial banks and federal savings institutions. Hughes & Middlebrook, *supra* note 182, at 527 (2015). Mobile wallets are not required to make users' deposit funds available to them within prescribed time frames. U.S. GAO, GAO-18-254, Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight 18 (2019).

[388] *See* Awrey & Zwieten, *supra* note 111.

[389] *See* Awrey, *supra* note 175, at 23 (discussing how the corporate bankruptcy regime fails depositors).

[390] Surujnath, *supra* note 197, at 301 (2017); *see also* Bank for Int'l Settlements, Core Principles for Systemically Important Payment Systems 31 (2001), http://www.bis.org/cpmi/publ/d43.pdf (calling for definitive finality because participants can face liquidity risk if they are unable to transfer the settlement asset for another claim).

[391] *See, e.g.*, Paul Kupiec, *Why Libra Must Be Treated Like Traditional Banks and Currency (*Nov. 4, 2019), https://thehill.com/opinion/finance/468924-why-libra-must-be-treated-like-traditional-banks-and-currency.

[392] The Board has supervisory authority over all BHCs. Board of Gov's of the Fed. Res. Sys., The Federal Reserve System: Purpose and Functions 59 (9th ed., 2005), *available at* https://www.federalreserve.gov/pf/pdf/pf_complete.pdf .

[393] For discussions of these definitions, see, e.g., Awrey & Zwieten, *supra* note 111, at 816; Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 Rev. Banking & Fin. L 113, 115 (2011).

For instance, the Banking Act of 1933 classifies "banks" as institutions that take deposits and are examined and regulated by state or federal banking authorities.[394] Four provisions of this legislation, colloquially referred to as the Glass-Steagall Act, were designed to separate banking and commercial activities. Although they were repealed by the GLBA, two sections remain in effect.[395] Section 21 makes it illegal for an entity to accept deposits without being regulated by a banking regulator.[396] The provision has been interpreted as an "axiomatic" statement preventing firms other than banks from issuing deposit liabilities.[397] Indeed, some experts have argued that it is a criminal offense for nonbanks to hold deposits.[398]

Unfortunately, however, the Glass-Steagall Act does not define "deposit", meaning regulators cannot easily invoke Section 21 to prevent nonbanks from engaging in general banking activities. Even if regulators or courts were to attempt to borrow the definition of "deposit" from another statute, there would be "no practical way forward."[399] For instance, because the Federal Deposit Insurance Act defines a "deposit" as "money or its equivalent received or held by a *bank*..."[400] (emphasis added), this creates a "perfect legal circle.[401] In general, the U.S. has no general "law of deposit",[402] that could reach stablecoin balances held in mobile wallets and easily bring DDs or wallet providers within the jurisdiction of banking regulators.[403]

Despite widespread acknowledgement that definitional problems allow nonbanks to engage in arbitrage,[404] the issues remain unresolved. Banking regulators could attempt to

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[394] 12 U.S.C. § 1841(c)(1)(B).
[395] John Crawford, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 2 (2017).
[396] *See* 12 U.S.C. § 378(a)(2).
[397] Morgan Ricks, *Entry Restriction, Shadow Banking, and the Structure of Monetary Institutions*, 2 J. FIN. REG. 291, 294 (2016).
[398] *See, e.g.*, The Federalist Society, "Financial Regulation: The Apotheosis of the Administrative State," 25 CONN. INS. L. J. 1, 8 (2018); Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 459-60 (2017); Cynthia Crawford Lichtenstein, *Defining Our Terms Carefully and in Context: Thoughts on Reading (and in One Case, Rereading) Three Books*, 31 REV. BANKING & FIN. L. 695, 698 (2012).
[399] Morgan Ricks, *Money As Infrastructure*, 2018 COLUM. BUS. L. REV 757, 811 (2018).
[400] 12 U.S.C. § 1813(l).
[401] Ricks, *supra* note 399, at 812.
[402] *See* Hughes & Middlebrook, *supra* note 182, at 525. Interestingly, some analysts have suggested that Swiss regulatory authorities can designate balances as "deposits." *See, e.g.,* David Gerard, *Switzerland's guidance on stablecoins — what it means for Facebook's Libra*, ATTACK OF THE 50 FOOT BLOCKCHAIN (Sept. 11, 2019), https://davidgerard.co.uk/blockchain/2019/09/11/switzerlands-guidance-on-stablecoins-what-it-means-for-facebooks-libra/. *But see* Baker, *supra* note 125 (noting FINMA has backtracked on its commitment to apply "strict banking rules.").
[403] Eniola Akindemowo, *Recalibrating Abstract Payments Regulatory Policy: A Retrospective After the Dodd-Frank Act*, KAN. J.L. & PUB. POL'Y, Fall 2011, at 86, 88 ("The number of payment applications falling uneasily within or outside categorizations of 'deposits' testifies to the diminishing efficiency of certain current payment concepts.").
[404] *See, e.g.*, U.S. TREAS., FINANCIAL REGULATORY REFORM: A NEW FOUNDATION (Oct. 8, 2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

promulgate rules clarifying the definitions of "bank" and "deposit",[405] but courts have generally been unwilling to expand the scope of such statutory terms. For instance, in *Board of Governors v. Dimension Financial Corp*,[406] the Supreme Court struck down a Federal Reserve Board of Governors (Board) regulation intended to expand the Bank Holding Company Act (BHCA) definition of "bank" to cover "nonbank banks." The Court claimed only Congress could amend the definitions provided by a clear statute.[407] Although some critics have argued that the Court's formalist approach in this case ignored statutory purpose,[408] there is a pattern of similar rulings.[409]

Ultimately, any attempt to expand core statutory definitions would still hinge on a favorable ruling by a federal judge. It is incumbent upon Congress to extend deposit insurance and banking regulation, generally, to the mobile wallet space.[410] But without assistance from the federal legislature (or FSOC), banking regulators would have to police depository institutions participating in the Libra ecosystem based on laws that already apply to those institutions for pre-existing reasons.[411]

Payments System Regulation

In the United States, the financial system consists of four core payment systems: credit card networks, debit card networks, automated clearing house (ACH) transfers, and wire transfers.[412] Given its proposed scope and volume, the Libra system could evolve into a fifth core system. Unfortunately, neither the Board nor any other regulator has plenary authority over payment systems. Rather, the Board (as well as the FDIC and Office of the Comptroller of the Currency) can regulate certain payment services only insofar as they are provided to insured

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[405] Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2043–44 (2014) (discussing how prudential regulation often occurs through administrative "soft law").

