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Regulating Libra: Will Legal and Regulatory Uncertainty Prevent the Launch of Facebook's Cryptocurrency Project?

AMANDA SIMMONS*[©]

I. INTRODUCTION

In June 2019, Facebook's co-founder and CEO, Mark Zuckerberg, announced the launch of a new cryptocurrency, Libra, by releasing a white paper entitled "An Introduction to Libra."¹ The new project's stated mission was "to enable a simple global currency and financial infrastructure that empowers billions of people."² The global media reacted swiftly and strongly to the announcement, immediately terming the currency "Zuck Bucks," and arguing that Libra looked less like a cryptocurrency and more like the next step in the social media giant's takeover.³ Within days,

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1. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

2. *Id.*

3. See Kyle Sammin, *Why Facebook's Libra Cryptocurrency Will Be Bad for Everyone*, THE FEDERALIST (July 26, 2019), <https://thefederalist.com/2019/07/26/facebooks-libra-cryptocurrency-is-bad-for-everyone/> (arguing that Libra looks less like Bitcoin and more like the next step in the social media giant's takeover); see also Daniel Döderlein, *No, Facebook's Libra Will Not Really Help the Unbanked*, FORBES (June 14, 2019, 6:09 AM), <https://www.forbes.com/sites/danieldoderlein/2019/06/24/will-libra-really-help-the-unbanked-no-and-heres-why/#1a70688d27ec> (arguing that Facebook will fail in its stated mission of banking the unbanked and that the project is highly ambitious, given Mark Zuckerberg's checkered past with issues including antitrust concerns, privacy, data handling, compliance and more). But see Nikhilesh De, *Facebook's Cryptocurrency Will Face 'Regulatory Hurricane,' Canaccord Analysis Say*, COINDESK, <https://www.coindesk.com/facebooks-cryptocurrency-will-face-regulatory-hurricane-canaccord-analysts-say> (last updated June 19, 2019, 6:59 PM) (with industry analysts remaining bullish about Libra's value as a socially conscientious effort to leverage the company's global clout to bring financial inclusion to billions and that the scale of reach is unprecedented); see also Marie Huillet, *US Fed Chair: Facebook's Libra Carries Both Benefits and Risks*, COINTELEGRAPH (June 20, 2019), <https://cointelegraph.com/news/us-fed-chair-facebooks-libra-carries-both-benefits-and-risks> (with Federal Reserve Chairman Jerome Powell stating that he recognizes both the potential benefits and risks, but believes society is a long way from digital currencies replacing central bank currencies).

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politicians called for Facebook to halt the project, insisting that it was incumbent upon policymakers to understand Libra and its unprecedented impact on the global financial system before the project could proceed.⁴ The onslaught of criticism and commentary from regulatory agencies, politicians, and foreign countries remains steady, and the vast majority of this material is skeptical of the project.⁵

Not to be deterred, Facebook has responded by hiring a powerful group of lobbyists to assist in removing regulatory roadblocks and releasing its “Bug Bounty” program, which provides a \$10,000 reward for discovering security vulnerabilities.⁶ Even after the October 2019 departure of nearly one quarter of the founding members,⁷ Facebook remained confident and released a statement contending that over 1,500 entities expressed an interest in joining the Libra Association,⁸ with many meeting the extremely high screening criteria.⁹ Facebook and Libra representatives have appeared before Congress three times to answer questions about the project.¹⁰

4. See Nikhilesh De & Stan Higgins, *Senate Banking Committee Schedules July Hearing on Facebook’s Libra Crypto*, COINDESK, <https://www.coindesk.com/senate-banking-committee-schedules-july-hearing-on-facebooks-libra-crypto> (last updated June 19, 2019, 11:25 PM); see also Makena Kelly, *Top Democrat Calls for Facebook to Halt Cryptocurrency Plans Until Congress Investigates*, THE VERGE (June 18, 2019, 5:25 PM), <https://www.theverge.com/2019/6/18/18684268/facebook-libra-cryptocurrency-stop-congress-house-democrat-maxine-waters-regulation>.

5. See *Global Regulators and Politicians React to Facebook’s Libra Cryptocurrency Initiative*, THE BLOCK (June 20, 2019, 11:08 AM), <https://www.theblockcrypto.com/post/28280/global-regulators-and-politicians-react-to-facebooks-libra-cryptocurrency-initiative> (providing a list of quotes about Libra from different politicians, all negative); see also Julia Magas, *How Facebook Libra Is Seeking Compliance, but May Not Launch by 2020*, COINTELEGRAPH (Aug. 31, 2019) <https://cointelegraph.com/news/how-facebook-libra-is-seeking-compliance-but-may-not-launch-by-2020>.

6. See *Libra Blockchain Bug Bounty Program*, HACKERONE, <https://hackerone.com/libra> (last updated on May 12, 2020).

7. See Colin Lecher, *Facebook’s Libra Association Has Now Lost a Quarter of Its Original Members*, THE VERGE (Oct. 14, 2019, 3:27 PM), <https://www.theverge.com/2019/10/14/20914269/facebook-libra-association-founders-paypal-visa-mastercard-stripe-ebay>.

8. See Josh Costine, *Libra Claims 180 Potential Replacement for 7 Mutineers*, TECHCRUNCH (Oct. 14, 2019, 5:59pm), <https://techcrunch.com/2019/10/14/libra-meeting/>.

9. See *How to Become a Founding Member of the Libra Association*, MEDIUM: LETKNOWNEWS (June 22, 2019) <https://medium.com/letknownews/how-to-become-a-founding-member-of-the-libra-association-66db2993916d>. The screening criteria for Libra Association requires members to meet two of the following three criteria: (1) more than \$1 billion USD in market value of more than \$500 million USD customer balances, (2) reach more than 20 million people a year, multi-nationally, or (3) be recognized as an established top-100 industry leader by a third-party association such as the Fortune 500 and the S&P Global 1200. Different criteria are provided for crypto-focused investors and blockchain infrastructure companies: crypto-focused investors would need to have more than \$1 billion of assets under management, and blockchain infrastructure companies would need to have been in operation for over 12 months, have enterprise level operations pertaining to security, privacy, and infrastructure, and be staking or managing \$100 million or more of assets for clients. *Id.*

10. David Marcus, head of Calibra for Facebook and member of the Libra Association board of directors, testified before the Senate Banking Committee on July 16, 2019, and House Financial Services Committee on July 17, 2019. Mark Zuckerberg testified again before the House Financial Services Committee on October 23,

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Zuckerberg has made it clear that he is committed to meeting all legal and regulatory challenges,¹¹ stating that the company will spend “however long it takes” to launch the project.¹²

This paper will examine the regulatory hurdles facing the Libra project and assess the likelihood that the project will launch. Section II will provide a brief overview of relevant concepts and terminology, as there remains a cloud of confusion in the legal community concerning the lexicon for the virtual currency marketplace.¹³ Section III will provide an overview of the Libra project,¹⁴ including a discussion of its key features: the Libra Blockchain,¹⁵ the Libra Reserve,¹⁶ the Libra Association,¹⁷ and Calibra—the digital wallet application which will be embedded within Facebook.¹⁸

With an understanding of the basic functionality of Libra, Sections IV¹⁹ and V²⁰ will provide a detailed analysis and application of international and domestic regulatory frameworks relevant to the Libra project. Specifically, Section IV will cover the broad international regulatory landscape facing the Libra project.²¹ Cryptocurrencies are fundamentally international, indeed, “borderless.”²² Thus, it is

2019. See Josh Constine, *Facebook’s Testimony to Congress: Libra will be Regulated by the Swiss*, TECHCRUNCH (July 15, 2019, 12:12 pm) <https://techcrunch.com/2019/07/15/libra-testimony/>; see also William Feuer, *Watch Zuckerberg’s Congressional Testimony: ‘I Actually Don’t Know if Libra is Going to Work,’* CNBC, <https://www.cnbc.com/2019/10/23/zuckerberg-facebook-libra-testimony.html> (last updated Oct. 23, 2019, 1:10 PM).

11. See Tony Romm, *Facebook’s Zuckerberg Takes Broad Lashing on Libra, 2020 Election and Civil Rights at Congressional Hearing*, THE WASHINGTON POST (Oct. 23, 2019, 1:44 PM), <https://www.washingtonpost.com/technology/2019/10/23/facebook-mark-zuckerberg-testifies-congress-election-libra/>.

12. Nikhilesh De, *‘However Long it Takes’: Zuckerberg Vows to Win Over Libra Regulators*, COINDESK, <https://www.coindesk.com/however-long-it-takes-zuckerberg-vows-to-win-over-regulators-on-libra> (last updated (July 25, 2019, 6:24 PM)).

13. See *infra* Section II.

14. See *infra* Section III.

15. Zachary Amsden et al., *The Libra Blockchain*, LIBRA, <https://developers.libra.org/docs/assets/papers/the-libra-blockchain/2020-05-26.pdf> (last visited Sept. 19, 2020).

16. *Economics and the Libra Reserve*, section from *Libra White Paper*, LIBRA (Apr. 2020) https://libra.org/en-US/about-currency-reserve/#the_reserve.

17. *The Libra Association*, LIBRA, <https://libra.org/en-US/association-council-principles/#overview> (last visited Sept. 19, 2020).

18. *Coming in 2020: Calibra*, FACEBOOK (June 18, 2019), <https://about.fb.com/news/2019/06/coming-in-2020-calibra/>.

19. See *infra* Section IV.

20. See *infra* Section V.

21. See *infra* Section IV.

22. Richard Lee, *Defining the Borderless Cryptocurrency*, NAMECOINNEWS (Nov. 23, 2018), <https://www.namecoinnews.com/defining-the-borderless-cryptocurrency/> (arguing that the “borderless nature of cryptocurrency can give birth to a truly global transparent investment system.”); see also Eric Jansen, *The Demise of Bitcoin Has Been Greatly Exaggerated*, CNBC (Jul. 31, 2018, 8:02 AM),

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important to understand the current international regulatory framework and the disparate approaches taken by other countries, leading to regulatory arbitrage and confusion about jurisdiction and applicable laws.²³

Section V will apply the current domestic regulatory framework and applicable law to Libra.²⁴ Crypto is “widely regarded as the Wild West of finance,” with massively fluctuating values, frequent scams, and rational concern over the financing of criminal activities.²⁵ Similar to international regulatory confusion, domestic lawmakers, regulators, and law enforcement agencies are scrambling to keep up with rapid technological advances of cryptocurrencies. Accordingly, Libra will face oversight from a wide range of regulatory agencies, including the Department of Treasury through the Financial Crimes Enforcement Network (FinCEN), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Internal Revenue Service (IRS), the Federal Trade Commission (FTC), and the Consumer Financial Protection Bureau (CFPB).²⁶ This section addresses how Libra will be subject to each of these different regulatory agencies and the challenges and difficulties it will face in achieving compliance.

<https://www.cnbc.com/2018/07/31/the-demise-of-bitcoin-has-been-greatly-exaggerated.html> (explaining that, “bitcoin is a borderless digital currency that eliminates the need for a bank—a common characteristic of different cryptocurrencies that have followed it.”); Carlos Hernandez, *Bitcoin Has Saved My Family*, THE NEW YORK TIMES (Feb. 23, 2019), <https://www.nytimes.com/2019/02/23/opinion/sunday/venezuela-bitcoin-inflation-cryptocurrencies.html>. Mr. Hernandez, a Venezuelan economist, explains how he keeps his money in cryptocurrency due to Venezuela’s currency control and hyperinflation, and that “borderless money is more than a buzzword when you live in a collapsing economy and dictatorship.” *Id.*

23. Jason Weinstein, Alan Cohn & Chelsea Parker, *Promoting Innovation Through Education: The Blockchain Industry, Law Enforcement and Regulators Work Towards a Common Goal*, 1 GLOB. LEGAL INSIGHTS – BLOCKCHAIN & CRYPTOCURRENCY REGUL. 1, 2 (2019), https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1489775_1.pdf (“the disparate approaches taken by different countries, or even by different agencies within the U.S., have led to confusion on the part of the blockchain companies about the jurisdictions and regulatory regimes to which their products and services will be subject.”).

24. *See infra* Section V.

25. PreSale Ventures, *Cryptocurrency Regulation - Facing the Challenge of a Globalized World*, MEDIUM: DATA DRIVEN INVESTOR (Oct. 16, 2018), <https://medium.com/datadriveninvestor/cryptocurrency-regulation-facing-the-challenge-of-a-globalized-world-42cb27bde916>.

26. Francine McKenna, *Here’s How the U.S. and the World Regulate Bitcoin and Other Cryptocurrencies*, MARKETWATCH (Dec. 28, 2017, 11:19 AM), <https://www.marketwatch.com/story/heres-how-the-us-and-the-world-are-regulating-bitcoin-and-cryptocurrency-2017-12-18>; *see also* Laura Jehl and Melonia Bennett, Baker & Hostetler, LLP, *A Guide to U.S. Regulation of Cryptocurrencies and Cryptocurrency Exchanges*, BLOOMBERG LAW: TECH & TELECOM (2018), <https://www.bakerlaw.com/webfiles/Litigation/2018/Articles/030518-Blockchain4-Cryptocurrency..pdf>; A House Democratic Aide, *Inside the Congressional Staff Meeting About Libra*, THE AMERICAN PROSPECT (July 2, 2019), <https://prospect.org/power/inside-congressional-staff-meeting-libra/>.

