The United States Senate Committee on Finance
"Examining the Taxation of Digital Assets"
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Testimony of Andrea S. Kramer,
Founding Member, ASKramer Law LLC

Introduction:

By way of background, I am the founding member of ASKramer Law where I practice law relating to financial products and trading markets. My clients span the finance, energy, nonprofit, and private wealth sectors. While tax is one major focus of my work, I advise clients on all aspects of financial products including their design, regulation, documentation, and risk management.

I have written a reference book on financial products; I served for 20 years as an adjunct professor in the LL.M Tax Program at Northwestern University School of Law; and I have conducted seminars and workshops on the taxation of financial products for IRS financial product specialists and agents since the 1980s.

I have some remarks to address tax areas that are subject to debate right now.

In ongoing discussions about the taxation of digital assets, we are making our jobs much more difficult than necessary. Yes, digital assets are a new asset class involving unique types of transactions never contemplated before. The Internal Revenue Code (Code) has never seen an asset class like digital assets.[1] But this is not the first time that a new asset class has been created and made available for trading, nor is this the first time our Code has been applied to a totally new asset class. In addressing the taxation of digital assets, I have been mindful of areas that require clarification by Congress as well as the precedent we are setting as new asset classes are introduced into the marketplace.

The existing tax framework as it is currently set out in the Code, with a few tweaks, is flexible enough to accommodate the thoughtful and appropriate taxation of digital assets. There are a few places where Congress can amend existing Code sections to address transactions that had not been considered when Congress originally enacted them. The vast majority of digital asset transactions can be accommodated under the existing tax regime with any residual gaps filled in by Congress.

As the Internal Revenue Service has repeatedly confirmed in various pronouncements,[2] digital assets are categorized as "property."[3] And Congress already has a firmly established tax

[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").
[2] *See* Notice 2014-21, 2014-16 I.R.B. 938, as modified by Notice 2023-34, 2023-19 I.R.B. 837, Rev. Rul. 2019-24, 2019-44 I.R.B. 1004, Rev. Rul. 2023-14, Notice 2024-56, Notice 2024-56, Notice 2024-57, Rev. Proc. 2024-28, and T.D. 10000, 89 FR 56480 (July 9, 2024)
[3] We do not have a general definition of property in the Code or government guidance. What we do have is definitions of property in various Code sections, Treasury regulations, and IRS pronouncements such as Treas. Reg.

framework in place for considering the character, timing, and sourcing for property that applies to digital assets.

While there are a few issues that need to be addressed by amending existing Code sections, the vast majority of the issues before us today can be accommodated under the existing tax regime with any residual gaps filled in by Congress. There are also existing grants of regulatory authority where the IRS has the ability to write operative rules for asset types not specifically mentioned in the Code. For example, under Code § 863, the IRS wrote rules applicable to notional principal contracts and for which the Code didn't have a specific rule for sourcing income from swaps.

As to those well-established rules, we must consider each of the following:

> **Tax Character**: Taxpayers receive either capital gains or ordinary income from digital asset transactions, depending on the type of transaction and the characterization of the taxpayer. Gain or loss is capital if the taxpayer is an investor or trader; or ordinary if the taxpayer is a dealer or hedger.
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> **Tax Timing**: Income is reported for tax purposes depending on when income is realized and the taxpayer's method of tax accounting, such as cash basis, accrual, or mark-to-market. Taxpayers have "dominion and control" over property when they receive money or property and they have the free use of it.
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> **Source**: The geographic location where income and expenses are allocated (sourced) that is, where services are performed or income is earned.
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> **Property**: Although not defined in one place in the Code, there are general tax provisions addressing property, with various Code provisions applying to specific types of property and specific transactions involving securities, commodities, and foreign currency. Many digital assets are commodities, while some are securities. The tax rules with respect to digital assets should not apply to financial assets that are tokenized and transferred on a blockchain. Rather, they should retain their tax character.

The Code—as it stands now along with some targeted modifications—is sufficient to categorize and tax digital asset transactions. Let me run through some Code provisions that are of special importance with respect to digital assets.