[406] 474 U.S. 361, 374 (1986). ("The [statute's definition of bank] may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.").

[407] *Id.; see also* Miriam F. Weismann et al., *The New Macroprudential Reform Paradigm: Can It Work?*, 16 U. PA. J. BUS. L. 1029, 1066 (2014).

[408] *See* David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 118 (2013).

[409] Notably, the Court also struck down the Board's attempt to expand the statutory definition of "commercial loan" to include commercial loan substitutes. Omarova & Tahyar, *supra* note 393, at 155.

[410] *See* Kristin N. Johnson et al., *(Im)perfect Regulation: Virtual Currency and Other Digital Assets As Collateral*, 21 SMU SCI. & TECH. L. REV. 115, 142 (2018) (arguing that expanding the existing definition of "deposit accounts" to include virtual wallets and platforms would presumably subject them to a host of intermediary regulations imposed on more traditional depository institutions).

[411] Weismann et al., *supra* note 407, at 1068–69. The FDIC could issue a narrow rule speaking to wallet balances held by banks acting as VASPs, defining them as deposits, but we can reasonably anticipate that any regulated banks serving as VASPs would create a subsidiary to do so, and take other protections to avoid this scenario. *See* 12 U.S.C. § 1813(a); 11 AM. JUR. 2D *Banks and Financial Institutions* § 1071 (discussing banking regulators' authority to define obligations of already insured institutions as deposits).

[412] Elizabeth Boison & Leo Tsao, *Money Moves: Following the Money Beyond the Banking System*, 67 DOJ J. FED. L. & PRAC. 95, 99 (2019).

depository institutions.[413] Even in this scenario, regulators only supervise the supply of payment services for *operational risk*.[414] Banking regulators may also take enforcement actions against "institution-affiliated parties" that have engaged in knowing or reckless conduct that "caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution."[415]

Regulators should monitor the behavior of any banks acting as DDs or providing wallet services. They should also supervise these dealers' interfaces with the Blockchain, although it is unclear to what extent they would be able to examine or audit a comprehensible portion of the ledger. Without cross-institutional cooperation, regulators would gain no general authority to investigate Libra Networks' books or impose prudential requirements upon it.

Macroprudential Regulation

In some ways, the Libra project epitomizes the broader potential of Big Tech companies to enter into financial services and emerge as a new breed of "too big to fail" financial institution;[416] unprotected Libra balances could become so tethered to other financial markets that regulators would face severe pressure to bailout Libra Networks in the event of a crisis. Even prior to the release of White Paper 2.0, the Board warned the inability to convert global stablecoins into domestic currency on demand (or to settle payments on time) could create credit and liquidity dislocations throughout the economy.[417]

In many ways, the systemic risk created by the Libra project would flow from the unacceptable mingling of banking and commerce. A properly regulated financial institution would not be able to promote such unsound plans. But as it stands, the Libra project would evade the primary barriers intended to prevent aggressive, cross-sectoral growth. Several existing federal statutes, most prominently the BHCA, are arguably intended to prevent excessive concentration of commercial and bank credit.[418] But due in part to the definitional problems discussed in the previous section, the BHCA regime does not accomplish this mission.

With this understanding in mind, policymakers have attempted to expand the BHCA model of regulation and supervision to all financial institutions designated as "systemically important", regardless of whether or not they fit the BHCA's statutory definition of a bank.[419]

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[413] The authorities coordinate their supervision through the Federal Financial Institutions Examination Council (FFIEC), in consultation with state banking regulators. U.S. GAO, GAO-17-361, FINANCIAL TECHNOLOGY: INFORMATION ON SUBSECTORS AND REGULATORY OVERSIGHT 26 (2017).
[414] Matthew W. Swinehart, *Modeling Payments Regulations and Financial Change,* 67 U. KAN. L. REV. 83, 112 (2018).
[415] *Id.* at 113.
[416] Omarova, *supra* note 39, at 52.
[417] FED. RES. BOARD OF GOV., FINANCIAL STABILITY REPORT 40-41 (Nov. 2019), https://www.federalreserve.gov/publications/files/financial-stability-report-20191115.pdf.
[418] Omarova & Tahyar, *supra* note 393, at 118–19.
[419] *Id.* at 127.

Most importantly, Title I of Dodd-Frank established FSOC to create collective accountability for threats to U.S financial stability and subject any systemically important entities to consolidated supervision and regulation by the Board.[420]

In December 2019, in agreement with the Board, FSOC staff asserted that if a stablecoin were widely adopted as a means of payment, disruptions could pose systemic risk via financial institutions exposures, operational risks, wealth effects, and confidence effects, warranting greater regulatory scrutiny.[421] FSOC should respond proportionately. More specifically, the Treasury Secretary and $^{2}/_{3}$ of FSOC members should vote to designate Libra Networks as "systemically important" and subject to heightened supervision. Based on the plan outlined in White Paper 2.0, Libra Networks should qualify under both of the two relevant standards: (i) "material financial distress" to Libra Networks could pose a threat to U.S. financial stability, and (ii) the "nature, scope, size, scale, concentration, interconnectedness" of the activities performed by Libra Networks could pose the same threat.[422]

Prior to a vote, FSOC would have to determine that Libra Networks would likely be "predominantly engaged in financial activities", meaning it would derive 85% or more of its consolidated annual gross revenues — or 85% of its asset value — from activities that are deemed to be "financial in nature."[423] This list encompasses several activities that would be conducted by Libra Networks, including the safeguarding, exchanging, and transferring of Libra Coins.[424] Accordingly, FSOC could declare that Libra Networks is systemically important, and subject it to substantial prudential regulation as either a "systemically important financial institution" (SIFI) or a "systemically important financial market utility" (SIFMU).[425]

Critics object to FSOC's fundamental task of contemplating hypothetical scenarios wherein a company *could* cause material financial distress or *could* pose a threat to financial stability.[426] However, there can be no doubt that FSOC was created precisely to monitor threats on the horizon, even if their specific form is still evolving.[427]

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[420] The voting members of FSOC are the Treas. Sec., Board Chair, OCC Comptroller, CFPB Director, SEC Chair, FDIC Chair, CFTC Chair, Federal Housing Finance Agency Director, National Credit Union Administration Chair, and an independent member (with insurance expertise), appointed by the President. The Treas. Sec. holds critical veto power. 12 U.S.C. § 5321.