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II. IMPORTANT TERMS AND CONCEPTS

Cryptocurrency is a digital or virtual currency that uses cryptographical²⁷ functionality to conduct financial transactions²⁸ and leverages blockchain technology to achieve a trustless, decentralized, and immutable ledger of account.²⁹ The term “cryptocurrency” is often used synonymously with the term “virtual currency,” which has been defined as “a digital representation of value that is not guaranteed by a central bank or public authority, is not necessarily attached to a legally established currency, and does not possess a legal status of currency or money, but is accepted by natural or legal persons, as a means of exchange, and which can be transferred, stored and traded electronically.”³⁰

Unveiled in 2009, Bitcoin was the first cryptocurrency to launch and currently has a market cap of \$143 billion, followed by Ethereum with a market cap of \$18 billion, and Ripple, valued at \$12 billion.³¹ With over 1,600 different coins currently on the market, Facebook hopes that Libra can successfully enter a market that some analysts predict will be worth more than \$20 trillion by 2027.³²

Cryptocurrencies are built on blockchains. A blockchain is a time-stamped series of immutable records of data verified by a decentralized network of computers that are not owned or maintained by any single entity.³³ Since the blockchain is not owned or maintained by one entity, there is no single point of access where a hacker or any

27. A better definition of cryptography defines it as the practice of encrypting certain data or information so that it can be kept secret from third parties. Cryptocurrencies use cryptography for three main purposes: to secure transactions, to control the creation of additional units of currency, and to verify the transfer of assets. To accomplish all of these things, cryptocurrencies rely on what is called “public key cryptography, which involves a user having both a public and private key. Both are encrypted and are a random assortment of numbers and letters and tend to be around 30 letters/numbers long. The purpose of the public key is to give people an address to send money to. The purpose of the private key is to unlock the public key in order to receive the money that has been sent.” See *How Cryptography is Used in Cryptocurrency*, WORLD CRYPTO INDEX, <https://www.worldcryptoindex.com/how-cryptography-is-used-cryptocurrency/> (last visited Sept. 27, 2020).

28. Jake Frankenfield & Michael Shonnenshein, *Cryptocurrency*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/cryptocurrency.asp> (last updated May 5, 2020).

29. Ameer Rosic, *What is Cryptocurrency? [Everything You Need to Know!]*, BLOCKGEEKS, <https://blockgeeks.com/guides/what-is-cryptocurrency/> (last visited Sept. 27, 2020).

30. Lutz Aufferberg, *Crypto Currencies as a New Challenge to Anti-Money Laundering Regulation and the Know-Your-Customer-Principle* 10 (May 2019) (working paper) (on file with Frankfurt School Blockchain Center), http://explore-ip.com/2019_Cryptocurrencies-as-a-New-Challenge-to-AML-Regulation-and-the-KYC-Principle.pdf.

31. *Today's Cryptocurrency Prices by Market Cap*, COINMARKETCAP, <https://coinmarketcap.com> (last visited Sept. 28, 2020).

32. Kai Bennink, *The Multi Trillion Dollar Potential of Cryptocurrency*, MEDIUM: BLOCKPORT (Feb. 14, 2019), <https://medium.com/blockport/the-multi-trillion-dollar-potential-of-cryptocurrency-d65c4f6ddf97>.

33. Ameer Rosic, *What is Blockchain Technology? A Step-by-Step Guide for Beginners*, BLOCKGEEKS, <https://blockgeeks.com/guides/what-is-blockchain-technology/> (last visited Mar. 1, 2019).

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other outside force can interrupt or corrupt the information contained in the blockchain.³⁴

Though blockchains are most widely known for their use as the technology underpinning cryptocurrency, blockchains are being used in countless other markets and industries. For example, blockchains are used for novel applications, including insurance claim processing, medical records and information, supply chain technology, and real estate title management.³⁵ Much like how internet technology drives a wide range of applications, including email, web browsing, shopping, gaming, and distributed cloud software services, blockchain technology is being applied to new and varying fields—far removed from its original development for cryptocurrency.

Many experts believe that three key features are driving cryptocurrency's growth, namely that cryptocurrencies are *trustless*, *immutable*, and *decentralized*.³⁶ Cryptocurrencies are trustless³⁷ because they were designed so that no individual has to trust anybody else in order for the network to function properly. Users on the network have a copy of the distributed ledger,³⁸ so there is no need to trust when you

34. Carol Goforth, *The Lawyer's Cryptonary: A Resource for Talking to Clients About Cryptocurrency Transactions*, 41 Campbell L. Rev. 47, 60-61 (2019).

35. Ameer Rosic, *17 Blockchain Applications that are Transforming Society*, BLOCKGEEKS, <https://blockgeeks.com/guides/blockchain-applications/> (last visited Sept. 29, 2020).

36. Lucho Poletti, *Cryptocurrency Basics — 3 Key Characteristics and Why They Matter*, MEDIUM: DATA DRIVEN INVESTOR (Apr. 9, 2018), <https://medium.com/datadriveninvestor/cryptocurrency-basics-3-key-characteristics-and-why-they-matter-7348242abe18>.

37. A better explanation of the concept of trustless is that “[t]raditional solutions to assuring trust between parties revolved around the implementation of a central authority or intermediary that acts as the implicitly trusted mediator. If two parties cannot trust each other, they put their trust in a third party whose vested interests are not directly involved in the components of the transaction The concept of a *trustless* environment has only recently become feasible with the creation of Bitcoin. Using a novel combination of [new technologies], a viable system of distributed, trustless consensus has emerged where interacting parties do not need to trust each other or a third party since all information being transacted across the network is, independently verified and immutably stored on the blockchain. Considered to be one of the primary advantages and paradigm shifting concepts within cryptocurrency platforms, distributed trustless consensus and the resulting environment that they create has enormous potential.” See Brian Curran, *What are Trustless Environments & How Cryptocurrencies Create Them?*, BLOCKONOMI (May 24, 2018), <https://blockonomi.com/trustless-environments/>.

38. *Ledgers: What are Distributed Ledgers?*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/distributed-ledgers.asp> (last updated May 12, 2020) (defining a distributed ledger as a database that is consensually shared and synchronized across multiple sites, institutions or geographies. It allows transactions to have a public “witness,” thereby making a cyberattack more difficult. The participants of each node of the network can access the recording shared across that network and can own an identical copy of it. Further, any changes or additions made to the ledger are reflected and copied to all participants in a matter of seconds or minutes. Underlying the distributed ledger technology is the blockchain . . .).

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can verify against this ledger.³⁹ Cryptocurrencies are immutable⁴⁰ because the distributed ledger is stored by a large number of participants, making it nearly impossible to tamper with the transactions on a public blockchain.⁴¹ Decentralized means that the ledger exists on multiple computers, often referred to as nodes, rather than existing or being stored in one place.⁴²

III. UNDERSTANDING LIBRA

To understand whether Facebook will be able to overcome the legal and regulatory challenges facing the Libra project, it is first important to have a solid understanding of Libra's proposed functionality. Facebook announced Libra with the release of a white paper detailing the need to provide financial services to the nearly 1.7 billion of the global population living outside of the financial system, with no access to traditional banks.⁴³ Facebook believes that Libra will achieve success by

39. *Id.*

40. See *What is Blockchain?*, LISK, <https://lisk.io/what-is-blockchain> (last visited Sept. 29, 2020) (explaining, "[w]hat does immutable mean? As nothing that is recorded on a blockchain can be changed, it is important to be absolutely sure where you are sending money. On a blockchain, once a transaction is sent it is sealed and cannot be reversed.").

41. See Zibin Zheng et al., *An Overview of Blockchain Technology: Architecture, Consensus, and Future Trends*, 6TH IEEE INT'L CONG. ON BIG DATA 557, 559 (2017), https://www.researchgate.net/profile/Hong-Ning-Dai/publication/318131748_An_Overview_of_Blockchain_Technology_Architecture_Consensus_and_Future_Trends/links/59d71faa458515db19c915a1/An-Overview-of-Blockchain-Technology-Architecture-Consensus-and-Future-Trends.pdf.

42. A better explanation of decentralization and the importance of the role it plays within the cryptocurrency culture is that "[t]here is tension between centralism and decentralization and it is a political dynamic as old as civilization. The decentralized dream is partly about society going to the next level where layers of the value draining middle-men we suffer now are gone. These middle-men tell us what to do, tell us what to think and charge us for the privilege as they gatekeep the juiciest intersections of our economies. Like the internet broke the information stranglehold, the blockchain will break many economic choke points... For this reason, blockchain and crypto are not loved by the monoliths of our economy, because blockchain and its cryptocurrency could vaporize their entire business model in the same way Amazon has laid waste to retail." See Clem Chambers, *Decentralized Cryptocurrencies are the Future*, FORBES (Sept. 6, 2018, 5:54 PM), <https://www.forbes.com/sites/investor/2018/09/06/decentralized-cryptocurrencies-are-the-future/#413c49cf35b1>.

43. Asli Demirgüç-Kunt et al., *The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution*, GLOBAL FINDEX DATABASE (World Bank, D.C.), 2017 at 1, 35, https://globalfindex.worldbank.org/sites/globalfindex/files/chapters/2017%20Findex%20full%20report_chapter_2.pd.

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combining the unique strengths of blockchains,⁴⁴ cryptocurrencies,⁴⁵ distributed governance,⁴⁶ open access, and security through cryptography with improvements limiting the volatility and improving the scalability of current blockchain systems.⁴⁷ Libra will attempt to limit the volatility and improve the scalability of the current blockchain through the use of its three key components: the Libra Blockchain, the Libra Reserve, and the Libra Association, which will each be discussed in more detail below.

As to Facebook's role,⁴⁸ it will maintain a leadership role until the project's launch, after which it will have the same commitments, privileges, and financial obligations as any other founding member.⁴⁹ Each founding member of the Libra Association⁵⁰ will run a validator node, which means that the Libra Blockchain will

44. Kevin Case, *How to Explain Blockchain in Plain English*, THE ENTERPRISERS PROJECT (June 26, 2018), <https://enterpriseproject.com/article/2018/6/how-explain-blockchain-plain-english> (defining a blockchain as "a digital and distributed ledger of transactions or decentralized database that keeps continuously updated digital records in real-time across a network of computers. Every transaction must be cryptographically validated before being permanently added to the ledger. Blockchain technology doesn't require a central authority to approve a transaction.").

45. See Frankenfield & Shonnenshein, *supra* note 29 (defining cryptocurrency as "a digital or virtual currency that uses cryptography for security. A cryptocurrency is difficult to counterfeit because of this security feature. Many cryptocurrencies are decentralized systems based on a blockchain technology; a distributed ledger enforced by a disparate network of computers. A defining feature of cryptocurrency . . . (is that) it is not issued by any central authority, rendering it theoretically immune from government interference or manipulation. The first blockchain-based cryptocurrency was Bitcoin, which still remains the most popular and most valuable. Today, there are thousands of alternate cryptocurrencies with various functions or specifications."). See also Joe Dewey, *Blockchain & Cryptocurrency Regulation 2020: USA*, GLOBAL LEGAL INSIGHTS, <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa> (last visited Sept. 29, 2020) (explaining "[t]here is no uniform definition of 'cryptocurrency,' which is often referred to as 'virtual currency,' 'digital assets,' 'digital tokens,' 'cryptoassets' or simply 'crypto'").

46. Max Semenchuk, *What is Distributed Governance?*, MEDIUM: DGOV FOUNDATION BLOG (Oct. 23, 2018), <https://medium.com/dgov/what-is-distributed-governance-3b103eb082c0> (defining distributed governance as the "specification of principles and methods which enable scalable coordination for forming consensus and to legitimate decisions. In such systems, all participants are treated equally without the presence of a central actor [or] hierarchy. They are scalable, so efficiency is not reduced but [steadily] increased by an increasing number of participants. . . . Challenge is how to maintain and implement changes in such an organization. As there's no direct decision maker to manage and allocate resources, management in such structures is done through the process of signaling, proposing and distributed decision making.").

47. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

48. Steven Leny & Gregory Barber, *The Ambitious Plan Behind Facebook's Cryptocurrency, Libra*, WIRED (June 18, 2019, 5:00 AM), <https://www.wired.com/story/ambitious-plan-behind-facebooks-cryptocurrency-libra/>.

49. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

50. Libra, *The Diem Association*, <https://libra.org/en-US/association/#overview> (last visited Sept. 16, 2020).

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initially function as a “permissioned blockchain,”⁵¹ with a stated goal of moving to a permissionless network within five years.⁵²

Many industry experts have raised concerns that Libra is not really a cryptocurrency because it lacks the three defining characteristics of trustlessness, decentralization, and immutability. Libra is being closely scrutinized for lacking decentralization⁵³ because it is a permissioned blockchain with Facebook serving as a gatekeeper that permits or denies entry to the network.⁵⁴ The project is not trustless because trust must be placed in the Libra Association and the Libra Reserve to manage the project—a sharp deviation from the libertarian principles underlying the history of cryptocurrency.⁵⁵ Nor is Libra immutable, because, as David Marcus, Head of Libra, indicated, Libra will have fraud protections in place, meaning transactions can be reversed.⁵⁶

51. “Permissionless blockchain networks power up most of the market’s digital currencies. They allow each end user to create a personal address and to interact with the network by submitting transactions and adding entries to the ledger. Additionally, all parties have the choice of running a node on the system, or employing mining protocols (e.g., POW [1] or POS [4]) to help to verify the transactions. In a permissioned blockchain or private blockchain, end users are required to authenticate before joining the network. Permissioned blockchains are preferred by centralized organizations, which leverage the power of the network for their own, internal business operations. Company consortiums are also likely to employ private blockchains to securely record transactions, and exchange information between one another.” Ence Zhou et al., *Ledgerdata Refiner: A Powerful Ledger Data Query Platform for Hyperledger Fabric*, THE 6TH INTERNATIONAL CONFERENCE ON INTERNET OF THINGS: SYSTEMS, MANAGEMENT AND SECURITY (IOTSMS) (Dec. 2019) <https://arxiv.org/pdf/1912.04526v1.pdf>.

52. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

53. “It is not difficult to imagine the 28 members conspiring to influence outcomes; all they would need is 15 members of the network to agree upon a dishonest result. On the bitcoin network, you would need to have over 4,500 nodes on the network conspire to agree upon a false outcome. This is a rather difficult feat to accomplish when you don’t know who the node operators are or where they are located globally. When you compare Bitcoin’s decentralization to Libra’s you start to get a sense of how decentralized Libra really is.” Amplify Exchange, <https://blog.amplifyexchange.com/news/is-facebooks-libra-a-cryptocurrency/> (last visited Sept. 16, 2020). See also Matthew Spoke, *Will Libra Ever Launch?*, FORBES (Sept. 13, 2019, 10:50 AM) <https://www.forbes.com/sites/mattspoke/2019/09/13/will-libra-ever-launch/#31cd8ebf2937> (stating “It is hard to seriously believe that Facebook—a company where one person is the Chairman and CEO and controls 60 percent of the voting shares—will be successful at deploying a technology founded on the principle of decentralization. The entire idea of Libra is antithetical to Facebook’s culture.”).

54. Matthew Spoke, *Will Libra Ever Launch?*, FORBES (Sept. 13, 2019, 10:50 AM) <https://www.forbes.com/sites/mattspoke/2019/09/13/will-libra-ever-launch/#31cd8ebf2937>.

55. Winco Team, *Is Libra a crypto?*, WINCO BLOG: CRYPTOCURRENCY (Sept. 3, 2019) <https://blog.winco.io/is-libra-a-crypto/>.

56. See Amplify Exchange, <https://blog.amplifyexchange.com/news/is-facebooks-libra-a-cryptocurrency/> (last visited Sept. 16, 2020) (explaining that true cryptocurrency network like Bitcoin and Ethereum, there are no fraud protections in place, and transactions cannot be reversed).

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A. The Libra Blockchain

Facebook introduced the developer community to the Libra Blockchain⁵⁷ in a 29-page paper co-authored by 53 industry experts.⁵⁸ After analyzing all currently available options, Facebook chose to build a new blockchain based on the requirements of scalability, security, and flexibility.⁵⁹ To meet these requirements, the Libra Blockchain was built from the ground up, utilizing a combination of innovative approaches and well-understood techniques.⁶⁰ In the process of building the Libra Blockchain, Facebook made three key decisions.⁶¹

First, the Libra Blockchain was designed using the “Move” programming language.⁶² Move is a new programming language for implementing custom transactions and “smart contracts”⁶³ on the Libra Blockchain and enables the secure implementation of the Libra ecosystem’s governance policies, such as the management of the Libra currency and the network of validator nodes.⁶⁴ Second, the Libra Blockchain adopted a Byzantine Fault Tolerant (BFT)⁶⁵ consensus approach using the LibraBFT⁶⁶ consensus protocol. This protocol allows the network to

57. Zachary Amsden et al., *The Libra Blockchain*, LIBRA <https://developers.libra.org/docs/assets/papers/the-libra-blockchain/2020-05-26.pdf> (last visited Sept. 16, 2020) (“The Libra Blockchain is a decentralized programmable database designed to support a low-volatility cryptocurrency that will have the ability to serve as an efficient medium of exchange for billions of people around the world.”).

58. *Id.*

59. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

60. *Id.* at 7.

61. *Id.*

62. Sam Blackshear et al., *Move: A Language With Programmable Resources*, LIBRA (June 18, 2019) <https://developers.libra.org/docs/assets/papers/libra-move-a-language-with-programmable-resources/2020-05-26.pdf>.

63. “Self-enforcing piece of software that is managed by a P2P network of computers. Smart contracts are client rights management tools that provide a coordination and enforcement framework for agreements between network participants, without the need of traditional legal contracts. They can be used to formalize simple agreements between two parties, catalogue the bylaws of an organization, or to create tokens...The agreement is embedded in computer code managed by a blockchain and contain a set of rules under which the parties of that smart contract agree to interact with each other. If and when the predefined rules are met.” *Smart Contracts*, BLOCKCHAINHUB BERLIN, <https://blockchainhub.net/smart-contracts/> (last modified July 2019).

64. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

65. “A condition of a computer system, particularly distributed computing systems, where components may fail and there is imperfect information on whether a component has failed.” *Byzantine fault*, WIKIPEDIA, https://en.wikipedia.org/wiki/Byzantine_fault (last modified Sept. 17, 2020). See Georgios Konstantopoulos, *Understanding Blockchain Fundamentals, Part 1: Byzantine Fault Tolerance*, MEDIUM (Nov. 30, 2017) <https://medium.com/loom-network/understanding-blockchain-fundamentals-part-1-byzantine-fault-tolerance-245f46fe8419> (detailing the Byzantine General’s Problem).

66. The LibraBFT Team, *State Machine Replication in the Libra Blockchain*, LIBRA (2018) <https://developers.libra.org/docs/assets/papers/libra-consensus-state-machine-replication-in-the-libra-blockchain/2020-05-26.pdf>.

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function even if up to one-third of the nodes are compromised or fail.⁶⁷ Third, the Libra Blockchain both adopts and iterates on widely adopted blockchain data structures.⁶⁸ The Libra Association will oversee the evolution of the Libra Blockchain protocol and network⁶⁹ and will continue to evaluate new techniques that enhance privacy in the blockchain while considering concerns of practicality, scalability, and regulatory impact.⁷⁰

B. The Libra Reserve

Libra is designed to be a stable digital cryptocurrency fully backed by a reserve of real assets⁷¹—the Libra Reserve—and supported by a competitive network of exchanges buying and selling Libra.⁷² The purpose of the reserve is to ensure that holders of Libra can be confident in the value of their coins over time.⁷³ By fully backing each coin with a set of stable and liquid assets and by working with a competitive group of exchanges and other liquidity providers, users can have confidence that they can buy and sell Libra coins at or close to the value of the reserve at any given time.⁷⁴

The money for the reserve will come from both investors in the separate Investment Token⁷⁵ and Libra users.⁷⁶ To limit counterparty risk, the reserve will consist of low-risk, interest-yielding assets held by a geographically distributed network of custodians with investment-grade credit.⁷⁷ Additionally, the actual assets backing each Libra coin will be a collection of low-volatility assets, including bank deposits and government securities in currencies from stable and reputable central banks.⁷⁸

Libra users will not directly interface with the reserve. To support higher efficiency, authorized resellers will be the only entities enabled to transact large

67. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

68. *Id.*

69. LIBRA, <https://developers.libra.org/docs/welcome-to-libra> (last visited Sept. 2020).

70. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

71. Steven Zheng, *Libra Reserve and the Libra Investment Token*, THE BLOCK (June 19, 2019, 3:13 PM) <https://www.theblockcrypto.com/genesis/28007/libra-reserve-and-the-libra-investment-token>.

72. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

73. *Id.*

74. *Id.*

75. Marc Hochstein, *There's a Second Token: A Breakdown of Facebook's Crypto Economy*, COINDESK <https://www.coindesk.com/theres-a-second-token-a-breakdown-of-facebooks-blockchain-economy> (last updated June 18, 2019, 10:49 AM).

76. *Economics and the Libra Reserve*, LIBRA (Apr. 2020) <https://libra.org/en-US/economics-and-the-reserve/#the-libra-reserve-and-protections>.

77. *Id.*

78. *Id.*

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amounts of fiat⁷⁹ and Libra in and out of the reserve.⁸⁰ Additionally, the Libra Association stated that the reserve does not set monetary policy and will mint and burn coins only in response to demand from authorized resellers.⁸¹

The reserve will remain fully backed across time, and the size of the reserve will be determined by the size of the outstanding balances of Libra holders.⁸² Since the goal is for Libra to exist alongside other global currencies, the Association decided not to develop its own monetary policy.⁸³ Rather, the Association decided to inherit the central banks' policies represented in the basket of assets held in reserve.⁸⁴ As the value of Libra will be effectively linked to a basket of fiat currencies, from the point of view of any specific currency, there will be fluctuations in the value of Libra.⁸⁵

C. The Libra Association

The governing entity of the Libra Blockchain and the Libra Reserve is the Libra Association, an independent not-for-profit membership organization headquartered in Geneva, Switzerland.⁸⁶ Switzerland is the Association's preferred location because of the country's history of global neutrality and openness to blockchain

79. "Fiat currency is legal tender whose value is backed by the government that issued it. The U.S. dollar is fiat money, as are the euro and many other major world currencies. This approach differs from money whose value is underpinned by some physical good such as gold or silver, called commodity money. The United States, for example, used a gold standard for most of the late 19th and early 20th century. A person could exchange U.S. currency . . . for gold as late as 1971. A fiat currency's value is underpinned by the strength of the government that issues it, not its worth in gold or silver." Jason Hall, *Fiat Currency: What It Is and Why It's Better Than a Gold Standard*, THE MOTLEY FOOL, <https://www.fool.com/investing/general/2015/12/06/fiat-currency-what-it-is-and-why-its-better-than-a.aspx> (last updated Sept. 20, 2018, 3:13 PM).

80. *Economics and the Libra Reserve*, LIBRA (Apr. 2020) <https://libra.org/en-US/economics-and-the-reserve/#the-libra-reserve-and-protections>.

81. *Id.*

82. *Id.*

83. In a statement entitled "Commitment to Compliance and Consumer Protection," Facebook explains that, "The Association will consult closely and regularly with sovereign governments, as well as with multilateral institutions, to support the understanding of this new network. The Association believes in preserving and strengthening the ability of governments to conduct monetary policy and is committed to working with regulatory authorities to achieve a safe, transparent, and consumer-friendly implementation of Libra project-compatible products and services. The Association will be governed and constrained by a Reserve management approach that will ensure safety and soundness of the network." *Commitment to Compliance and Consumer Protection*, LIBRA (Apr. 2020) <https://libra.org/en-US/compliance-consumer-protection/#overview>.

84. *Economics and the Libra Reserve*, LIBRA (Apr. 2020) <https://libra.org/en-US/economics-and-the-reserve/#the-libra-reserve-and-protections>.

85. Francisco Memoria, *Facebooks Cryptocurrency Libra Will Inherit the Monetary Policy of Central Banks*, CRYPTOLOBE (June 19, 2019) <https://www.cryptoglobe.com/latest/2019/06/facebook-cryptocurrency-libra-will-inherit-the-monetary-policy-of-central-banks/>.

86. *Libra White Paper*, LIBRA (Apr. 2020), <https://libra.org/en-US/white-paper/>.

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technology.⁸⁷ The Libra Association, which is separate from Calibra and Facebook,⁸⁸ currently has 22 members and remains committed to launching with 100 members in the network.⁸⁹ Each founding member⁹⁰ becomes a validator node,⁹¹ though this role may not be necessary as the network moves towards a permissionless blockchain.⁹² The Libra Association's role is to coordinate among the validator nodes to develop and secure the network technically and financially. From a technical perspective, the Association will drive alignment among the validator nodes and open-source community around the network's technical roadmap. From a financial perspective, the Association is primarily responsible for managing the reserve.

D. Calibra

With the launch of Libra, Facebook also announced its plans for Calibra, “a newly formed Facebook subsidiary whose goal is to provide financial services” enabling the world's 1.7 billion unbanked to “access and participate in the Libra network.”⁹³ Most users will interact with the Libra currency through the Calibra wallet, which means it will likely be the first cryptocurrency wallet for hundreds of millions of

87. *The Libra Association*, LIBRA, <https://libra.org/en-US/association/#overview> (last visited Sept. 16, 2020).

88. *Calibra: Customer Commitment*, CALIBRA, <https://www.docdroid.net/gBNirQc/calibra-customer-commitment.pdf> (June 2019).

89. Elizabeth Schulze, *Libra project will reach 100 members by the time it launches despite dropouts, group executive says*, CNBC, <https://www.cnbc.com/2019/10/15/100-members-will-join-facebooks-libra-before-launch-group-executive.html> (last updated Oct. 15, 2019, 8:32 AM).

90. Facebook further explained the responsibilities of the founding members of the Libra Association during the early years of the Libra Network. For a better explanation of the responsibilities of each founding member, which will include recruiting additional members (with a goal of reaching 100 by launch), the raising of funds through the sale of the Libra Investment Token, the design and implementation of incentive programs and other technical and financial management as determined necessary by the Libra Association, see *Libra Ass'n.*, LIBRA, <https://libra.org/en-US/association-council-principles/#overview> (explaining the structure of the Libra Association) (last visited Sept. 15, 2020).

91. “[A] validating node is ‘a device on a blockchain network, that is, in essence, the foundation of the technology, allowing it to function and survive. Nodes are distributed across a widespread network and carry out a variety of tasks.’ Nodes maintain either a full or partial copy of the blockchain and employ their computing power to confirm transactions. They confirm transactions through a consensus protocol, which involve nodes relaying information to one another. Each cryptocurrency has its own nodes.” XResearch, *How Do I Become a Validating Node, and What Do I Get out of It*, MEDIUM (Oct. 9, 2018) <https://medium.com/@teamxres/how-do-i-become-a-validating-node-and-what-do-i-get-out-of-it-8635d8eb11fb>.

92. *Cover Letter*, LIBRA, 1 (Apr. 2020), https://libra.org/en-US/wp-content/uploads/sites/23/2020/04/Libra_WhitePaperV2_April2020.pdf.

93. *Coming in 2020: Calibra*, ABOUT FACEBOOK, <https://about.fb.com/news/2019/06/coming-in-2020-calibra/> (last updated May 26, 2020, 7:05 AM).