Examining the Taxation of Digital Assets

Code § 61, Gross Income Defined

I'd like to start with how gross income is defined and how we determine the amount and recognition of gain or loss. Code § 61 defines gross income as income from whatever source

§ 1.83-3(e), which defines property to include real and personal property other than money or an unfunded, unsecured promise."

derived. Although the Code does not provide taxpayers with prescriptive mechanical tests as to how gross income is determined, it provides a nonexclusive list of common items that are included in gross income.[4] In this way, the tax laws cast a broad net when capturing income.

To have gross income, a taxpayer must experience an "undeniable accession to wealth," that is "clearly realized" when the item is sufficiently fixed and definite[5] and "over which the taxpayers have complete dominion."[6] Although the seminal case of *Eisner v. Macomber* has been narrowed by subsequent cases, it has not been overruled. Income can be realized in many ways, including money, property, services, or liability relief, either directly or constructively.

Unless a specific Code provision provides an exclusion, compensation is taxable when services are performed. Certain noncash compensation is not currently taxable under Code § 83[7] if it is restricted or subject to forfeiture unless the taxpayer chooses to make an election to pay tax currently.

Specifically with respect to digital assets, mining rewards are released to "miners" who "mine" blocks of transactions on a blockchain and validation rewards are compensation received by "validators" for validating proposed blocks of transactions. They perform consensus validation services subject to a blockchain protocol. The validator receives digital asset units for validating and adding blocks to the blockchain. Mining and validation rewards are taxable as ordinary income in the year in which the miner or validator receives the rewards and has both dominion and control over the rewards.

The argument for deferral of income is that the miner or validator is creating property—that is, self-created property—so the rewards are not taxable until there is a sale. The rewards, however, are not self-created because they are based on the blockchain protocol. Creation is subject to a blockchain protocol, not in the staker's or miner's own hands. They are performing a service.

For validators where there is a lockup period, the validator does not have undisputed possession, that is, dominion and control until the lockup period lapses.[8] When the validator subsequently sells the rewards, this is separate from the validator's initial receipt of the rewards. Validators receive generating capital investors or traders or ordinary income (dealer or hedger) depending on the tax characterization of the taxpayer. I agree with the following conclusions, many of which have been reached by the IRS:

(1) Mining rewards are taxable in the year the taxpayer has actual or constructive dominion and control over the rewards.[9]

[4] Code § 61(a).
[5] *Eisner v. Macomber* 252 U.S. 189 (1920).
[6] *Comm'r v. Glenshaw* Glass Co., 348 U.S. 426, (1955).
[7] Code § 83 provides an election to have restricted property taxed currently.
[8] I.R.S., Chief Counsel Advice Memorandum number 202444009, fn4 (Nov. 1, 2024).
[9] IRS, FS-2024-12, April 2024.

(2) Staking rewards are taxable in the year the taxpayer has actual or constructive dominion and control over the rewards.[10]

(3) "Gas fees" received by a taxpayer to validate a transaction are taxable in the year the taxpayer receives them (actual dominion and control over the fees).

(4) A taxpayer has taxable income as a result of a "hard fork" if the taxpayer receives additional digital asset units. A hard fork might result in creation of a new digital asset that exists on the new blockchain in addition to the legacy digital asset. Receiving a new digital asset is not required after a hard fork.[11]

(5) A taxpayer has taxable income if the taxpayer receives digital asset units in an "airdrop."[12] Unexpected and unwanted "property" can be airdropped into a taxpayer's account without the taxpayer's knowledge or consent. Taxing such airdrops upon receipt seems inappropriate. I believe that taxpayers should have an opportunity to reject such property by disclaiming it or transferring it to a null account.

(6) Provided mining and validation activities are services, rewards are sourced to the residence of the miner or validator.

Code § 1001, Amount and recognition of gain or loss

Code § 1001 provides that gain from selling or disposing of property is equal to the amount realized on the sale or disposition minus the taxpayer's adjusted basis. Gain or loss on the transaction is the amount recognized unless a statutory exemption applies. Code § 1001 applies to all property, including digital assets.