[421] *See generally* DEP'T OF THE TREAS., FSOC 2019 ANNUAL REPORT (2019), https://home.treasury.gov/system/files//261FSOC2019AnnualReport.pdf.

[422] *See* 12 U.S.C. § 5323.

[423] 12 U.S.C. 5311(a)(6) (borrowing a definition of this term from the BHCA at 12 U.S.C. § 1843(k)(4)(F)).

[424] The Board may also determine an activity to be a "proper incident of banking" and thus a "financial activity" for our purposes. An accommodative Board could thus adjust the list to facilitate an FSOC designation. *See* 12 U.S.C. 5311(a)(6)).

[425] The process is the same for a U.S. or foreign nonbank financial company. *See* 12 U.S.C. § 5323(b). *See also* Caitlin Bozman, *Holding the Line or Changing Tides? The Future of "Too Big to Fail" Regulation*, 107 GEO. J.L. 1105, 1121 (2019) (describing how supervision by the Federal Reserve increases operating costs and operational challenges for nonbanks).

[426] *See, e.g.,* Robert F. Weber, *The FSOC's Designation Program As A Case Study of the New Administrative Law of Financial Supervision*, 36 YALE J. ON REG. 359, 376, 399–400 (2019).

[427] *See*, *e.g.*, Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247, 1255-1257 (2014).

The tailored regulation that flows from SIFI and SIFMU designations could entail the imposition of risk-based capital requirements, leverage limits, liquidity requirements, resolution plans and credit exposure report requirements, concentration limits, and other obligations.[428] Importantly, FSOC can require consolidated supervision of companies regardless of their specific corporate form: thus, the Council could address risks posed by both parent companies and subsidiaries in a holistic analysis.[429] In certain instances, FSOC even has the authority to determine whether the U.S. government should break a nonbank company into several smaller companies and could exercise that authority with regard to the Libra project.[430]

SIFI Designation

Unfortunately, in practice, SIFI designation has not led to comprehensive supervision of very large non bank institutions.[431] To date, the Council has designated four nonbank financial companies as SIFIs: American International Group, Inc., General Electric Capital Corporation, Prudential Financial, Inc., and MetLife Inc. Yet none of these conglomerates remain under SIFI designation. In March 2016, a federal district court rescinded MetLife's SIFI designation, claiming FSOC officials failed to appropriately consider the costs of designation to MetLife. The election of President Donald Trump is widely considered to have prevented an appeal.[432] Following the *MetLife* dismissal, the other SIFIS immediately and successfully demanded FSOC rescind their designations.[433]

Critics have argued the *MetLife* court failed to sufficiently defer to FSOC's prior discretion and even read a non-existent cost-benefit analysis requirement into Dodd-Frank.[434] FSOC amended its interpretive guidance on SIFI designation in 2019, adding a cost-benefit requirement.[435] The guidance establishes an "activities-based" approach, stressing that FSOC will only pursue entity-specific designations "if a potential risk or threat cannot be adequately addressed through an activities‑based approach."[436]

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[428] *See* 12 U.S.C. § 5325.
[429] 12 U.S.C. § 5323(c); 12 C.F.R. § 1310.12.
[430] *See* 12 U.S.C. § 5331.
[431] *See also* 12 U.S.C. § 5311(a)(4)(A) (securities clearing agencies and DCOs are excluded from SIFI designation, but not SIFMU designation).
[432] John Heltman, *FSOC Gives Up Effort to Designate MefLife as SIFI*, AM. BANKER (Jan. 18, 2018), https://www.americanbanker.com/news/fsoc-gives-up-effort-to-designate-metlife-as-sifi.
[433] Jeremy C. Kress, *The Last Sifi: The Unwise and Illegal Deregulation of Prudential Financial*, 71 STAN. L. REV. ONLINE 171, 174 (2018).
[434] *See*, *e.g.*, Stephen J. Lubben, *MetLife Decision Could Torpedo Dodd-Frank Risk Protections*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/business/dealbook/metlife-decision-could-torpedo-dodd-frank-risk-protections.html.
[435] Marion Leydier et al., *Sullivan & Cromwell Discusses FSOC Changes to Nonbank SIFI-Designation Guidance*, CLS BLUE SKY BLOG (Jan. 6, 2020), https://clsbluesky.law.columbia.edu/2020/01/06/sullivan-cromwell-discusses-fsoc-changes-to-nonbank-sifi-designation-guidance/.
[436] *Id.*

AFR and other organizations have argued that this new guidance was intended to "make it unlikely that the Council will ever act to designate a nonbank financial firm even if such a firm could impose a threat to financial stability."[437] It is important to remember, however, that the guidance is nonbinding: FSOC retains discretion to approach SIFI designation differently.[438]

SIFMU Designation

While FSOC may have voluntarily diluted its power to issue SIFI designations for the moment, SIFMU designations remain firmly in place. The Dodd-Frank Act defines an FMU as "any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, *or other financial transactions* among financial institutions or between financial institutions and the person" (emphasis added).[439] Given this premise, a SIFMU designation for Libra Networks would be generally agnostic as to whether Libra Coins are considered to be money, currency, securities, commodities, derivatives, or any other specific financial instrument by other regulators, so long as Libra Networks could be said to manage the Blockchain and Reserve.

In July 2012, FSOC members unanimously voted to designate eight major securities clearing organizations as SIFMUs.[440] Each of the SIFMUs, to varying degrees, provides services or deals in products that at the time of designation did not have readily available substitutes within their respective systems.[441] In contrast to the SIFIs, all of these corporations maintain their designations. In fact, several thinkers and politicians have argued that the designation is so useful it should be applied to corporations that threaten the financial system even if they are not traditionally considered to be financial firms. On August 23, 2019, Rep. Nydia Velázquez (D-NY) and Rep. Katie Porter (D-CA) sent a letter to FSOC asking that Amazon Web Services, Microsoft Azure, and Google Cloud be considered SIFMUs.[442]

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[437] Letter from Ams. for Fin. Reform to FSOC (May 3, 2019), https://ourfinancialsecurity.org/2019/05/letters-regulators-afr-education-fund-letter-fsoc-regarding-proposed-designation-guidance/.

[438] *See, e.g.*, Packin & Lev-Aretz, *supra* note 21, at 128 (...if big data and social netbanks want to become competitors in the financial services market, including in the payment system, they should be prepared for the possibility of being classified as a SIFI…).