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people who will access Calibra through Facebook’s massive ecosystem.⁹⁴ Many analysts believe that the tight integration of Calibra within the Facebook ecosystem will serve as the primary method for Facebook to promote and enable its network to use Libra, probably by providing free peer-to-peer payments to boost adoption to the point where Libra can have a vibrant financial services economy built on top of it.⁹⁵

Regarding compliance, Facebook stated that Calibra is committed to “keeping illicit activity off the platform and working with law enforcement globally.”⁹⁶ Facebook has described the actions it will take to achieve this objective, including “conduct[ing] a risk assessment on the basis of guidelines issued by the Financial Action Task Force (FATF),⁹⁷ the global standard-setting body for Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT), as well as applicable regulators.”⁹⁸ Calibra will also be subject to the recently released FinCEN Guidance⁹⁹ currently facing other Money Service Businesses¹⁰⁰ and has already registered with FinCEN.¹⁰¹

IV. INTERNATIONAL REGULATORY FRAMEWORK

A. Overview

The international community reacted strongly to Facebook’s announcement, with the G7¹⁰² immediately announcing the formation of a task force to examine how

94. *Facebook’s Calibra is a Secret Weapon for Monetizing its New Cryptocurrency*, THE VERGE (June 18, 2019, 5:00 AM), <https://www.theverge.com/2019/6/18/18682838/facebook-digital-wallet-calibra-libra-cryptocurrency-kevin-weil-david-marcus-interview>.

95. *Id.*

96. *Calibra: Customer Commitment*, CALIBRA, <https://www.eff.org/files/2019/07/10/calibra-customer-commitment.pdf> (last visited Dec. 20, 2020).

97. *Id.*

98. *Id.*

99. *Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FIN. CRIMES ENF’T NETWORK (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

100. *Am I an MSB*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/am-i-msb> (last visited Sept. 21, 2020).

101. Yogita Khatri, *Facebook Announces its Crypto Subsidiary Calibra is Registered with US FinCEN*, THE BLOCK (June 18, 2019, 11:31 AM), <https://www.theblockcrypto.com/linked/27874/facebook-announces-its-crypto-subsidiary-calibra-is-registered-with-us-fincen>.

102. *What Is the G7 Summit And What Does it Do?*, BBC (Aug. 24, 2019), <https://www.bbc.com/news/world-49434667> (“The G7 [or Group of Seven] is an organi[z]ation made up of the world’s seven largest so-called advanced economies: Canada, France, Germany, Italy, Japan, the United Kingdom and the United States.”).

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cryptocurrencies are regulated to avoid money laundering.¹⁰³ The G7 further clarified that it would not let Libra proceed until all regulatory concerns are addressed.¹⁰⁴ This response was echoed by a spokesman for the G20,¹⁰⁵ stating that Facebook's plan to expand into cryptocurrency warranted closer scrutiny by authorities.¹⁰⁶

Within a month of the project's announcement, the Bank for International Settlements (BIS), considered *the* central bank of central banks, warned that Libra could seriously harm the banking sector.¹⁰⁷ In a report dated June 23, 2019, BIS stated that big tech companies such as Facebook, Amazon, and Google could rapidly establish a dominant position thanks to their extensive network of users, and that, despite their ability to improve financial inclusion, they also present threats to financial stability, competition, and data protection.¹⁰⁸

Because of Facebook's massive international user base, Facebook will likely have to navigate a very complicated and highly variable set of international cryptocurrency regulations. In a June 2018 report entitled "Regulation of Cryptocurrency Around the World," the Law Library of Congress detailed the legal and policy landscape of 130 different countries that have issued laws or policies on the subject.¹⁰⁹ The report explains the varying responses from foreign countries, ranging from a complete ban of any and all cryptocurrency¹¹⁰ to cryptocurrency-

103. Daniel Palmer, *G7 Forming Task Force in Response to Facebook's Libra Cryptocurrency*, COINDESK, <https://www.coindesk.com/g7-forming-task-force-in-response-facebooks-libra-cryptocurrency> (last updated June 21, 2020, 10:32 AM).

104. See Harry Pettit, *Facebook's Libra Cryptocurrency Will Be Banned in Europe, France Says*, THE SUN, <https://www.thesun.co.uk/tech/9914118/facebooks-libra-cryptocurrency-france-ban-europe/> (last updated Sept. 12, 2019, 1:12 PM) (reporting that "Libra . . . represents a systemic risk from the moment when you have two billion users. Any breakdown in the functioning of this currency, in the management of its reserves, could create considerable financial disruption").

105. See Jaden Urbi, *The Difference Between G-7, G-8, and G-20 – And Why They Matter*, CNBC (Jun 8, 2018, 12:10 PM), <https://www.cnbc.com/2018/06/08/difference-between-g7-g8-g20-world-economy.html>. (explaining that the G7 and the G20 differ in that the G7 has a stronger focus on politics in industrialized countries, including discussions on health, energy, environment, and terrorism, while the G20 looks at economic issues facing developed and emerging economies).

106. Edward Helmore, *Facebook's Libra Cryptocurrency Faces Questions from International Regulators*, THE GUARDIAN (June 25, 2019, 6:26 PM), <https://www.theguardian.com/technology/2019/jun/25/facebook-libra-cryptocurrency-regulation>.

107. Yogita Khatri, *Bank for International Settlements Warns: Facebook's Libra Crypto Project Could Pose Risks to Banks*, THE BLOCK (June 24, 2019, 1:33 AM), <https://www.theblockcrypto.com/linked/28601/bank-for-international-settlements-warns-facebooks-libra-crypto-project-could-pose-risks-to-banks>.

108. *Big Tech in Finance: Opportunities And Risks*, BANK FOR INT'L SETTLEMENTS (June 23, 2019), <https://www.bis.org/publ/arpdf/ar2019e3.htm>.

109. *Regulation of Cryptocurrency Around the World*, LAW LIBR. OF CONG., 1 (June 2018), <https://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf>.

110. See *id.* at 2 ("Some jurisdictions have gone even further and imposed restrictions on investments in cryptocurrencies, the extent of which varies from one jurisdiction to another. Some [Algeria, Bolivia, Morocco, Nepal, Pakistan, and Vietnam] ban any and all activities involving cryptocurrencies. Qatar and Bahrain have a

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friendly regulatory regimes meant to attract investment in technology companies in this sector.¹¹¹ The sections below will survey the regulatory and compliance challenges within both crypto-friendly and crypto-hostile international landscapes and the current status of intergovernmental regulatory efforts.

B. Crypto-friendly International Regulatory Responses to Cryptocurrency and Libra

The Libra Association will be headquartered in Switzerland, in a region known as “Cryptovalley”—a cluster of companies and foundations recently ranked as the fastest-growing tech community in the world.¹¹² Switzerland has a light-touch approach to regulation and enthusiasm for digital currency not shared by all European countries and initially welcomed the project,¹¹³ with the Swiss State Secretariat for International Finance stating that “it’s a positive sign that Switzerland can play a role in an ambitious international project.”¹¹⁴ Switzerland has implemented a forward-looking regulatory framework for cryptocurrencies through the Swiss Financial Market Supervisory Authority (FINMA) and has been dubbed an “unofficial” cryptocurrency tax haven.¹¹⁵

Members of the House Financial Services Committee were so concerned about how Swiss laws will apply to the Libra Association that committee members traveled to Switzerland in order to better understand how the organization will be regulated

slightly different approach in that they bar their citizens from engaging in any kind of activities involving cryptocurrencies locally but allow citizens to do so outside their borders. There are also countries that, while not banning their citizens from investing in cryptocurrencies, impose indirect restrictions by barring financial institutions within their borders from facilitating transactions involving cryptocurrencies [Bangladesh, Iran, Thailand, Lithuania, Lesotho, China, and Colombia].”).

111. *See id.* (“Not all countries see the advent of blockchain technology and cryptocurrencies as a threat, albeit for different reasons. Some of the jurisdiction[s] surveyed for this report, while not recognizing cryptocurrencies as legal tender, see a potential in the technology behind it and are developing a cryptocurrency-friendly regulatory regime as a means to attract investment in technology companies that excel in this sector. In this class are countries like Spain, Belarus, the Cayman Islands, and Luxemburg.”).

112. Oscar Williams-Grut, *Here’s What it’s Like to Visit ‘Crypto Valley’ – Switzerland’s Picturesque Blockchain Version of Silicon Valley*, BUSINESS INSIDER (July 2, 2018, 2:55 AM), <https://www.businessinsider.com/what-its-like-in-zug-switzerlands-crypto-valley-2018-6>.

113. Daniel Palmer, *Swiss Central Bank ‘Relaxed’ About Facebook’s Libra Crypto*, COINDESK, <https://www.coindesk.com/swiss-central-banker-relaxed-about-facebooks-libra-crypto> (last updated Jun. 25, 2019, 8:11 AM).

114. Hugo Miller & Leonard Kehnscherper, *Facebook’s Cryptocurrency Gets a Warm Welcome in Geneva*, BLOOMBERG (June 25, 2019, 12:00 AM), <https://www.bloomberg.com/news/articles/2019-06-25/facebook-s-cryptocurrency-gets-a-warm-welcome-in-geneva>.

115. Selva Ozelli, *Why Switzerland is Becoming a ‘Crypto Nation’ with a Flourishing ICO Market: Expert Take*, COINTELEGRAPH (Feb. 18, 2018), <https://cointelegraph.com/news/why-switzerland-is-becoming-a-crypto-nation-with-a-flourishing-ico-market-expert-take>.

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as a Swiss non-profit.¹¹⁶ The delegation met with representatives from the State Secretariat for International Financial Matters, the Federal Data Protection and Information Commissioner, the Financial Markets Supervisory Authority, and Swiss Legislators.¹¹⁷

After an initial warm welcome from Switzerland, Swiss regulators subsequently indicated that Libra would face stricter laws than most cryptocurrency projects and could be subject to scrutiny under both banking rules and tough anti-money laundering laws.¹¹⁸ FINMA indicated that Libra's currency would need an official green light taking into account its "bank-like risks" and applying the "highest international anti-money laundering standards."¹¹⁹ On September 11, 2019, FINMA released new guidance regarding the regulation of stablecoins, targeted at ensuring a high-level of regulatory compliance for Libra.¹²⁰ In fact, FINMA confirmed that it had received Libra's request to file as a Payment System on the same day as the newly released guidance, indicating Facebook's intention to seek full compliance with Swiss regulators.¹²¹

Other countries with a cryptocurrency-friendly regulatory environment have not been as welcoming towards Libra. Spain, which offered tax breaks to attract companies in the blockchain technology sector, added its voice to a general European skepticism on all things Libra-related, with the deputy governor of the Bank of Spain opining that Libra "could become a destabilizing element for the economy" and calling for a "coordinated international action" to keep Libra in check.¹²² Other countries that are also otherwise crypto-friendly, have responded similarly to Spain.

116. Jason Brett, *Congress Questions the SEC on Libra, Cryptocurrency and "the Whole Blockchain" Phenomenon*, FORBES (Sept. 28, 2019, 9:54 PM), <https://www.forbes.com/sites/jasonbrett/2019/09/28/congress-questions-the-sec-on-libra-cryptocurrency-and-the-whole-blockchain-phenomenon/#57be15f45135>.

117. Stephen A. Rutenberg et al., *Libra Faces Continued Skepticism in U.S. Congress*, NAT. L. REV.: BITBLOG WEEKLY UPDATE (Sept. 9, 2019), <https://www.natlawreview.com/article/bitblog-weekly-update>.

118. John Miller & Tom Wilson, *Switzerland warns Facebook's Libra it will face extra scrutiny*, REUTERS (Sept. 11, 2019, 1:46 AM), <https://www.reuters.com/article/us-facebook-cryptocurrency-finma/switzerland-warns-facebooks-libra-it-will-face-extra-scrutiny-idUSKCN1VW0H6>.

119. Catherine Bosley, *Swiss Say Libra Needs License, Anti-Money Laundering Controls*, BLOOMBERG LAW (Sept. 11, 2019, 3:08 AM), https://www.bloomberglaw.com/document/XFAU8V04000000?bna_news_filter=tech-and-telecom-law&jcsearch=BNA%25200000016d20cfd3ccaf6f2cdf3aa70000#jcite.

120. *FINMA Publishes 'Stable Coin' Guidelines*, SWISS FIN. MKT. SUPERVISORY AUTH. (Sept. 11, 2019), <https://finma.ch/en/news/2019/09/20190911-mm-stable-coins/>.

121. Benjamin Pirus, *FINMA Application from Facebook's Cryptocurrency Libra Might Not Be Good Enough to Satisfy Regulators*, FORBES (Sept. 16, 2019, 10:46 AM), <https://www.forbes.com/sites/benjaminpirus/2019/09/16/finma-application-from-facebooks-cryptocurrency-libra-might-not-be-good-enough-to-satisfy-regulators/#6dc64f411d74>.

122. Tim Alper, *Facebook's Libra in Spain Setback – But Is There a Glimmer of UK Hope?*, CRYPTO NEWS (Sept. 19, 2019), <https://cryptonews.com/news/facebook-s-libra-in-spain-setback-but-is-there-a-glimmer-of-4681.htm>.