One important issue with respect to Code § 1001 and digital assets is whether there is an exchange of property for other property "differing materially either in kind or in extent."[13]

Clarification is needed, however, with respect to the taxation of wrapping and unwrapping digital assets. To wrap a digital asset means to create a new digital asset and "wrap" an existing digital asset (possibly through a smart contract) in the new tokenized asset so that it can be "unwrapped" and allow the holder to access the wrapped digital asset. It allows one digital asset to be used on a different blockchain. For example, a holder of bitcoin may deposit it into a smart contract that issues a token that can be used on a different blockchain. The smart contract will redeem the issued token, at any time, for the underlying deposited bitcoin. This

[10] Rev. Rul. 2023-14 (Jul. 31, 2023).
[11] IRS Frequently Asked Questions on Virtual Currency Transactions, Q22. A "hard fork" occurs when a digital asset on a blockchain undergoes a protocol change that results in a permanent diversion (fork) from the legacy or existing blockchain.
[12] IRS Frequently Asked Questions on Virtual Currency Transactions, Q22. An "airdrop" is an amount of digital asset units that are added to the taxpayer's account on a blockchain as a distribution to multiple taxpayers' distributed ledger addresses.
[13] *See* Treas. Reg. § 1.1001-(a).

may or may not be a taxable event, depending on whether the wrapped token is materially different in kind or extent from its unwrapped counterparts.

Code § 475, Mark-to-Market Accounting Method for Dealers in Securities

Code § 475 mark-to-market tax accounting is mandatory for "securities dealers."[14] Under Code § 475(a) gain or loss on all open security positions[15] held by the securities dealer on the last day of the taxable year is recognized as if the security were sold for its fair market value on the last business day of the taxable year. Code § 475 is elective for securities traders,[16] commodity dealers,[17] and commodity traders.[18] All gain or loss realized by mark-to-market is treated as ordinary (even for traders that would otherwise receive capital gain or loss).

The term "commodity" is broadly defined in Code § 475 to include any commodity that is *actively traded* for purposes of the straddle rules;[19] any notional principal contract with respect to any commodity; any evidence of an interest in, or derivative instrument in, such a commodity (including any option forward contract, futures contract, short position, or any similar instrument in a commodity); and any hedge of a position.[20] Active trading includes activities that range from an interdealer market to an established financial market. Commodities include physical commodities, derivative instruments in any commodity, and evidences of an interest in any commodity.[21] The definition of a commodity includes any position that is not itself a commodity *if* it is a hedge with respect to a commodity.

The IRS has generally deferred to the CFTC in the past as to what constitutes a commodity, and Code § 475 includes actively traded items that are commodities under the federal commodity laws.

As to whether some digital assets are commodities eligible to elect into Code § 475, the answer is yes but it is not clear which digital assets are "in", and which are "out" of the commodity definition. We know that bitcoin (BTC), ether (ETH), solana (SOL), and XRP are actively traded "commodities" because futures contracts do trade on these digital assets. At a minimum, taxpayers can elect into mark-to-market as commodity dealers or commodity traders for BTC, ETH, SOL, and XRP. But how can taxpayers determine which other digital assets meet the definition of a commodity at Code § 475(e)(2)? Many additional digital assets are "actively traded."

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[14] Defined at Code § 475(c)(1).
[15] Defined at Code § 475(c)(2).
[16] Code § 475(f)(1).
[17] Code § 475(e).
[18] Code § 475(f)(2).
[19] Code § 1092(d)(1). Because most actively-traded digital assets are "commodities," it is important to look at the definition of a commodity in Code § 475.
[20] Code § 475(e)(2).
[21] Interestingly, the Code § 475 statutorily enumerated definitions of a "security," specifically *excludes* Code § 1256 contracts, but the term "commodity" specifically *includes* Code § 1256 contracts. This makes section 1256 contracts in commodities subject to Code § 475, rather than Code § 1256. For a discussion of section 1256 contracts, see discussion below.