[439] 12 U.S.C. § 5462(6).

[440] Swinehart, *supra* note 414, at 105 (the existing SIFMUs are (1) The Clearing House Payments Co., (2) CLS Bank International, (3) Chicago Mercantile Exchange, Inc., (4) The Depository Trust Co., (5) Fixed Income Clearing Corp., (6) ICE Clear Credit, (7) National Securities Clearing Corp., and (8) The Options Clearing Corp.).

[441] *See* U.S. DEP'T OF THE TREAS., FSOC DESIGNATIONS REPORT (2017) https://www.treasury.gov/press-center/press-releases/Documents/PM-FSOC-Designations-Memo-11-17.pdf.

[442] Pete Schroeder, *U.S. House lawmakers ask regulators to scrutinize bank cloud providers*, REUTERS (Aug. 23, 2019), https://www.reuters.com/article/us-usa-congress-cloud/u-s-house-lawmakers-ask-regulators-to-scrutinize-bank-cloud-providers-idUSKCN1VD0Y4.

Fortunately, the Libra case is more straightforward.[443] Financial analysts have argued that FMU authority over critical payments processors seems direct, if not explicit.[444] Although Libra Networks would certainly differ from traditional payments processors, its complexity and role in broader financial ecosystems should make it an even stronger candidate for designation than AWS or Google Cloud.

SIFMU designation is a two-stage process.[445] The first stage is largely quantitative: the Council must preliminarily identify the FMU as systemically important based on certain numerical factors. The second stage involves a more in-depth review, with a greater focus on qualitative and institutional factors, including consideration of the effect that a failure or disruption to FMU would have on "critical markets, financial institutions, or the broader financial system."[446] Importantly for the Libra case, the Council has explicitly addressed the process of designation for "newly formed or start-up FMUs."[447] In such cases, the Council has indicated it would take into account available information, including *estimates* and *projections* of volume and value of cleared or settled transactions. The Council would then consider *expected* importance to the financial system, financial markets, and markets and products to be supported by the FMU, and the type and nature of expected participants and risks to be borne by the FMU. [448] A precautionary SIFMU designation could be rescinded during annual reevaluation.[449]

SIFMU designation would subject Libra Networks to enhanced regulation by a "federal supervisory agency."[450] If the SEC or CFTC were to designate Libra Networks as a clearing agency, that commission would serve as the federal supervisory agency (primary regulator) and the Board would serve a "back-up regulatory role", permitting it to conduct examinations and enforcement actions.[451] If both agencies were to designate Libra Networks as a clearing agency, the SEC and CFTC would determine which agency is the primary regulator, with the Board as back-up regulator, and FSOC resolving any conflicts.[452] If neither agency has designated Libra Networks as a clearing agency, the Board would serve as the primary regulator.

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[443] *See* Graham Steele, *The Miner of Last Resort: Digital Currency, Shadow Money and the Role of the Central Bank* 1, 35-37 (May 13, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600073 (last visited on June 12, 2020) (arguing FSOC can "announce a policy that any cryptocurrency, or other payment service over a certain size, or owned or operated by technology companies or banks, must register, and be designated, as "systemically important" market utilities under Dodd-Frank's Title VIII authority.").

[444] *See, e.g.*, Karen Petrou, *Systemic Risk and Payment-System Consolidation*, FED. FINANCIAL ANALYTICS (Mar. 2, 2019), http://www.fedfin.com/blog/2892-karen-petrou-systemic-risk-and-payment-system-consolidation.

[445] *See* 12 C.F.R. § 1320.10.

[446] *Id.*

[447] ¶ 98-028 FSOC FINALIZES RULE ON SYSTEMICALLY IMPORTANT FINANCIAL MARKET UTILITIES (12 CFR CHAPTER XIII AND PART 1320), Fed. Bank. L. Rep. P 98-028.

[448] *Id.*

[449] *See* CFR § 1320.13(b).

[450] *See* 12 U.S.C. § 5462(8); 12 U.S.C. § 5464(a)(2) (relating to setting standards); 12 U.S.C. § 5466 (relating to examination and enforcement).

[451] 12 U.S.C. § 5466; 12 U.S.C. § 5467(e).

[452] 12 U.S.C. § 5462(8)(B).

In any of these scenarios, the Council could direct the supervisory agency to impose additional prudential requirements on Libra Networks, including various capital and financial resource requirements.[453] The Board could then recommend additional requirements, which FSOC could direct the SEC or CFTC to adopt if necessary.[454] Furthermore, SIFMUs are subject to quarterly examinations and "deep-dive" reviews of information security, technology and operations, liquidity management, audit, risk management, and special resolution planning.[455] The Board's SIFMU supervision program is administered by the FMU Supervision Committee (FMU-SC), a multidisciplinary committee of senior supervision, payment policy, and legal staff at the Board of Governors and Reserve Banks.[456] Board examiners can assess a SIFMU for cybersecurity risks[457] and GLBA privacy compliance.[458] FMUs must provide examiners with advance notice of changes to rules, procedures, or operations that could "materially affect" the FMU's risk level.[459] Finally, the Board may authorize a Federal Reserve Bank to establish and maintain a master account for a designated SIFMU,[460] providing it with another set privileges and responsibilities.[461]

On the enforcement side, the primary regulator would be empowered to respond to violations of the above requirements by seeking civil penalties, removing insiders and other affiliated parties from office, and prohibiting their participation in the affairs of the SIFMU.[462] The Council would resolve any conflict among regulators as to enforcement actions.[463] Finally, the relevant regulators, as well as the Council, would have board rulemaking authority to carry out their regulatory duties.[464]

Some critics might worry that if FSOC determined Libra Networks to be a SIFMU, it would have to make a similar determination for every other major payments provider. But the Council and Board are required to differentiate among companies on an individual basis or by category, taking into consideration any risk-related factors the Board deems appropriate.[465] This