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For example, a representative from the Central Bank of Luxembourg stated that the proposed launch of Libra could weaken the European bank's ability to introduce monetary policy and cautioned that the rest of Europe should avoid its "treacherous promises."¹²³

C. International Responses from Countries with Regulatory Hostility to Cryptocurrency and Libra

Though Switzerland has expressed tepid acceptance of Libra, the overwhelming response from foreign sovereigns has been extremely negative. The project is currently facing an antitrust investigation by the European Union amidst concerns related to anti-competitive behavior if the proposed payment system unfairly shuts out rivals.¹²⁴ The project's struggles in Europe are not limited to the antitrust probe, as the European Union vows to block Libra entirely in Europe and France warns that Libra cannot be allowed to operate in Europe at all as it poses a threat to the monetary sovereignty of nations across the continent.¹²⁵ However, what is less clear, is how France intends to keep Libra out of the 38-member European Union, with France's Finance Minister, Bruno La Maire, admitting that he does not have a specific plan for achieving his stated objective.¹²⁶

China responded to the Libra announcement by stepping up its efforts to launch the world's first government-backed digital currency. China's project, known as the Digital Currency Electronic Payment (DCEP), which failed to launch on its November 11, 2019, targeted start-date and has been delayed. The central bank has indicated that there is no current timetable for the launch, though they appear to be ahead of other countries who are undertaking similar research, including Singapore, Canada, and Switzerland.¹²⁷ Chinese central bank officials emphasized that one of the goals for China's cryptocurrency is to preempt the rise of Libra, as the launch of Libra will reinforce the American dollar dominance in the international financial

123. Rajan Dhall, *Another ECB Member Has His Say on Libra This Time its Yves Mersch from Luxembourg*, FXSTREETS (Sept. 2, 2019, 10:25 AM), <https://www.fxstreet.com/cryptocurrencies/news/another-ecb-member-has-his-say-on-libra-this-time-its-yves-mersch-from-luxembourg-201909021425>.

124. Lydia Beyoud & Aoife White, *Facebook's Libra Currency Gets European Union Antitrust Scrutiny*, BLOOMBERG (Apr. 20, 2019, 12:41 PM), <https://www.bloomberg.com/news/articles/2019-08-20/facebook-s-libra-currency-gets-european-union-antitrust-scrutiny>.

125. Harry Pettit, *So Long Zuckers: Facebook's Libra Cryptocurrency Will Be Banned in Europe, France Says*, THE SUN, <https://www.thesun.co.uk/tech/9914118/facebooks-libra-cryptocurrency-france-ban-europe/> (last updated Sept. 12, 2019, 1:12 PM).

126. *Id.*

127. Yuan Yang & Hudson Lockett, *What Is China's Digital Currency Plan?*, FIN. TIMES (Nov. 25, 2019), <https://www.ft.com/content/e3f9c3c2-0aaf-11ea-bb52-34c8d9dc6d84>.

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system.¹²⁸ China's proposed digital currency bears many similarities to Libra with the digital coin accessible across major payment platforms, including China's ubiquitous WeChat and Alipay.¹²⁹ Many industry analysts expressed concern that China is strategically positioned to become the de facto global currency in emerging economies and that China may be the real winner in the anti-Libra cryptocurrency battle.¹³⁰ Indeed, Zuckerberg attempted to gain support for Libra by explaining to members of the House Financial Services Committee that Libra will extend "America's financial leadership globally and improve democratic values and oversight in the world."¹³¹

In addition to the imminent threat of a rival, government-backed Chinese coin, Libra is facing outright bans and extremely harsh regulatory regimes in so many countries that most experts feel the project will be unable to meet its stated objective of banking the unbanked.¹³² According to Facebook report, half of all adults without bank accounts live in just seven countries: Bangladesh, China, India, Indonesia, Mexico, Nigeria, and Pakistan.¹³³

As mentioned above, Facebook is completely banned in China, and other countries such as Pakistan, Indonesia, and Bangladesh, have temporarily banned Facebook for periods of time, severely limiting the potential effectiveness of Libra to bank the unbanked population of any of those countries.¹³⁴ India's current regulation does not permit use of the banking network for blockchain currency transactions, and the Reserve Bank of India has indicated that Facebook has not filed any applications to launch its cryptocurrency there.¹³⁵

128. David Pan, *Facebook's Marcus Says China Wins With Digital Renminbi if US Nixes Libra*, COINDESK, <https://www.coindesk.com/facebook-says-china-wins-with-digital-renminbi-if-u-s-nixes-libra> (last updated Oct. 22, 2019, 11:07 AM).

129. Kate Rooney, *As Facebook's Libra Faces Headwinds, China Is Racing to Launch its Own Global Cryptocurrency*, CNBC, <https://www.cnbc.com/2019/10/15/china-races-to-launch-a-cryptocurrency-that-could-rival-facebooks.html> (last updated Oct. 15, 2019, 2:59 PM).

130. Jen Wiczner & David Z. Morris, *Why China Is the Real Winner in the Anti-Libra Cryptocurrency Battle—The Ledger*, FORTUNE (Oct. 16, 2019, 10:29 AM), <https://fortune.com/2019/10/16/if-libra-fails-china-wins-the-ledger/>.

131. Charlie Wood, *Facebook CEO Mark Zuckerberg Is Trying to Drum up Support for the Firm's Wild New Currency by Amping up Worries of China's Financial Dominance*, BUS. INSIDER (Oct. 23, 2019, 3:30 AM), <https://www.businessinsider.com/zuckerberg-says-libra-will-help-america-influence-global-financial-system-2019-10>.

132. Döderlein, *supra* note 4.

133. Asli Demirgüç-Kunt, *supra* note 44, at 4.

134. See Elizabeth Lopatto, *Facebook's Libra Probably Won't Help People Without Bank Accounts*, THE VERGE (Jun. 27, 2019, 9:00 AM), <https://www.theverge.com/2019/6/27/18760384/facebook-libra-currency-cryptocurrency-money-transfer-bank-problems-india-china>.

135. See Raghu Krishnan, Anandi Chandrashekhar & ET Bureau, *Facebook may abort Libra launch in India*, THE ECON. TIMES (Jun. 22, 2019, 8:31 AM), <https://economictimes.indiatimes.com/tech/internet/facebook-may-abort-libra-launch-in-india/articleshow/69867426.cms> (quoting statement by Indian legal experts that "any entity

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With over 66% of Sub-Saharan Africa unbanked, and the cost of sending cash nearly 20% higher than any other region in the world,¹³⁶ many believe that Africa is a perfect continent to explore the untapped potential of blockchain projects.¹³⁷ However, African governments are also deeply suspicious of cryptocurrency and there is a long list of countries who have, prohibited the use of cryptocurrencies in some way or another, including Nigeria, Kenya, Ethiopia, and Zimbabwe.¹³⁸ Legal experts have commented that Libra presents a fundamental challenge to governments in poor countries with weak financial institutions as it will shift monetary policy from the governments to the Libra Association, despite the group's claims to the contrary.¹³⁹

D. Intergovernmental Regulation of Virtual Currencies

While most countries have developed some type of regulatory approach to cryptocurrency, there have been very few effective intergovernmental regulatory efforts. One of the few exceptions to the absence of cohesive international guidelines on cryptocurrency is the increasing efforts of international surveillance and monitoring of the crypto on and off-ramps to traditional fiat currency.¹⁴⁰ The most comprehensive international, intergovernmental regulatory response is embodied in the Financial Action Task Force (FATF).

that uses Libra may fall foul of RBI's norms as well as provisions of the IT Act, and face penalties. 'Under Section 79 of the Indian IT Act, Facebook is obligated to take "all due care" to ensure its network or platform is not used for illegal activities like dealing in cryptocurrencies in India. Section 79 would apply to Facebook even though it is based out of India. Section 75 of the IT Act also gives extraterritorial jurisdiction to the law.'")

136. Neo Sesinye, *66 Percent of Sub-Saharan Africans Are Listed as "Unbanked" – World Bank*, IT NEWS AFR. (Dec. 7, 2018), [https://www.itnewsafrica.com/2018/12/66-percent-of-sub-saharan-africans-are-listed-as-unbanked-world-](https://www.itnewsafrica.com/2018/12/66-percent-of-sub-saharan-africans-are-listed-as-unbanked-world-bank/#:~:text=According%20to%20research%20by%20the,many%20operating%20in%20informal%20economies)

ies.

137. Darryn Pollock, *Africa's Blockchain Potential Untapped, but How Can It Be Implemented?*, FORBES (Oct. 23, 2018, 8:27 AM), <https://www.forbes.com/sites/darrynpollock/2018/10/23/africas-blockchain-potential-untapped-but-how-to-implement-it/#6571bf6b4911>.

138. *Will Facebook's Digital Money Libra Be Good for Africa?*, BBC (Jul. 6, 2019), <https://www.bbc.com/news/world-africa-48882301>.

139. Dirk A. Zetsche et al., *Regulating LIBRA: The Transformative Potential of Facebook's Cryptocurrency and Possible Regulatory Responses* 23 (Univ. of New South Wales L. Rsch. Series, Working Paper No. 47, 2019) (explaining monetary policy and the authors belief that the project will succeed in poor countries despite the fundamental challenges it poses to poor countries because of the loss of monetary control and the denial of major policy tools necessary for accomplishing government objectives).

140. See Michael J. Casey, *Perverse Outcomes: FATF, Bitcoin and Financial Exclusion*, COINDESK (Jul. 29, 2019, 1:18 PM), <https://www.coindesk.com/perverse-outcomes-fatf-bitcoin-and-financial-exclusion>.

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FATF is an intergovernmental organization founded in the 1989 initiative of the G7 to develop policies combating money laundering and terrorist financing.¹⁴¹ Following the terrorist attacks on September 11, 2001, FATF formulated a set of forty recommendations for international standards on combating money laundering and terrorist financing, widely known as the “FATF Recommendations.”¹⁴²

With the growth of the financial technology marketplace, including the evolution of Virtual Assets (VAs) and Virtual Asset Service Providers (VASPs),¹⁴³ FATF has updated and clarified these recommendations numerous times, including in a June 2019 update titled “Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers.”¹⁴⁴ This new guidance is intended to help countries and VASPs understand their anti-money laundering and counter-terrorist financing obligations and effectively implement the FATF’s requirements.¹⁴⁵ FATF stated that the updates were in response to a “serious and urgent threat of criminal and terrorist misuse of virtual assets” and gave member countries twelve months to adopt the guidelines.¹⁴⁶

The FATF Recommendations are not legally binding, though 39 countries representing most major global financial centers, including the United States, contribute to the organization’s standards¹⁴⁷ and an additional 200 non-member

141. See *Financial Action Task Force*, WIKIPEDIA, https://en.wikipedia.org/wiki/Financial_Action_Task_Force (last visited Sept. 8, 2020).

142. THE FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION, (2019), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

143. See THE FIN. ACTION TASK FORCE, VIRTUAL CURRENCIES KEY DEFINITIONS AND POTENTIAL AML/CFT RISKS, (2014) <https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (providing virtual currency definitions for a complete understanding of the definitions for VA’s and VASP’s); See also THE FIN. ACTION TASK FORCE, TO VIRTUAL ASSETS AND VIRTUAL ASSETS SERVICE PROVIDERS 57 (2019), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets.html> (defining virtual asset and virtual assets providers in accordance with the risk-based approach). See also THE FIN. ACTION TASK FORCE, TO VIRTUAL ASSETS AND VIRTUAL ASSETS SERVICE PROVIDERS 13-18 (2019), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets.html> (defining and featuring the VASP Sector Relevant information for AML/CFT).

144. See generally THE FIN. ACTION TASK FORCE, GUIDANCE FOR A RISK-BASED APPROACH TO VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS (2019), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf>.

145. *Id.*

146. See Anna Baydakova & Nikhilesh De, *All Global Crypto Exchanges Must Now Share Customer Data, FATF Rules*, COINDESK (Jun. 21, 2019, 4:00 PM), <https://www.coindesk.com/fatf-crypto-travel-rule>.

147. See The COIN360 Editorial Team, *New FATF Guidelines: Overview and Community Response*, COIN360 (Jul. 12, 2019), <https://coin360.com/news/new-fatf-guidelines-overview-and-community-response>.

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countries also follow the recommendations.¹⁴⁸ Countries that fail to comply with the FATF Recommendations can be blacklisted and could lose access to the global financial system. Thus, the recommendations have significant importance.¹⁴⁹

Though the release of the June 2019 Guidance was met with backlash from some industry experts, most insiders were not surprised by the content of the guidance as FATF warned of the updates in February of 2019.¹⁵⁰ The guidance is intended to force VAs and VASPs to adhere to the same Bank Secrecy Act (BSA) standards as traditional banks and financial institutions and provides for standards that are similar to the current U.S. FinCEN policy that were put in place in 2013.¹⁵¹ Since virtually every bank and financial institution needs access to U.S. dollars, these standards closely mirror the regulations found in the BSA,¹⁵² which will be discussed in more detail below. FATF President, Xiangmin Liu, indicated that the organization is closely watching Libra and will address the project's significant risks.¹⁵³

V. DOMESTIC REGULATORY FRAMEWORK

A. Legal and Regulatory History and Overview

In order to understand the complex and confusing legal and regulatory challenges facing the Libra project, it is first necessary to understand the very brief, but extremely impactful legal history of cryptocurrency projects. Cryptocurrency first appeared with the release of an October 2008 white paper authored by Satoshi Nakamoto entitled "Bitcoin: A Peer-to-Peer Electronic Cash System," which outlined the conceptual and technical details of a payment system that would allow individuals to send and receive payments without involving any intermediary financial institution.¹⁵⁴

148. See Olga Kharif, *Crypto Exchanges Are Facing Their Biggest Regulatory Hurdle Yet*, BLOOMBERG (Jun. 11, 2019, 8:57AM), <https://www.bloomberg.com/news/articles/2019-06-11/crypto-exchanges-are-facing-biggest-regulatory-hurdle-yet>.

149. See Global Witness, *Financial Crime Watchdog's Chance to Show Its Teeth*, BANK TRACK (Feb. 12, 2010), https://www.banktrack.org/show/news/financial_crime_watchdog_s_chance_to_show_its_teeth.

150. See Paul de Haviland, *FATF Issues Draconian Crypto Recommendations: You Now Have 12 Months to Comply*, CRYPTO BRIEFING (Jun. 27, 2019), <https://cryptobriefing.com/fatf-draconian-crypto/>.