Because actively traded digital assets are commodities for purposes of Code § 475, the question turns on how actively traded is defined for Code § 475(e)(2)(A) and which digital assets meet this definition. Congress should provide guidance as to how taxpayers can determine which digital assets—in addition to—BTC, ETH, SOL, and XRP—can be included in Code § 475. Guidelines need to be provided as to how to determine whether a particular digital asset is actively traded. This will provide parity in the tax treatment of digital assets and other commodities.

If rather than clarifying how actively traded digital assets are "commodities," Congress amends Code § 475 to specifically include digital assets, I suggest that Code § 475 be elective for digital asset dealers as well as traders.

Elective treatment would provide parity in the tax treatment of digital assets and other commodities. There appears to be no reason to make mark-to-market mandatory for digital assets when it is not mandatory for other types of actively traded commodities. Congress should accordingly amend Code § 475 to clarify that digital assets qualify for mark-to-market treatment just like commodities.

Stablecoins should be exempt because there is little or no gain or loss on them.[22]

As is discussed in the section on wash sales, if Congress were to modify the wash sales rule to include digital assets, it should further amend Code § 475 to permit digital asset dealers and traders to elect into Code § 475. This would be an important option for taxpayers that want to reduce the burden of tracking and applying the wash sales rule to their digital asset position. This should also extend to stablecoins, about which the Treasury Department has already issued regulations confirming that qualifying stablecoins are digital assets.[23]

Code § 1256, Mark-to-Market Rule for Section 1256 Contracts

Futures contracts and options on digital assets trade on U.S. commodity exchanges. They qualify as "section 1256 contracts." Code § 1256 provides two specific rules for the taxation of so-called "section 1256 contracts." Section 1256 contracts are defined at Code § 1256(g) to include regulated futures contracts, nonequity options, foreign currency contracts, dealer equity options, and dealer securities futures contracts.

The first rule is that section 1256 contracts are marked-to-market on the last business day of the taxable year. The second rule is that for those section 1256 contracts that are capital assets, they are taxed as 60 percent long-term and 40 percent short-term capital gain or loss. Ordinary assets, however, are marked-to-market and taxed at ordinary income rates.

At present, BTC, ETH, solana, and XRP currently trade futures and options on CFTC-regulated commodity exchanges, and they qualify as regulated futures contracts and as nonequity options. Both of these products qualify as section 1256 contracts, so digital asset contracts that qualify are subject to section 1256 treatment. As additional digital asset products are traded on

[22] Code § 6045.
[23] Treas. Reg. § 1.6045-1(d)(10).

commodity and crypto exchanges, there will be more section 1256 contracts that will be subject to the rules at Code § 1256. In addition, section 1256 contracts will be subject to the mark-to-market rule at Code § 475 if a commodity dealer or trader is in Code § 475 for tax accounting purposes.

Code § 1091, Wash Sales

Under Code § 1091 losses on stock or securities are deferred if the taxpayer acquires substantially identical stock or securities within the period 30 days before and 30 days after the stock or securities were sold at a loss (the 61-day period). The wash sales rule prevents taxpayers from taking tax losses and returning to the same economic position.

But if Congress decides to extend wash sales to digital assets, however, it might want to consider:

(1) Shortening the wash sales period from 61 days due to the highly volatile nature of digital assets trading to a much smaller time period, say, to 21 days.

(2) Excluding stablecoins (perhaps as specified in Code § 6045) from the wash sales rule. Take for example "payment stablecoins," as defined in the GENIUS Act[24] that are used as a means of payment or settlement where the issuer is obligated to convert, redeem, or repurchase the stablecoin for a fixed amount of monetary value. Payment stablecoins do not include digital assets that are a national currency, a deposit, or a security under the federal securities laws. Because payment stablecoins are designed to maintain a fixed monetary value, the reasons for having a wash sales rule (to prevent holders from taking tax losses and returning to the same economic position) are not applicable.

(3) Providing an exception so that dealers and transactions entered into in the taxpayer's ordinary course of business are exempt.