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[453] *See* 12 C.F.R. §§ 234.1-.6 (describing Board Regulation HH in further detail).
[454] 12 U.S.C. § 1818(b)(1).
[455] Robert C. Hunter & Mina Hession, *Critical Expectations: Federal Regulatory Guidance on Risk Management and its Impact on Financial Institutions and Third-Party Relationships*, 17 FIN. TECH. L. REP. 17 (Mar/Apr. 2014).
[456] *See, e.g.,* ¶ 156-201 FED ISSUES ANNUAL REPORT FOR 2018.—PART 1 OF 2, FED. BANK. L. REP. P 156-201.
[457] *Id.*
[458] The federal regulatory authorities, including banking regulators have all issued "substantially similar rules" implementing GLB's privacy provisions. HOW TO COMPLY WITH THE PRIVACY OF CONSUMER FINANCIAL INFORMATION RULE OF THE GLBA, FTC, https://www.ftc.gov/tips-advice/business-center/guidance/how-comply-Privacy-Consumer-financial-information-rule-gramm (last visited on June 22, 2020).
[459] *See* 12 C.F.R. § 1320.
[460] 12 U.S.C. § 5465. *See also* 12 U.S.C. § 248a(b).
[461] *See* 12 U.S.C. § 347b.
[462] 12 U.S.C. § 5466(c). *See also* 12 U.S.C. § 1818.
[463] 12 U.S.C. § 5466.
[464] 12 U.S.C. § 5469. *See also* Stephen J. Lubben, *Failure of the Clearinghouse: Dodd-Frank's Fatal Flaw?*, 10 VA. L. & BUS. REV. 127, 146–47 (2015).
[465] 12 U.S.C. § 5365(A)(2)(a).

report suggests that because of its scale and mingling of finance and commerce, Libra Networks should be considered especially systemically important. More broadly, given that the Federal Reserve is creating its own real-time retail system, additional regulation on behalf of users should be welcomed.[466]

A more relevant concern is that FSOC designation requires ⅔ agreement of members. SIFMU regulation might require ongoing coordination between regulators that is difficult to achieve.[467] There is a risk that an attempt to achieve coordinated regulation is unfruitful and leads to an absence of regulation. Regulators should still affirmatively consider tackling the Libra system jointly.

International Coordination

FSOC's designation process is part of an international effort to identify systemically risky firms.[468]As part of its own mandate, the G20 FSB addresses global systemic risk determinations and develops accompanying policy measures to limit risk.[469] More importantly for our immediate purposes, the International Organization of Securities Commissions (IOSCO) has prescribed standards for systemically important payments systems. In 2012, IOSCO and the G10 Committee on Payment and Settlement Systems (CPSS) released a report entitled *Principles for Financial Market Infrastructures* (PFMI), which included international guidelines for mitigating credit risk, liquidity risk, operational risk, legal risk, general business risk, custody risk, investment risk, and systemic risk generally.[470] The Board, SEC, and CFTC have already applied these principles to SIFMUs through rulemaking.[471] The BIS and IOSCO guidance predictably suggest SIFMU designation for "global stablecoins" of systemic importance.[472]

It is of paramount importance that U.S. regulators continue to coordinate not just with international organizations and Swiss regulators, but with other regulators around the globe. If it were to reach its proposed scale, the Libra project could easily destabilize monetary and financial

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[466] *See* Letter from Ams. for Fin. Reform Ed. Fund and Demand Progress Ed. Fund to Fed. Res. Board of Gov. (Nov. 8, 2019), https://ourfinancialsecurity.org/2019/11/afr-ed-fund-and-demand-progress-ed-fund-comments/.
[467] *See, e.g.,* Dan Awrey, *Macro-Prudential Financial Regulation: Panacea or Placebo?*, 1 AMSTERDAM L.F. 17, 20 (2009) (explaining how the necessity of coordination between systemic risk regulators may ultimately undermine macroprudential regulation); Colleen M. Baker, *When Regulators Collide: Financial Market Stability, Systemic Risk, Clearinghouses, and CDS*, 10 VA. L. & BUS. REV. 343, 370 (2016) (describing how past collisions between the SEC and CFTC make additional coordination with the Fed seem difficult to achieve); *but see also* Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1862 (2017) (arguing that in all likelihood, the SEC would have refused to accept FSOC's recommendations on money market funds were it not for the council's designation power).
[468] Schwarcz & Zaring, *supra* note 467 at 1874–75.
[469] Christina Parajon Skinner, *Regulating Nonbanks: A Plan for Sifi Lite*, 105 GEO. L.J. 1379, 1409 (2017).
[470] COMM. ON PAYMENT & SETTLEMENT SYS. & TECH. COMM. OF THE INT'L ORG. OF SEC. COMM'NS, PRINCIPLES FOR FINANCIAL MARKET INFRASTRUCTURES 1-3 (2012), www.bis.org/cpmi/publ/d101a.pdf.
[471] Dan Ryan, *Financial Market Utilities: Is the System Safer?*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (Feb. 21, 2015), https://corpgov.law.harvard.edu/2015/02/21/financial-market-utilities-is-the-system-safer/.
[472] *See* IOSCO, *supra* note 13, at 5-16; G7 WORKING GROUP ON STABLECOINS, INVESTIGATING THE IMPACT OF GLOBAL STABLECOINS 19 (OCT. 2019), https://www.bis.org/cpmi/publ/d187.pdf

systems. As a first order point, experts have argued the blockchain technology used for a large payment system would become an extremely tempting target for cyberattack and terrorism.[473] But the popularity of Libra Coins themselves could have other insidious impacts. While the Association now claims that it has always intended to "complement" local currencies rather than replace them, those who have been following the saga know this claim is "dubious to say the least."[474] To put it bluntly, the single-currency stablecoins are not worth anything to the Association if users do not use them in place of the local currency.

If Libra became the *de facto* currency in a given economy, capital controls would no longer be a tool available to domestic regulators. Deposit flight toward Novi or other Libra wallets could cause leading banks to take on more risks or to contract lending to the real economy beyond the purview of local regulators.[475] Some experts anticipate that governments in developing countries might even use Libra for government salary and transfer payments to citizens, sacrificing long-run monetary sovereignty for short-run administrative gains.[476] With sufficient scale, Libra Networks could buy or sell enough of a particular country's sovereign debt to affect the ability of central banks and government agencies to conduct monetary policy. Finally, if ≋LBR became a benchmark rate, it could also be used to affect interest rates in private sectors.