151. See Peter Van Valkenburgh, *The Upcoming FATF Interpretive Note Is Not Doomsday for Cryptocurrency*, COIN CTR. (Jun. 20, 2019), <https://www.coincenter.org/the-upcoming-fatf-interpretive-note-is-not-doomsday-for-cryptocurrency/>.

152. Bank Secrecy Act, 31 U.S.C. §§ 5311-5314 (2012).

153. See Yogita Khatri, *FATF Closely Monitoring Facebook's Libra Crypto*, OFFICIAL SAYS, THE BLOCK (Sep. 11, 2019, 2:25 AM), <https://www.theblockcrypto.com/linked/39282/fatf-closely-monitoring-facebooks-libra-crypto-official-says>.

154. See SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1-2 (Satoshi Nakamoto Institute 2008) (2008), <https://bitcoin.org/bitcoin.pdf>.

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However, Bitcoin's legal and regulatory problems became apparent early on with Silk Road launching in February 2011.¹⁵⁵ Silk Road was an online black market and the first modern darknet market, best known as a platform for human trafficking and child pornography, as well as the sale of weapons and drugs, that operated through a hidden router system and allowed users to browse anonymously and purchase securely without potential traffic monitoring.¹⁵⁶ The FBI ultimately shut the site down, and Silk Road's founder, Ross Ulbricht, was convicted in 2014 of eight charges, including money laundering, computer hacking, conspiracy to traffic in narcotics, and attempted murder.¹⁵⁷

With much of its short history defined by illegal use, regulators and criminal prosecutors continue to struggle with the use of cryptocurrency for illicit exchange, as criminals are becoming more and more sophisticated at using cryptocurrency to facilitate illegal financial flows.¹⁵⁸ Because of the decentralized nature of cryptocurrency, transactions take place with no bank or financial institution as an intermediary, posing a serious regulatory challenge to existing money laundering and terrorist financing prevention rules.¹⁵⁹ The existing regulations become ineffective when there is no traditional financial institution serving as the intermediary.¹⁶⁰ Since 2012, both domestic and international regulators have worked to strengthen, augment, and adapt international anti-money laundering regulations to the new challenges of cryptocurrency.¹⁶¹ Lawmakers have already stated that Libra will be

155. See *Silk Road (marketplace)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Silk_Road_\(marketplace\)](https://en.wikipedia.org/wiki/Silk_Road_(marketplace)) (last visited Sept. 21, 2020).

156. See *id.*

157. See *United States v. Ulbricht*, 79 F. Supp. 3d 466, 471–483 (S.D.N.Y. 2015).

158. See Ben Iorio, *Cryptocurrency and the Rise of New Illicit Financial Flows*, GLOBAL FINANCIAL INTEGRITY (Jun. 20, 2019), <https://gfintegrity.org/cryptocurrency-and-the-rise-of-new-illicit-financial-flows/>.

159. See Lutz Auffenberg, *Crypto Currencies as a New Challenge to Anti-Money Laundering Regulation and the Know-Your-Customer-Principle* (May 2019) (unpublished working paper) (on file with the Frankfurter Sch. Blockchain Ctr.), http://explore-ip.com/2019_Cryptocurrencies-as-a-New-Challenge-to-AML-Regulation-and-the-KYC-Principle.pdf.

160. See *id.* at 2.

161. See The Financial Action Task Force, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/resources/international/financial-action-task-force> (last visited Sep. 27, 2020) (“The Financial Action Task Force [FATF] is an inter-governmental policymaking body whose purpose is to establish international standards, and to develop and promote policies, both at national and international levels, to combat money laundering and the financing of terrorism. It was formed in 1989 to set out measures to be taken in the fight against money laundering. Since then, the FATF has issued 40 recommendations to fight money laundering and 9 special recommendations to fight terrorist financing. FinCEN supports the Department of the Treasury's efforts to promote the adoption of international standards involving anti-money laundering and the counter-financing of terrorism [AML/CFT], including through the FATF where FinCEN led the delegation from 1994 through 1998.”).

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expected to adhere to the highest standards for anti-money laundering.¹⁶² Subsection B of this Article will provide a detailed analysis of how Libra will be required to comply with FinCEN's current AML framework.¹⁶³

Though money laundering and terrorist financing concerns remain some of the most pressing legal challenges facing the cryptocurrency industry's growth, there are also other emerging regulatory concerns facing the industry. In 2017, the use of initial coin offerings (ICOs)¹⁶⁴ exploded with over 435 successful ICOs, each raising an average of \$12.7 million, for a total amount raised of over \$5.6 billion,¹⁶⁵ though some industry analysts have reported that more than 80% of 2017's ICOs were later identified as scams.¹⁶⁶ To respond to the proliferation of fraudulent, unregistered ICOs that are intended to function as securities,¹⁶⁷ the SEC has exercised jurisdiction in this area, though its focus has turned mostly to tokens marketed as investment opportunities rather than to virtual currency that functions solely as a store of value.¹⁶⁸ Subsection C of this Article will describe how the SEC has exercised jurisdiction over cryptocurrency and what type of compliance measures the agency will exert on Libra.¹⁶⁹

162. Adrian Zmudzinski, *Libra Must Comply with Anti-Money Laundering Standards: US Treasury*, COINTELEGRAPH (Sep. 10, 2019), <https://cointelegraph.com/news/libra-must-comply-with-anti-money-laundering-standards-us-treasury>.

163. See *infra* Section V.B.

164. See Carol Goforth, *The Lawyers Cryptionary: A resource for talking to Clients About Crypto-transactions*, 41 CAMPBELL L. REV. 47, 84-85 (2019) (explaining "the process by which issuers sell crypto-coins or tokens that they have developed in exchange for Fiat currency or other virtual currency. It has been compared to public offerings of securities in traditional Initial Public Offerings [IPO's] . . . one practical difference is the nature of the underlying stake being acquired by the purchaser. In an IPO, shares generally represent ownership in the company that is raising funds, whereas in an ICO the Coins or Tokens do not include direct ownership of the business.").

165. See Jake Frankefield, *Initial Coin Offering (ICO)*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp> (last updated Sep. 26, 2020) (explaining Initial Coin Offerings).

166. See Ana Alexandre, *New Study Says 80 Percent of ICOs Conducted in 2017 Were Scams*, COINTELEGRAPH (Jul. 13, 2018), <https://cointelegraph.com/news/new-study-says-80-percent-of-icos-conducted-in-2017-were-scams>.

167. See Lawrence J. Trautman, *Bitcoin, Virtual Currencies, and the Struggle of Law and Regulation to Keep Up*, 102 MARQ. L. REV. 447, 498 (2018) (explaining that starting in 2013, the SEC started to issue investor alerts about Ponzi schemes incorporating virtual currencies, and commenting on a *Wall Street Journal* article describing how hundreds of cryptocurrencies show hallmarks of fraud and in a review of documents produced for 1,450 digital coin offerings, 271 red flags were found including plagiarism, fake executives, and promises of guaranteed returns).

168. See DECHERT LLP., *US BLOCKCHAIN ENFORCEMENT AND LITIGATION UPDATE 3* (2019), <https://www.dechert.com/knowledge/publication/2019/1/us-blockchain-enforcement-and-litigation-update.html>.

169. See *infra* Section V.C.

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Of the 36 cases filed by federal regulators so far in 2019, the SEC has filed 23 of these cases, underscoring the agency's importance in the emerging regulatory framework for cryptocurrency.¹⁷⁰ However, the SEC is not the only agency actively pursuing regulatory compliance in the cryptocurrency industry. The Commodity Futures Trading Commission (CFTC) treats virtual currencies as "commodities" under the broad definition of the term in the Commodity Exchange Act (CEA),¹⁷¹ enabling the agency to regulate virtual currency derivative contracts and target cases of fraud involving underlying virtual currencies.¹⁷² Adding to the confusion, the categories of commodities and securities are not necessarily mutually exclusive under existing law, meaning that the SEC and CFTC may wield overlapping jurisdiction in this field.¹⁷³ Subsection D of this Article will provide an in-depth analysis of the CFTC's regulatory oversight of cryptocurrency.¹⁷⁴ Finally, Subsection E will examine other legal challenges facing the company, including compliance with tax law, privacy law, and consumer protection requirements.¹⁷⁵

B. Department of Treasury and FinCEN: Enforcement of the BSA, Know-Your-Customer (KYC), and Anti-Money Laundering (AML)

FinCEN is the U.S. Treasury Department bureau charged with monitoring financial transactions to combat domestic and international money laundering, terrorist financing, and other financial crimes.¹⁷⁶ Under FinCEN's BSA and Anti-money laundering (AML) regulations, money transmitters and other money service businesses are required to develop AML and Countering the Financing of Terrorism (CFT) policies, including Know-Your-Customer (KYC) and Suspicious Activity Reporting (SAR) procedures.¹⁷⁷

170. See Daniel M. Payne, *Six Trends Emerge in Murphy & McGonigle's Newly Published "Blockchain Litigation: 2018 Year in Review Report,"* BLOCKCHAIN LAW CTR. (Feb. 7, 2019), <https://www.blockchainlawcenter.com/newsitem/news/six-trends-emerge-in-murphy-and-mcgonigle-s-newly-published-blockchain-litigation-2018-year-in-review-report-677/>.

171. See 7 U.S.C. § 1(a)(9) (2018).

172. See Dechert LLP, *supra* note 169, at 3.

173. See Dechert LLP, *supra* note 169, at 3.

174. See *infra* Section V.D.

175. See *infra* Section V.E.

176. See Norman Roos, *New FinCEN Cryptocurrency Guidance Clarifies Applicability of Anti-Money Laundering Regulations to Virtual Currency Business Models*, 4 THE NAT'L L. REVIEW 143 (2019), <https://www.natlawreview.com/print/article/new-fincen-cryptocurrency-guidance-clarifies-applicability-anti-money-laundering>.

177. *Id.*

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FinCEN is empowered¹⁷⁸ to implement, administer, and enforce compliance with what is commonly known as the “Bank Secrecy Act.”¹⁷⁹ The Currency and Foreign Transactions Reporting Act of 1970¹⁸⁰ requires U.S. financial institutions to assist government agencies in detecting and preventing money laundering.¹⁸¹ The Act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000, and report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.¹⁸²

Though originally passed in 1970, FinCEN has regularly updated the guidance, including a May 9, 2019 update gathering the existing FinCEN regulations, related administrative rulings, and guidance.¹⁸³ The guidance is intended to help money service businesses (MSBs)¹⁸⁴ apply the FinCEN regulations to business models involving Convertible Virtual Currency (CVC).¹⁸⁵ MSBs are required to register with FinCEN and implement full compliance with the BSA, including implementation of AML controls, recordkeeping, and reporting requirements.

Determining which businesses in the crypto industry meet the definition of an MSB has been difficult, and many businesses have been left uncertain as to their

178. Treas. Order 180-01 (July 1, 2014).

179. *FinCEN’s Mandate from Congress*, FINANCIAL CRIME ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/statutes-regulations> (last visited Sept. 29, 2020).

180. 31 U.S.C. §§ 5311-5321 (2012).

181. *FinCEN’S Mandate from Congress*, FINANCIAL CRIME ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/statutu-regulations> (last visited Sept. 29, 2020).

182. *Id.* (“[BSA] was passed by the Congress of the United States in 1970. The BSA is sometimes referred to as an ‘anti-money laundering’ law (‘AML’) or jointly as ‘BSA/AML.’ Several AML acts, including provisions in Title III of the USA PATRIOT Act of 2001, have been enacted up to the present to amend the BSA. (See 31 USC 5311-5330 and 31 CFR Chapter X [formerly 31 CFR Part 103])”).

183. *FINCEN GUIDANCE*, FIN-2019-G001 (May 9, 2019) [hereinafter *FinCEN Guidance*], <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> (defining Convertible Virtual Currency (CVC) in Section 1.3 as “[t]he term virtual currency refers to a medium of exchange that can operate like currency but does not have all of the attributes of ‘real’ currency, as defined in 31 CFR §1010.100(m), including legal tender status. CVC is a type of virtual currency that either has an equivalent value as currency, or acts as a substitute for currency, and is therefore a type of ‘value that substitutes for currency.’” As mentioned above, the label applied to any particular type of CVC (such as “digital currency,” “cryptocurrency,” “cryptoasset,” “digital asset,” etc.) is not dispositive of its regulatory treatment under the BSA. Similarly, as money transmission involves the acceptance and transmission of value that substitutes for currency *by any means*, transactions denominated in CVC will be subject to FinCEN regulations regardless of whether the CVC is represented by a physical or digital token, whether the type of ledger used to record the transactions is centralized or distributed, or the type of technology utilized for the transmission of value).

184. 31 C.F.R. § 1010.100 (2014) (defining an MSB to include a person that provides money transmission services, or any other person engaged in the transfer of funds).

185. *FinCEN Guidance*, *supra* note 184.

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regulatory status.¹⁸⁶ However, what is certain, is that Calibra will qualify as an MSB as the company has already registered with FinCEN.¹⁸⁷ Calibra will function as both a hosted wallet and an exchange, both of which fall within the definition of an MSB.¹⁸⁸

In addition to registration and compliance with the mandates of the BSA, Facebook has indicated that each Calibra user will have to go through a “Know-Your-Customer (KYC) process,” requiring the user to produce a government-issued ID as well as other personal information to cash-in and cash-out Libra coins. Also known as “Customer Due Diligence” (CDD),¹⁸⁹ KYC requirements also require MSBs and other financial institutions to verify the owners and source of funds for account holders.¹⁹⁰ Though initially somewhat vague on how they anticipated meeting their KYC requirements when the stated goal of Libra is to bank the unbanked, many of whom do not have government-issued IDs, the Libra Association has recently indicated that it will meet these requirements through a concept of “tiered KYC.”