(4) Including related party transactions and clarifying reporting obligations, given the fact that digital assets can move across multiple wallets.

(5) Expanding the mark-to-market rule to include an election into Code § 475 for those digital assets subject to the wash sales rule. This would be an important option for those taxpayers that want to reduce the burden of tracking and applying the wash sales rule to their digital assets positions.

(6) In considering the appropriateness of including digital assets in the wash sale rules, all types of actively traded property—including digital assets—are currently subject to the straddle rules at Code § 1092. Although the straddle rules are not identical to the wash sales rule, they prevent abusive transactions but also sweeping in non-abusive transactions. Would the fact the straddle rules currently apply to actively traded digital

[24] The Guiding and Establishing National Innovation for U.S. Stablecoins (GENIUS) Act, Publ. Law 119–27, 139 STAT. 419 (Jul. 18, 2025).

assets provide enough protection from abuse so as not to require application of the wash sales rule to digital assets.

Code § 1092, Straddle Rules

Under Code § 1092, losses are deferred while a taxpayer holds offsetting positions in "actively traded personal property" where the value of one position moves inversely to the value of another position. Interest and carrying charges on to a straddle position must be capitalized and added to the basis of the position they relate to. In addition, as is provided in Temporary Treasury Regulations, a modified wash sales and modified short sales rules prevent a deduction on the disposition of a position at a loss if the taxpayer has an unrecognized gain in a successor position. The modified short sales rule suspends the holding period for a position during the period the taxpayer holds offsetting positions and positions that are successor positions to the initial offsetting position.[25]

Actively traded digital assets are currently subject to the straddle rules at Code § 1092. Thus, Congress does not need to amend Code § 1092 to include digital assets.

Code § 1259, Constructive Sales Rule

The constructive sales rule is an anti-abuse rule designed to prevent taxpayers from entering into certain financial positions for purposes of benefiting from the appreciation in value of equity securities without actually selling those securities. Taxpayers would avoid current taxation by entering into a constructive sale, defined as a transaction in which the owner of an appreciated financial position (AFP) enters into one of three enumerated transactions:

(1) A short sale on the same or substantially identical property;

(2) An offsetting notional principal contract with respect to the same or substantially identical property; or

(3) A futures contract or forward contract to deliver the same or substantially identical property.

The constructive sales rule is intended to prevent taxpayers with appreciated stock positions from entering into short sales of their shares for cash while locking in cash by entering into a short-against-the-box transaction so the taxpayer would receive cash, have a loan in place, without actually selling their shares. The constructive sales rules are designed to treat enumerated transactions as actual sales.

Congress may choose to amend the constructive sale rules to include some or all types of digital assets. If the constructive sales rules were to apply to digital assets, those digital assets would be treated differently from all other commodities and financial products.

[25] Temp. Treas. Reg. § 1.1092(b)-2T(a)(1) (1986), and Temp. Treas. Reg. § 1.1092(b)-5T(g) and (h) (1986) for temporary definitions.

Code § 864(b)(2), Trading in Securities or Commodities Safe Harbor

Trading safe harbors for securities and commodities at Code § 864(b)(2) were enacted to encourage foreign investment in the United States through a resident U.S. broker, commission agent, custodian, or other independent agent trading on behalf of non-US investors. One safe harbor is for stock and securities, and the other one is for commodities. The safe harbors are intended to provide foreign investors with certainty, avoid confusion, and ensure that they do not inadvertently find themselves in a US trade or business. The securities safe harbor applies to stock and securities, with securities defined as "any note, bond, debenture, or other evidence of indebtedness," and "any evidence of an interest in or right to subscribe to or repurchase any of the items listed above."[26]

The need for a safe harbor applicable to digital assets applies equally to foreign investors investing in digital assets as it does for investing in other securities and commodities. Although some digital assets are securities, most are likely to be "commodities" so the question is whether the commodity safe harbor is adequate for non-US investors interested in trading digital assets in the United States. The answer to that question is an unqualified "no."