Novi CEO David Marcus has boasted that Libra "allows the Free World of the Western nations to preserve the influence that in my opinion is necessary to maintain a good balance in the world."[477] Some analysts in the United States have welcomed this sort of international development approach,[478] but others have criticized Facebook for engaging in "imperialism by stealth."[479] In general, the fintech sector has been accused of violations of monetary sovereignty, to say nothing of violations of political sovereignty and democracy on a number of counts.[480] For instance, a project driven by former Association member Vodafone has received mounting backlash from activists and academics alleging predatory inclusion.[481] Increasingly, activists and

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[473] Angela Walch, *The Bitcoin Blockchain As Financial Market Infrastructure: A Consideration of Operational Risk*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 837, 865 (2015).
[474] Del Castillo, *supra* note 78.
[475] *See, e.g.*, Pistor, supra note 34.
[476] Del Castillo, *supra* note 78.
[477] *See. e.g.,* Jemima Kelly, *Suddenly Facebook's Libra is all about defending "the Free World" from China*, F.T. ALPHAVILLE (Sept. 19, 2019), https://ftalphaville.ft.com/2019/09/19/1568891272000/Suddenly-Facebook-s-Libra-is-all-about-defending--the-Free-World--from-China/.
[478] *See*, *e.g.*, Elena Botella, *What to Salvage From the Wreckage of Libra,* SLATE (Dec. 23, 2019), https://slate.com/technology/2019/12/libra-facebook-cryptocurrency-developing-countries-remittances.html.
[479] Jones & Kaminska, *supra* note 120.
[480] *See. e.g.,* Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEORETICAL INQUIRIES L. 491, 492 (2017); Pavlina R. Tcherneva, *Money, Power, and Monetary Regimes* 13 (Levy Econ. Inst. of Bard Coll., Working Paper No. 861, 2016); Isabel Feichtner, *Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?*, 17 GERMAN L.J. 875, 887–88 (2016).
[481] *See. e.g.,* Kevin P. Donovan & Emma Park, *Perpetual Debt in the Silicon Savannah,* BOSTON REV. (Sept. 20, 2019),

thinkers in the global south are pushing back against dollarization and monetary colonialism in all forms.[482]

Overall, we should expect regulation even absent U.S. involvement. But Facebook is a U.S. company, cloaking itself in patriotism as well as cosmopolitanism, and in some sense, it is U.S. regulators' responsibility to meet the challenge. Moreover, while the Libra project poses dangers to the entire world, the United States has more power to regulate it than many other actors, especially in jurisdictions in the global south.

Conclusion

Rep. Maxine Waters has counseled that Mark Zuckerberg is "willing to step on or over anyone"..."even our democracy..." in order for his company to profit.[483] The danger with Libra is that Facebook and a cartel of junior partners will leverage their platform power to establish a global financial surveillance system, on the back of public monetary systems. With this danger in mind, policymakers should not be reassured by recent changes to the White Paper. Facebook and the Association may cloak their effort in the mantle of public service, but such maneuvers should not deter policymakers from adopting a precautionary approach. Although the architects may protest that regulators should refrain from stifling innovation, precaution should be the norm in dealing with projects with global systemic reach, especially when captained by corporations with a record of evading or flouting existing laws, just as it is the norm in other regulatory regimes, including food and drug regulation.[484] As of the publication of this report, some analysts are suggesting that the Libra project could play a unique role in delivering faster, cheaper payments amidst the COVID-19 pandemic.[485] These remarks ignore mass surveillance and systemic risk. They also assume that a Big Tech cartel, rather than civil society or democratically elected governments, *should* deliver faster, cheaper payments to the entire world. To put it bluntly, no one asked for the Libra project. Rep. Waters' demand for a moratorium should continue, especially while the Association is unwilling to answer basic questions about its business model or speak to the details of prudential regulation.

We conclude by discussing the troubling efforts of other tech companies to enter the financial sector, reinforcing the need for legislative reform, and advocating for a public option

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https://bostonreview.net/class-inequality-global-justice/kevin-p-donovan-emma-park-perpetual-debt-silicon-savannah.

[482] *See, e.g.,* Ruth Maclean, *West African Countries Take a Step Away From Colonial-Era Currency,* N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/world/africa/west-africa-currency-france-franc.html.

[483] Press Release, HFSC, Waters to Zuckerberg: You Have Opened Up a Discussion About Whether Facebook Should Be Broken Up (Oct. 23, 2019), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=404587.

[484] COHEN, *supra* note 4, at 91-92.

[485] *See*, *e.g.*, *Libra Cryptocurrency Progress May Aid COVID-19 Economic Recovery*, COMPETITIVE ENTERPRISE INST. (April 16, 2020), https://cei.org/content/libra-cryptocurrency-progress-may-aid-covid-19-economic-recovery

for various financial services, to more accountably provide services the Association claims to offer as a matter of goodwill.

Regardless of whether or not the Libra project succeeds, other companies are likely to take up similar enterprises. One day after the Association released White Paper 2.0, Google announced a partnership with Citibank to launch a debit card rivalling Apple's joint card with Goldman Sachs.[486] In all likelihood, Google aims to integrate financial transaction data with its existing datastores (derived from its internet search monopoly), improve ad campaigns, and generally enhance its dominance. The other member of the "Big Four", Amazon, already owns a payment processing application that gives Amazon customers the ability to pay for things on other websites with their Amazon accounts. While convenient, like Facebook social plug-ins, the technologies significantly expand Amazon's surveillance of consumer and competitor behavior, allowing the company to sell more ads, hawk more targeted products, and generally conquer more of the financial services space.[487] Amazon has also launched a set of "store-branded" credit cards, issued by Synchrony Bank, which had previously allied with Amazon's brick-and-mortar competitors.[488] Signs suggest a move into full-fledged banking might be popular among existing Amazon customers.[489]

It is impossible to know which mega corporation will next attempt something as ambitious as the Libra project. But given the efforts already underway, U.S. policymakers must confront the general threat now. To understand what is at stake, policymakers and advocates can look not only to U.S. financial history,[490] but other contemporary approaches to regulating data aggregators engaging in shadow banking.[491] For a sense of potential scale, we can look to China for warnings: within a mere five years since its launch, Yu'ebao, the world's largest mobile payment platform, owned by China's largest e-commerce company, became the world's largest fund, with over 350 million customers and $150 billion in assets.[492]

The IRS and FinCEN should approach Libra according to their existing standards for other virtual currency, without granting Facebook or the Association any special privileges. The CFPB should extend its rules and enforcement powers to mobile wallet transactions. The FTC should take advantage of its broad mandate to regulate unfair competition to discipline the

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[486] John Constine, *Leaked pics reveal Google smart debit card to rival Apple's,* TechCrunch (Apr. 17, 2020), https://techcrunch.com/2020/04/17/google-card/.