Tiered KYC uses digital means as a first step to identify users in situations where government-issued, paper certificates may be scarce.¹⁹¹ Libra Association member Kiva has developed a partnership with the government of Sierra Leone to use biometrics to assign digital wallets that record transactions on the blockchain, and Dante Disparte, head of policy and communication at the Libra Association, has indicated that Libra will use a similar system.¹⁹² Currently these plans are only

186. Editorial Board, *FinCEN's New Guidance for Cryptocurrency Business – Some Questions Answered, Some New Questions Raised, Careful Considerations a Must*, ORRICK, <https://blogs.orrick.com/blockchain/fincens-new-guidance-for-cryptocurrency-businesses-some-questions-answered-some-new-questions-raised-careful-consideration-a-must/> (last visited Sept. 30, 2020).

187. Yogita Khatri, *Facebook Announces Its Crypto Subsidiary Calibra is Registered with US FinCEN*, YAHOO FINANCE (Jun. 18, 2019), <https://finance.yahoo.com/news/facebook-announces-crypto-subsidiary-calibra-153156295.html>.

188. *Fact Sheet on MSB Registration Rule*, FINCEN, <https://www.fincen.gov/fact-sheet-msb-registration-rule> (last visited Sept. 29, 2020).

189. 31 U.S.C. § 5318(i)(1) (2012).

190. 31 U.S.C. § 5318(l)(2)(A) (2012).

191. Ian Allison, *How Anti-Money-Laundering Rules Hinder Libra's Mission to Reach the Unbanked*, COINDESK (Oct. 9, 2019, 4:09 PM), <https://www.coindesk.com/how-anti-money-laundering-rules-hinder-libras-mission-to-reach-the-unbanked>.

192. *Id.* (statement of Dante Disparte) (“In the developed world, we haven’t really thought about tiered KYC, because we haven’t had to. All our transactions have been running through banks or through something that has a KYC check. But go to a refugee camp or go to a rural village in Uganda. You’ll see that like 85% of transactions are under a dollar. How would you possibly KYC those? . . . In terms of KYC requirements, there can be a stepladder approach, based on the dollar magnitude or the Libra magnitude of an account, where it’s a slightly lower barrier at a lower financial threshold and a higher one at a higher financial threshold.”).

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aspirational. What is certain is that Calibra must ensure compliance with all relevant AML and CFT requirements and best practices for KYC.¹⁹³

C. The Securities and Exchange Commission (SEC): Initial Coin Offerings, The DAO Report, Howey Test, and Libra Investment Tokens

The Securities and Exchange Commission has regulatory authority over the issuance or resale of any token or cryptocurrency that has the characteristics of an “investment contract,”¹⁹⁴ as well as other instruments such as stocks, bonds, and transferable shares.¹⁹⁵ In 2017, the use of ICOs increased dramatically,¹⁹⁶ and virtually all of these ICOs were held without any kind of governmental filing normally required in a public financing event, operating in a regulatory grey area and with many turning a blind eye to whether securities regulations applied.¹⁹⁷ This uncertainty changed in July 2017 with the release of a 21(a)¹⁹⁸ investigative report (the “DAO Report”) in which the SEC declared that digital tokens may be investment contracts and, therefore subject to the regulation of the SEC.¹⁹⁹ To help clarify

193. *Id.*

194. Dave Berson & Susan Berson, *Blockchain Law 101: Understanding Blockchain Technology and the Applicable Law*, 88 J. KAN. BAR ASS'N 40, 42 (2019).

195. 15 U.S.C. § 77b(a)(1) (2018) (defining the term “security” to mean “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.”). *Framework for “Investment Contract” Analysis of Digital Assets*, U.S. SEC. AND EXCHANGE COMM'N (Apr. 3, 2019) [hereinafter *Framework*], <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.

196. *See supra* note 166 and accompanying text.

197. Michael Mendelson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 STAN. TECH. L. REV. 52, 54 (2019).

198. Memorandum from Gibson, Dunn & Crutcher LLP, SEC Warns Public Companies on Cyber-Fraud Controls, (Oct. 17, 2018) (describing a 21(a) report as “[s]ection 21(a) of the Securities Exchange Act of 1934 empowers the SEC to issue a public Report of Investigation where deemed appropriate. While SEC investigations are confidential unless and until the SEC files an enforcement action alleging that an individual or entity has violated the federal securities laws, Section 21(a) reports provide a vehicle to publicize investigative findings even where no enforcement action is pursued. Such reports are used sparingly, perhaps every few years, typically to address emerging issues where the interpretation of the federal securities laws may be uncertain. (For instance, recent Section 21(a) reports have addressed the treatment of digital tokens as securities and the use of social media to disseminate material corporate information.)”).

199. Mendelson, *supra* note 198, at 54.

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whether a digital asset meets the definition of “security,”²⁰⁰ the SEC released additional guidance on April 3, 2019, detailing how the investment contract analysis applies to digital assets to clarify when these assets are subject to federal securities law.²⁰¹

The April 2019 guidance clarifies the 2017 DAO Report and provides a framework for analyzing whether a digital asset has the characteristics of one particular type of security—an investment contract.²⁰² In *SEC v. W.J. Howey Co.*, the U.S. Supreme Court held that an “investment contract,” as used in the Securities Act, “means a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.”²⁰³ In *Howey*, the owner of large tracts of citrus acreage in Florida began selling shares of his citrus farm in order to “help finance additional development.”²⁰⁴ Each prospective customer was offered both a land sales contract and a service contract, giving the company full discretion and control over the groves.²⁰⁵ The purchasers were advised that it was not feasible to invest in the grove unless agreeing to the service contract.²⁰⁶

In holding that an investment contract exists when there is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others, the Court reasoned that the company was “offering something more than fee simple interest in land [it was] offering an opportunity to contribute money and to share in the profits of a large citrus enterprise.”²⁰⁷ A third party must manage the common enterprise with adequate personnel and equipment for the investors to achieve a return on investment, so the investors’ interests are made manifest through an investment contract.²⁰⁸ Thus, the transaction qualified as an investment contract, which requires registration with the SEC, and *Howey Co.* violated the law by failing to do so.²⁰⁹

Applying the investment contract analysis to digital assets, the SEC’s 2019 guidance addressed how each of the elements of the *Howey* test apply to digital assets. There are three elements that a court must assess when determining whether

200. *Framework*, *supra* note 196 (stating at Note 3, “The term ‘security’ is defined in Section 2(a)(1) of the Securities Act of 1933 (the “Securities Act”), Section 3(a)(10) of the Securities Exchange Act of 1934, Section 2(a)(36) of the Investment Company Act of 1940, and Section 202(a)(18) of the Investment Advisers Act of 1940.”).

201. *Framework*, *supra* note 196.

202. *Framework*, *supra* note 196.

203. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

204. *Id.* at 295.

205. *Id.* at 296.

206. *Id.* at 295.

207. *Id.* at 299.

208. *Id.* at 298-99.

209. *W. J. Howey Co.*, 328 U.S. at 299, 300.

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an investment contract exists: whether there has been (1) an investment of money, (2) a common enterprise, and (3) reasonable expectation of profits derived from the efforts of others. The first prong of the *Howey* test is the investment of money. This is satisfied in an offer and sale of a digital asset because the asset is purchased or otherwise acquired in exchange for value, whether in the form of real currency, another digital asset, or another type of consideration.²¹⁰ The second element, a common enterprise, is easily met, with the SEC stating “investments in digital assets have constituted investments in a common enterprise because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter’s efforts.”²¹¹

The third element of the *Howey* test is whether a purchaser has a reasonable expectation of profits derived from the efforts of others. The SEC clarifies this element by explaining that when a “promoter, sponsor, or third party (or affiliated group of third parties) provides essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profits from those efforts, then this prong of the test is met The inquiry, therefore, is an objective one, focused on the transaction itself and the manner in which the digital asset is offered and sold.”²¹² The SEC then provides a long list of factors for companies to consider when evaluating whether their digital asset is an investment contract or any other type of security before concluding with advice to seek further clarification through securities counsel.²¹³

Taken together, the DAO report and the July 2019 Guidance create a framework for determining whether a digital asset is an investment contract subject to SEC oversight by applying *Howey* to this rapidly growing, but sporadically regulated marketplace.²¹⁴ Though the SEC has maintained that each ICO is analyzed on a case-by-case basis, SEC Chairman Jay Clayton stated during his 2018 congressional testimony that he believed every ICO token he has seen constitutes a security.²¹⁵

While the Libra Association has made no mention of utilizing an ICO, the Libra project envelops two separate and distinct types of tokens or coins. First, the Libra coins will be used by individual users and will be broadly available to the general public. Second, the Libra Investment Token will be used and sold to a much more exclusive audience—the founding corporate members of the project’s governing consortium and accredited investors.²¹⁶ The company has acknowledged that the

210. *Framework, supra* note 196.

211. *Framework, supra* note 196.

212. *Framework, supra* note 196.

213. *Framework, supra* note 196.

214. Frankenfeld, *supra* note 166.

215. Mauricio S. Beugelmans & Krista M. Hess, *The Current Environment of U.S. Cryptocurrency Regulation*, 36 No.11 WESTLAW J. COMPUT. & INTERNET, Nov. 2, 2018 at 1, 2.

216. Hochstein, *supra* note 76.

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Libra Investment Token, purchasable by investing over \$10 million in the Libra network, is a security and will be regulated accordingly.²¹⁷ What is less clear is whether the SEC will have any oversight over Libra coins. Facebook is eager to avoid SEC oversight, with Libra executives arguing that the coin itself falls outside of the agency's jurisdiction because it operates more like cash than a security held by investors.²¹⁸ Industry analysts have reported that Facebook is spending large amounts of money behind the scenes in a lobbying campaign to entice lawmakers to this perspective²¹⁹ as a lengthy and cumbersome approval process could significantly delay the token's launch.²²⁰

Despite Facebook's lobbying efforts, many industry leaders believe that the Libra coin, which maintains a stable value by being backstopped with a basket of currencies managed by investment professionals, operates as an exchange traded fund (ETF), an investment product that requires SEC approval.²²¹ The House Financial Services Committee is pushing to ensure that the SEC is doing everything possible to ensure that "Libra is appropriately and rigorously regulated" and has indicated that the offering of the Libra coin is integrated into the offering of the Libra Investment Token, therefore deeming both securities.²²²

D. U.S. Commodities Futures Trading Commission (CFTC): Overview, Case Law and Application to Libra

The CFTC was established in 1974 to provide oversight of markets previously under the jurisdiction of the U.S. Department of Agriculture and is empowered to regulate "commodities" under the U.S. Commodity Exchange Act (CEA).²²³ The CFTC was among the first regulatory authorities to assert jurisdiction over cryptocurrency-related products.²²⁴ The CFTC first determined that Bitcoin and other virtual currencies are properly defined as "commodities" under the CEA in 2015 in

217. Francine McKenna, *Facebook's Crypto Plans Look a Lot Like the Ones the SEC is Trying to Stop*, MARKETWATCH (Jun. 27, 2019, 11:22 AM), <https://www.marketwatch.com/story/facebooks-crypto-plans-look-a-lot-like-the-ones-the-sec-is-trying-to-stop-2019-06-27>.

218. Bloomberg News, *Debate on Crypto Oversight Intensifies as SEC Clashes with Facebook over Libra*, INVESTMENTNEWS (Aug. 27, 2019), <https://www.investmentnews.com/debate-on-crypto-oversight-intensifies-as-sec-clashes-with-facebook-over-libra-81045>.

219. *Id.*

220. *Id.*

221. Noelle Acheson, *Libra Isn't a Cryptocurrency. It's a Glimpse of a New Asset Class*, COINDESK (July 7, 2019, 10:04 AM), <https://www.coindesk.com/libra-isnt-a-cryptocurrency-its-a-glimpse-of-a-new-asset-class>.

222. Jason Brett, *Congress Questions the SEC on Libra, Cryptocurrency and "The Whole Blockchain Phenomenon"*, FORBES (Sept. 28, 2019, 9:54 PM), <https://www.forbes.com/sites/jasonbrett/2019/09/28/congress-questions-the-sec-on-libra-cryptocurrency-and-the-whole-blockchain-phenomenon/#7858f11c5135>.

223. Commodity Exchange Act, 7 U.S.C. §§ 1-27.

224. Beugelmans & Hess, *supra* note 216, at 1.

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an enforcement action, *In the Matter of: Coinflip, Inc., d/b/a/ Derivabit, and Francisco Riordan*, CFTC Docket No. 15-29.²²⁵ In September 2015, the CFTC charged Coinflip²²⁶ for conducting activity related to commodity options without registering with the agency or meeting rules for exemption.²²⁷ The CFTC concluded in *Coinflip* that cryptocurrencies fit within the definition of “commodity” under the CEA and are subject to the CFTC’s supervision and jurisdiction.²²⁸ This order established the CFT’s view that (1) virtual currencies are commodities, (2) sales of options on virtual currencies fall within its purview, and (3) virtual currencies are not “real” currencies.²²⁹ However, CFT failed to provide much analytical support for its primary finding—that virtual currencies are commodities—arguing only that the CEA’s definition is broad and citing to a single case.²³⁰

Despite its vague definitions, the CFTC’s early legal victories within the cryptocurrency regulatory landscape continued in *CFTC v. McDonnell*.²³¹ In *McDonnell*, the court held that the CFTC can take enforcement action over virtual currency fraud, on the basis that 17 CFR 180.1²³² grants the CFTC antifraud authority over any “contract of sale of any commodity in interstate commerce.”²³³ The determination in the *My Big Coin Pay, Inc.* case affirmed the earlier decisions and actions, with the court reasoning that the CFTC’s “broad approach” to its antifraud jurisdiction over virtual currencies is in sync with Congress’s goal of “strengthening the federal regulation of the . . . commodity futures trading industry.”²³⁴

Though the CFTC is carving out a strong regulatory presence in the cryptocurrency market, it seems unlikely that the CFTC will exert much control over the Libra project. New CFTC Chair, Heath Terbert, said the CFTC is looking at

225. David Lucking & Vinod Aravind, *1 Cryptocurrency as a Commodity: The CFTC’s Regulatory Framework*, GLOBAL LEGAL INSIGHTS, <https://www.globallegalinsights.com/practice-areas/fintech-laws-and-regulations/1-cryptocurrency-as-a-commodity-the-cftc-s-regulatory-framework> (last visited Oct. 2, 2020).