The commodity safe harbor defines "commodities" narrowly by limiting it to commodities "of a kind" that are " dealt in" on an "organized commodity exchange" or "of a kind" that are "customarily consummated" at "such a place." The term "commodity" also does not include goods or merchandise in the ordinary channels of commerce. With this limited definition of a commodity, arguably the only digital assets that definitely fall into the commodities safe harbor are those that trade on commodity exchanges, such as BTC, ETH, SOL, and XRP. In enacting the commodity safe harbor, Congress did not provide a rationale in the legislative history for why it limited the commodity definition the way it did. With that said, however, I believe that this commodity definition does not make sense for digital assets any more than it does for commodities generally.

If Congress wants the trading safe harbor to apply more broadly to digital assets, it can either amend the current safe harbor commodity definition, or it can enact a separate safe harbor for digital assets. At present, it is difficult to squeeze digital assets into the current commodity definition, but taxpayers are currently expanding the definition based on a broad reading of the phrase "of a kind."

If Congress does not choose to broaden the definition of a commodity so it still requires being of a kind that is dealt in on an organized commodity exchange, crypto exchanges that trade spot contracts and centralized crypto exchanges that are not regulated by the CFTC should both qualify as "organized commodity exchanges."

I urge Congress to amend the definition of a "commodity" to modernize the commodity safe harbor—whether it decides to include digital assets in the current commodity safe harbor or to create a new digital asset safe harbor. In crafting a safe harbor for digital assets, it should be broad enough to include ancillary activities and closely related activities. As the securities safe

[26] Treas. Reg. § 1.864-2(c)(2)(i)(C).

harbor includes securities lending and interest rate hedging; at a minimum, a digital assets safe harbor should allow for securities lending, digital asset lending, interest rate hedging, and delegated staking. Congress should also clarify whether operating a node as a validator could possibly result in a foreign investor being in a U.S. trade or business by performing personal services or making property available to a validator.

De minimis exception (similar to Code § 988(e))

Congress has been asked to enact a de minimis exemption similar to Code § 988(e) for the personal use of digital assets. Code § 988(e)(2) provides that an individual that disposes of a "non-functional currency" in a personal transaction does not recognize gain provided that the gain on the transaction does not exceed $200 and that expenses allocable to the transaction are not business expenses under Code § 162[27] or investment expenses under Code § 212.[28]

The rationale given for such a de minimis exemption is that because digital assets are "property," not currency, every time a digital asset is used to buy a cup of coffee, the holder has a taxable event. Providing a de minimis exemption would reduce the recordkeeping and reporting burden that is imposed when a taxpayer uses digital assets for personal transactions.

As was noted by the Federal Reserve Bank of Kansas City in a September 24, 2025 "Payment System Research Briefing," the share of consumers that use digital assets for payments has been very small—less than two percent—having recently declined from three percent in 2021 and 2022. This is the share of consumers across all consumer classes even though digital assets have been available for consumers to make payments since the mid-2010s.[29]

There is also an ancillary industry benefit if Congress were to provide a de minimis exception for personal transactions. This exception would encourage taxpayers to use digital assets as a medium of exchange, thereby promoting the wider use of digital assets.

In July of this year, Senator Lummis introduced a digital asset tax bill that provides a $300 de minimis exemption. Taxpayers would exclude "$300 for both transaction value and total gain with a $5,000 yearly total cap."[30] The de minimis exclusion would not be available for sales or exchanges for "cash or cash equivalents (including payment stablecoins)"; or "property used in active trade or business"; or "property held for income production."[31]

In considering enacting a de minimis provision for personal use digital assets, Congress should consider the following:

[27] Other than certain travel expenses. Code § 162(a)(2).
[28] Other than expenses incurred in connection with taxes. Code § 212(3).
[29] Fumiko Hayashi and Aditi Routh, U.S. Consumers' Use of Cryptocurrency for Payments, Federal Reserve Bank of Kansas City, September 24, 2025.
[30] S. 2207, 119th Cong. (2025). Lummis Unveils Digital Asset Tax Legislation, July 3, 2025, lummis.senate.gov.
[31] S. 2207, 119th Cong. (2025); also *see generally* Lummis unveils Digital Asset Tax Legislation, lummis.senate.gov, (Jul. 3, 2025).