[487] *See, e.g.*, Ron Shevlin, *Amazon's Impending Invasion Of Banking*, Forbes (July 8, 2019), https://www.forbes.com/sites/ronshevlin/2019/07/08/amazon-invasion/#1bcfa8477921.

[488] *See, e.g.*, Micael Corkery & Jessica Silver-Greenberg, *Profits From Store-Branded Credit Cards Hide Depth of Retailers' Troubles,* N.Y. Times (May 11, 2017), https://www.nytimes.com/2017/05/11/business/dealbook/retailer-credit-cards-macys-losses.html.

[489] Hugh Son, *Two-thirds of Amazon Prime members would try banking with the retailer,* CNBC (Sept. 18, 2019), https://www.cnbc.com/2018/09/18/most-amazon-prime-members-open-to-a-checking-account-from-tech-giant.html

[490] *See, e.g.,* Wilmarth, *supra* note 398, at 458; Ricks, *supra* note 399, at 394.

[491] *See, e.g.,* Dan Awrey & Kristin van Zwieten, *Mapping The Shadow Payment System* 41-44 (SWIFT Institute Working Paper No. 2019-00, 2019), *available at*: https://ssrn.com/abstract=3462351 (discussing comparative approaches in the U.S., UK, EU, and China).

[492] BIS Report, *supra* note 6, at 59-61.

prospective monopolistic business model of the project. Financial regulators must find a way to impose prudential regulation on Libra Networks. If it becomes clear that the Libra Coins would function like investment assets and the Libra project would operate as an investment pool, the SEC could impose prudential regulation across the ecosystem, and constrain participation to more sophisticated entities, which would have a significant impact on its scope. It could also coordinate with the CFTC to achieve similar ends. Finally, FSOC could designate Libra Networks as a SIFMU and subject the Libra ecosystem to prudential regulation by the Federal Reserve System, as well as the SEC or CFTC.

In addition, Congress should give regulators more power and tools to prevent the dangers posed by projects like Libra. First, legislators should constrain corporate data usage to a short list of permissible purposes, and ban the use of data for other purposes, so that much of the anti-competitive surveillance discussed in this report would become commercially unfruitful.[493] Due to issues raised in the Banking Regulation section, legislators should also designate the deposit-like obligations of dominant tech platforms as "deposits", prohibiting the platforms from issuing such obligations absent approval by banking regulators.[494] Perhaps most importantly, legislators should reestablish a bright line between the ownership of large tech companies and the ownership of financial institutions.[495] We need structural partitions between commerce and banking, profit-driven enterprise and "money creation",[496] and platforms and payment systems.[497] Even smaller tech and fintech companies are now acquiring regulated banks.[498] They are also attempting to create subsidiary Industrial Loan Companies (ILCs)[499] and gain special charters from the Office of the Comptroller of the Currency (OCC), much to the dismay of consumer, antitrust, and financial reform advocates.[500]

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[493] *See, e.g.*, Hartzog & Richards, supra note 45, at 1753 (arguing Congress should "get serious about limiting collection in the first place" as restrictions on data collection are sometimes more important than rules surrounding data use. Moreover, data that does not exist cannot be exposed, shared, breached, or misused.)

[494] For discussion of this general principle, see, e.g, Crawford, *supra* note 395, at 3.

[495] Bills like this might not stop the Libra project permanently, but they would likely force the Association to reconfigure contractually. *See, e.g.,* Pistor, *supra* note 34, at 11-12.

[496] For one vision of such separation, see Lev Menand, *The Monetary Basis of Bank Supervision*, VAND. L. REV. 1, 23-24 (forthcoming 2020), *available at* https://ssrn.com/abstract=3421232 [https://perma.cc/W5H5-B2FN].

[497] *See* Awrey, *supra* note 175, at 41-43 (comparing various approaches to this issues); Letter from Ams. for Fin. Reform Ed. Fund and Demand Progress Ed. Fund to H. Comm. on the Judiciary (Apr. 17, 2020), https://ourfinancialsecurity.org/2020/04/joint-letter-promote-tradition-of-separating-banking-and-commerce-regarding-dominant-platforms/ (arguing for the structural separation of large tech platforms and payments).

[498] *See, e.g.*, Hugh Son, *LendingClub buys Radius Bank for $185 million in first fintech takeover of a regulated US bank,* CNBC (Feb. 18, 2020), https://www.cnbc.com/2020/02/18/lendingclub-buys-radius-bank-in-first-fintech-takeover-of-a-bank.html.

[499] *See, e.g.*, Johnson et al., *supra* note 23, at 512-517; Letter from Ams. for Fin. Reform to FDIC (Oct. 10, 2017), https://ourfinancialsecurity.org/2017/10/letter-regulator-afr-opposes-fdic-insurance-square-inc/; Letter from Ams. for Fin. Reform to FDIC (July 19, 2017), https://ourfinancialsecurity.org/2017/07/letter-regulators-afr-opposes-sofis-deposit-insurance-application/.

[500] *See* Comment from Ams. for Fin. Reform to OCC (Jan. 15, 2017), https://ourfinancialsecurity.org/wp-content/uploads/2017/01/FINAL-AFR-Comment-to-OCC-re-FinTech-White-Paper-1-15-2017.pdf.

On the surface, the increasing collapse of the distinctions between finance and technology sectors might suggest invigorated competition. But with other tech and digital currency companies under its umbrella, businesses like Libra would run over competitors. At first, Libra might merely oust rival money transfer businesses, like TransferWise and Ripple, as well as other firms in the young digital currency industry. But given the Association's aspirations to become global infrastructure, other finance, technology, and fintech companies would likely eventually find themselves in Libra's crosshairs.

Libra's public relations pitch does in fact point to problems with the existing payments system. But the dangers of a private sector approach to this core utility function of the financial system underscore the importance of public sector development. The U.S. government should obviate retail demand for Libra by providing public options for real-time payments, safe deposits, international money transfer, and other basic digital financial services.[501] It should also ensure affordable, reliable internet access for these services to work.[502] This would essentially constitute a fundamentally important, and complementary, mode of regulation.[503] The Federal Reserve Board has already taken steps down this road, by announcing the launch of FedNow, a new interbank system to facilitate real-time payments (RTP) between businesses and consumers.[504] Like consumer advocates,[505] FTC Commissioner Rohit Chopra has urged the Board to proceed promptly, arguing that slow development has created space for the Libra project and "attempts to bypass our banking system altogether."[506]

In addition to upgrading our payments infrastructure, many central bankers, regulators, activists, and academics have pushed for some form of public banking option.[507] Interestingly,

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[501] For a brief history of public options in "basic banking" and financial services, including "postal banking", see GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 169-178 (2019).