226. *In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736 (Sep. 17, 2015).

227. Pete Rizzo, *CFTC Ruling Defines Bitcoin and Digital Currencies as Commodities*, COINDESK (Sep. 18, 2015, 8:28 PM), <https://www.coindesk.com/cftc-ruling-defines-bitcoin-and-digital-currencies-as-commodities>.

228. Beugelmans & Hess, *supra* note 216, at 1.

229. Allen Kogan, *Not All Virtual Currencies Are Created Equal: Regulatory Guidance in the Aftermath of CFTC V. MCDONNELL*, 8 AM. U. BUS. L. REV. 199, 213 (2019).

230. *Id.* at 213 and n.79.

231. *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018).

232. 17 C.F.R. § 180.1(a)(4) (2020) (stating that “[i]t shall be unlawful for any person, directly or indirectly, in connection with any . . . sale of any commodity in interstate commerce . . . to intentionally or recklessly: . . . (4) Deliver or caused to be delivered, or attempt to deliver or cause to be delivered . . . a false or misleading or inaccurate report concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such a report is false, misleading or inaccurate.”).

233. *McDonnell*, 287 F. Supp. 3d at 227.

234. Lucking & Aravind, *supra* note 226.

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Libra, but has yet to make a decision.²³⁵ However, at the July 17, 2019, Congressional hearing on Libra, multiple speakers, including Gary Gensler, former chairman of the CFTC, argued that elements of Libra and the Libra Reserve invoke securities law.²³⁶ Though it is still unclear whether the CFTC will attempt to regulate Libra, it seems unlikely that the CFTC and the CEA will prove to be a major regulatory roadblock in light of the early efforts taken by FinCEN and the SEC to assert authority and jurisdiction over the project.

E. Other Regulatory Considerations Including Tax, Consumer Protection, and Data Privacy

As part of a wider effort to assist taxpayers and enforce the tax laws in a rapidly changing area, the Internal Revenue Service (IRS) offered new guidance in October 2019 for taxpayers who engage in virtual currency transactions.²³⁷ The new guidance clarified several technical issues²³⁸ and reaffirmed the 2014 guidance issued by the IRS. The previous guidance²³⁹ stated that for federal tax purposes, virtual currency is treated as property, and that general tax principles applicable to property transactions would apply to transactions involving virtual currency. Thus, lacking any additional guidance from the IRS, gain or loss will be calculated every time there is a transaction and is equal to the price at the time of transaction over the acquisition price.²⁴⁰ The holding period will determine whether it is short-term or long-term capital gain, which means that if a cryptocurrency is used to purchase goods, one would have to pay not only sales tax, but also capital gains tax.²⁴¹ Libra Association executives have already indicated that they expect Libra to incur both the sales tax

235. Daniel Palmer, *Too Early to Tell if Libra is a Security, CFTC Chairman Says*, COINDESK (Nov. 20, 2019, 6:24 PM), <https://www.coindesk.com/too-early-to-tell-if-libra-is-a-security-cftc-chairman-says>.

236. Gary DeWaal, *Bridging the Week by Gary DeWaal: July 15 – 19, and July 22, 2019 (Misvaluations for Higher Bonus; Failure to Supervise; New Eligible Block Trade Participants)*, THE NAT'L L. REV. (July 22, 2019), <https://www.natlawreview.com/article/bridging-week-gary-dewaal-july-15-19-and-july-22-2019-misvaluations-higher-bonus>.

237. *Vital currency: IRS issues additional guidance on tax treatment and reminds taxpayers of reporting obligations*, IRS (Oct. 9, 2019), <https://www.irs.gov/newsroom/virtual-currency-irs-issues-additional-guidance-on-tax-treatment-and-reminds-taxpayers-of-reporting-obligations>.

238. See Rev. Rul. 2019-24, 2019-44 I.R.B. 1004 (2019) (resolving the tax consequences of hard forks and airdrops).

239. See I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (describing how existing general tax principles apply to transactions using virtual currency).

240. Jay Schulman, Jamison Sites, Bennett Moore, Wes Jamieson, Sam Auch, *Tax and Audit Considerations for Facebook's Libra Currency*, RSM (June 20, 2019), <https://rsmus.com/what-we-do/services/blockchain-consulting/tax-and-audit-considerations-for-facebook-s-libra-currency.html>.

241. *Id.*

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and capital gains tax, so it does not look as though Libra will encounter any significant regulatory challenges with the IRS.²⁴²

With regards to consumer data privacy, Facebook states that Libra is “designed with a strong commitment to protecting customer privacy,”²⁴³ and that aside from limited cases, such as preventing fraud and criminal activity, account information and financial data will not be shared with Facebook or any third party without customer consent.²⁴⁴ Facebook has a shoddy history with data privacy, including a 2019 data breach that exposed the data of nearly 540 million users²⁴⁵ and ongoing domestic and international legal challenges²⁴⁶ concerning numerous data privacy violations. This lackluster history has many analysts skeptical about Libra’s ability to achieve its data privacy goals²⁴⁷ though other sources maintain that Facebook is prepared to counter the existing privacy concerns.²⁴⁸ The announcement of Libra was followed in July 2019 with the announcement that Facebook had settled with the Federal Trade Commission (FTC) for a record-breaking \$5 billion settlement, which also required a massive overhaul of its consumer privacy practices.²⁴⁹ Thus, regulatory uncertainty with the FTC regarding consumer privacy could prove to be a large stumbling block for the project.

242. Josh Constine, *Facebook Answers How Libra Taxes & Anti-Fraud Will Work*, TECHCRUNCH, (July 12, 2019, 11:53 AM), <https://techcrunch.com/2019/07/12/facebook-libra-taxes-trump/>.

243. *See Commitment to Compliance and Consumer Protection*, LIBRA (Apr. 2020), <https://libra.org/en-US/compliance-consumer-protection/#overview> (stating that “[t]he Association is committed to compliance with global privacy regulation and to working with regulators and policymakers to shape a regulatory environment that promotes privacy and blockchain technology. Individuals or organizations will operate on the Libra Blockchain through user accounts, which are dissociated from their real-world identity. Authentication occurs through public keys used on the network, which does not give any information regarding the user’s personal data. Only data relevant to each transaction, such as the public address of the sender and receiver, the timestamp, and the transaction amount are recorded and publicly visible.”).

244. NOVI, <https://calibra.com/media> (last visited Dec. 20, 2020).

245. April Glaser, *Another 540 Million Facebook Users’ Data Has Been Exposed*, SLATE (Apr. 3, 2019, 7:41 PM), <https://slate.com/technology/2019/04/facebook-data-breach-540-million-users-privacy.html>.

246. Lauren Feiner, *Mark Zuckerberg’s Call for Tougher Internet Regulation Won’t Save Facebook from These Investigations*, CNBC (Mar. 31, 2019, 3:55 PM), <https://www.cnbc.com/2019/03/31/facebook-federal-and-international-investigations-into-data-privacy.html>.

247. Robert Hackett, *Facebook Cryptocurrency: Calibra’s Privacy Implications*, FORTUNE (June 18, 2019, 7:15 AM), <https://fortune.com/2019/06/18/facebook-cryptocurrency-libra-privacy/>.

248. Philip Rosenstein, *Facebook’s Libra Prepared to Counter Privacy Concerns*, LAW360 (June 19, 2019, 10:11 PM), <https://www.law360.com/articles/1170851/facebook-s-libra-prepared-to-counter-privacy-concerns>; *see also* John Dantoni, *An Analysis of Libra Association Members and Their History of Blockchain Involvement*, THE BLOCK (Oct. 31, 2019, 1:47 PM), <https://www.theblockcrypto.com/genesis/45189/an-analysis-of-libra-association-members-and-their-history-of-blockchain-involvement> (stating that documents from the company indicate they are taking privacy and security seriously and that all non-custodial transactions will be pseudo-anonymous, much like other cryptocurrency).

249. Lesley Fair, *What the FTC Facebook Settlement Means for Consumers*, F.T.C. (July 24, 2019), <https://www.consumer.ftc.gov/blog/2019/07/what-ftc-facebook-settlement-means-consumers>.

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The Consumer Financial Protection Bureau (CFPB) is another regulatory agency that could potentially impact the Libra project.²⁵⁰ However, CFPB Director Kathleen Kraninger confirmed that CFPB officials met with Libra Association representatives and downplayed CFPB's future role in overseeing the project, stating that their jurisdiction in the area is fairly limited. The Libra Association stated that "it is committed to working with authorities to shape a regulatory environment that encourages technological innovation while maintaining the highest standards of consumer protection," but skepticism remains as to whether Facebook can win consumer trust.²⁵¹ Regardless of whether Libra will be able to win back consumer trust, it does not appear that the CFPB will prove to be much of a regulatory roadblock to the successful launch of the Libra project.

VI. CONCLUSION

Libra is facing a mountain of regulatory challenges and uncertainty. Domestically, Libra will be subject to strict regulation through FinCEN, the SEC, and the CFTC. It will also be subject to regular and capital gain tax and will remain in the crosshairs of the FTC due to past performance on privacy issues. The CFPB appears to be one of the few federal regulatory agencies with a stake in the cryptocurrency sector that is not currently exerting much influence over the project.

The international regulatory landscape is even more unfriendly to Libra. Though Switzerland has extended a tepid welcome to the Libra Association, a large number of countries including many members of the European Union, China, and India have indicated that the project is currently banned or should be banned. China has taken opposition a step further by developing a government-backed copycat of the Libra coin, which experts are warning could be even more dangerous to global monetary policy than Libra. Other international challenges include serious threats to Libra's mission statement of banking the unbanked due to bans and regulatory red tape in Africa, Pakistan, and Bangladesh.

Despite this harsh and unfriendly regulatory landscape, and even with the departure of one-quarter of the original membership, Facebook adamantly maintained that it intended to launch the project with a 2020 target date. The

250. See Evan Weinberger, *CFPB Could Be Powerful Libra Regulator, If It Chooses*, BLOOMBERG LAW, (July 19, 2019, 5:31 AM), <https://news.bloomberglaw.com/banking-law/cfpb-could-be-powerful-libra-regulator-if-it-chooses> (explaining that Facebook has touted the Libra ecosystem's potential to enable faster, cheaper payments to developing countries, which could place the social media giant under the CFPB's supervision of remittance providers. Such a move could also trigger the CFPB's sweeping enforcement powers to bring Unfair, Deceptive or Abusive Acts and Practices claims on everything from remittance practices to improperly sharing customer data.).

251. Michael del Castillo, *Facebook Crypto Chief Hopes Blockchain Will Reboot Trust in the Social Network*, FORBES (July 16, 2019, 5:00 AM) <https://www.forbes.com/sites/michaeldelcastillo/2019/07/16/as-facebook-prepares-for-congress-its-crypto-chief-asks-forgiveness/#251b9f5e6c10>.

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organization has since backed off of this statement, with Mark Zuckerberg indicating that Facebook will now take a more cautious approach because Libra is “very sensitive for society.”²⁵² Zuckerberg stated that Libra will seek full regulatory compliance prior to its launch, which is “a very different approach than what we might have taken five years ago,”²⁵³ reflecting some level of self-awareness that Facebook may still have the public perception of “moving fast and breaking things.”²⁵⁴

However, even with Facebook’s adamant commitment to launching Libra, the regulatory roadblocks and trust deficits make it highly uncertain as to whether this will be possible. Facebook has an immense amount of capital, technological resources, and expertise to bring to the project, as well as a massive, unparalleled global reach, which will certainly aid the company in successfully navigating the pitfalls awaiting Libra. But analysts and experts remain divided as to whether Facebook will be able to overcome the regulatory challenges it is facing at both the national and international level. There is so much uncertainty around the product launch that a crypto futures exchange, taking bets on whether, and when, Libra will launch, places the odds at only a 30% likelihood that Facebook will launch Libra before December 30, 2020.²⁵⁵ Given the immense regulatory tapestry that Libra will have to navigate, those odds seem fair.

252. Daniel Palmer, *Facebook’s Zuckerberg Appears to Put Libra Launch Date in Doubt*, COINDESK (Sept. 26, 2019, 9:32 AM), <https://www.coindesk.com/facebooks-zuckerberg-appears-to-put-libra-launch-date-in-doubt>.

253. *Id.*

254. See Hemant Taneja, *The Era of “Move Fast and Break Things” Is Over*, HARVARD BUSINESS REVIEW (Jan. 22, 2019), <https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over> (explaining that though many of today’s entrepreneurs still live by Zuckerberg’s famous motto, the public will continue to grow weary of perceived abuses by tech companies, and will favor businesses that address economic, social, and environmental problems).

255. William Foxley, *Now Traders Can Make Bets on When Facebook’s Libra Will Launch*, COINDESK (Oct. 7, 2019, 11:40 AM), <https://www.coindesk.com/now-traders-can-make-bets-on-when-facebooks-libra-will-launch>.