[502] *See* Terri Friedline, *An Open Internet is Essential for Financial Inclusion, FinTech Revolution*, HUFF. POST (Dec. 14, 2017), https://www.huffpost.com/entry/an-open-internet-is-essential-for-financial-inclusion_b_5a3345dce4b0e1b4472ae520; *see also The fight for net neutrality in 2019*, DEMAND PROGRESS (Dec. 31, 2017), https://demandprogress.org/the-fight-for-net-neutrality-in-2019/.

[503] *See, e.g.*, Mehrsa Baradaran, *Facebook's cryptocurrency won't help the poor access banks*, WASH. POST (Oct. 29, 2019), https://www.washingtonpost.com/outlook/2019/10/29/facebooks-cryptocurrency-wont-help-poor-access-banks-heres-what-would/.

[504] Lael Brainard, Gov., Fed. Res., Delivering Faster Payments For All (Aug. 15, 2019), https://www.federalreserve.gov/newsevents/speech/brainard20190805a.htm.

[505] *See* Letter from Ams. for Fin. Reform Ed. Fund et al. to Fed. Res. Board of Gov. (Nov, 7, 2019) https://realbankreform.org/2019/11/07/joint-letter-letter-federal-reserve-emphasizing-need-strong-consumer-protections-real-time-payment-systems/.

[506] Comment from FTC Comm'r Rohit Chopra to FTC (Nov. 7, 2019), https://www.ftc.gov/public-statements/2019/11/comment-commissioner-rohit-chopra-federal-reserve-proposal-develop-round; *see also* AFR LIBRA LETTER, *supra* note 46, at 4.

[507] *See, e.g.,* Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165 (2014); Morgan Ricks et al., *A Public Option for Bank Accounts (or Central Banking for All)* 1 (VANDERBILT UNIV. LAW SCH., RESEARCH PAPER NO. 18-33, 2018), *available at* https://ssrn.com/abstract=3192162; Robert Hockett, *Money's Past is Fintech's Future: Wildcat Crypto, the Digital Dollar, and Citizen Central* Banking 2 STAN. J. BLOCKCHAIN L. & POL'Y 221

White Paper 2.0 indicates the Association's desire to integrate Libra with these systems.[508] Central banks should reject this offer on systemic risk grounds alone. But just as importantly, Big Tech's involvement in public money development would doom any future for financial privacy. Lest it fall victim to the same sort of criticisms as Libra, a new "digital dollar" would need to respect the privacy of its users.[509]

Such respect would entail, among other things, offering digital wallets as well as bank accounts for all, preserving the existing choice of bearer instruments that do not track user activity (like paper Federal Reserve Notes) and registered instruments that do track user activity (like bank deposits).[510] While legal firewalls might prevent some level of abuse in an account-based system, technical solutions are necessary. If the owner of a public centralized ledger system, (for instance, the Federal Reserve Bank of New York) were able to access digital dollar transaction activity at any given time, that data could be inappropriately accessed by other governmental entities, including law enforcement.[511] By contrast, within our existing monetary system, the Federal Reserve System does not make any records of where individual Federal Reserve Notes are at any given time; circulation is merely recorded as a single aggregate liability on the Fed's balance sheet titled 'Federal Reserve Notes Outstanding.'[512] A new public option for financial services should proceed from the principle that data that is not harvested in the first place cannot be abused. It should not ask users to choose between financial inclusion and privacy. In order to mitigate illicit flows, policymakers could choose to only offer anonymity under a certain threshold of holdings, as federal law does now with paper cash.[513] Public sector innovation is necessary to truly regulate the space, and privacy and public sector innovation need not conflict.[514]

(2019); *Facilitating Faster Payments in the U.S.: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs,* 116th Cong. 2 (2019) (Statement of Sheila C. Bair, Former Chair, FDIC), *available at* https://www.banking.senate.gov/download/bair-testimony-9-25-19.

[508] WHITE PAPER 2.0, *supra* note 1, at 17.

[509] *See, e.g.*, Jason Brett, *Congress Considers Federal Crypto Regulators In New Cryptocurrency Act Of 2020*, FORBES (Dec. 19, 2019), https://www.forbes.com/sites/jasonbrett/2019/12/19/congress-considers-federal-crypto-regulators-in-new-cryptocurrency-act-of-2020/#716eff165fcd (describing the popularization of the idea of the digital dollar in response to Libra's development).

[510] *See* Jonathan Dharmapalan & Rohan Grey, *The Case for Digital Legal Tender: The Macroeconomic Policy Implications of Digital Fiat Currency*, eCurrency Mint Ltd. (2017), https://www.ecurrency.net/static/resources/201802/TheMacroeconomicImplicationsOfDigitalFiatCurrencyEVersion.pdf.

[511] *See, e.g.*, Matla Garcia Chavolla, *Cashless Societies and the Rise of the Independent Cryptocurrencies: How Governments Can Use Privacy Laws to Compete with Independent Cryptocurrencies*, 31 PACE INT'L L. REV. 263, 273 (2018).

[512] Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, KY. L.J. 1, 16-18 (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536440.

[513] Dell'Erba, *supra* note 276, at 43.

[514] *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Dr. Seny Kamara, Assoc. Prof., Dept. of Comp. Sci., Brown

Facebook and the other Association members' existing user bases give the Libra system a unique opportunity to scale quickly: in many ways, Libra epitomizes the fintech industry's "endless capacity for self-referential growth."[515] That dynamic can only be disciplined by policymaker's own forward thinking about services people need in an informational economy. Perhaps above all, the Libra project plan underscores the idea that the "new language of financialization" will be defined by "privileged access to data."[516] Any such privileges need to be paired with powerful guardrails and responsibilities. Policymakers must avoid being swayed by general promises of 'innovation' and create systems for real accountability on behalf of the public.

Univ.), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-kamaras-20191121.pdf (arguing cutting-edge pro-privacy technology has applications for financial services).

[515] *Fintech: Examining Digitization, Data, and Technology: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. 17 (2018) (Statement of Saule T. Omarova, Prof. of Law, Cornell L. Sch.), *available at* https://www.banking.senate.gov/download/omarova-testimony-and-appendix-91818.

[516] COHEN, *supra* note 4, at 29.

Info

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