(1) Such a de minimis exception gives digital asset holders a tax subsidy that is not available to any other class of property or to any other taxpayers.

(2) It makes little sense to amend Code § 988(e), which deals with foreign currency transactions. Instead, Congress should enact a new Code provision in the section of the Code where certain income is exempt from taxation.

(3) If a major concern is recordkeeping and reporting, it is my understanding that most digital assets holders either hire companies to do their bookkeeping or have calculator "apps" to track their transactions. Recordkeeping and reporting might not actually be excessively burdensome, especially since taxpayers need to keep track of these transactions anyway.

(4) Treasury Regulations provide a $10,000 de minimis exemption threshold for qualified stablecoin tax reporting. Sales or exchanges over this amount are reportable on an aggregate basis.[32] It is not clear why any additional exemptions or guidance is even needed.

(5) Proper anti-abuse rules would need to be put in place that consider the following:

   (a) Related parties.

   (b) The possibility that taxpayers would structure transactions in small fractions to be below the de minimis threshold.

   (c) The possibility that taxpayers would use one digital asset to acquire another digital asset under the guise of a personal transaction for goods and services.

   (d) A maximum aggregate dollar amount and an annual cap would be appropriate.

   (e) A maximum income threshold level for eligibility would be appropriate.

   (f) Personal transactions would need to be limited to goods and services, and not for cash, cash equivalents, stablecoins, or foreign currency.

   (g) Such an exemption provides an incentive to taxpayers to seek to game the system, making it difficult for the IRS to administer a de minimis exception and difficult to confirm compliance.

Anti-abuse rules should be considered hand-in-hand with the systemic risks associated with the growth of digital assets as a new asset class.

Code § 1058, Transfer of Securities Under Certain Agreements

Digital assets do not qualify for the lending safe harbor available at Code § 1058, which is limited to stock and securities. Code § 1058 provides that there is no gain or loss on loans of

[32] Treas. Reg. § 1.6045-1(d)(10).

stock and securities[33] that meet the requirements set out at Code § 1058. This section is limited to loans of stock and securities and does not include or currently apply to digital assets. Congress could amend Code § 1058 to include loans of digital assets or create a separate provision for tax-free digital asset loans.

If Congress were to apply the current Code § 1058 provisions to digital assets:

(1) A digital asset loan would require the return of digital assets with the same rights and obligations as the loaned digital asset (knowing that the digital assets being returned could never be the ones that were loaned out).

(2) The transferor would be entitled to all payments of income or other distributions. For example, if while a loan is outstanding there is a fork or airdrops with a distribution of digital asset units, the lender would receive the benefit of the distribution and would need to pay the tax on it.

(3) The transaction could not reduce the transferor's risk of loss or opportunity for gain.

Code § 1058 provides a safe harbor for certain securities lending transactions. A transaction is not taxable simply because it does not meet the requirements of Code § 1058. There is no taxable event if property is exchanged for property that does not differ in kind or extent.[34] This means that even without a safe harbor, certain loan transactions would be tax-free.

There are many different ways in which taxpayers lend digital assets. If Congress decides to provide a safe harbor for the lending of digital assets, it should be flexible enough to cover types of lending agreements that have not currently been structured.

Code § 170(f), Qualified Appraisal

Code § 170(f) requires a "qualified appraisal" from a "qualified appraiser" in order for taxpayers to deduct charitable contributions of noncash property with a value of over $5,000. The only exception to the appraisal requirement is for donations of publicly traded securities.

Finding a qualified appraiser for digital assets that meets the requirements of Treas. Reg. § 1.170A-17 can be a challenge at best and impossible at worst. Appraisers cannot meet the required experience and education requirements, to qualify to appraise most digital assets.

Moreover, the appraisal requirement is unnecessary for publicly traded digital assets. The fair market value of digital assets can be determined from the trading price at the crypto exchange at the time of the donation. Actively traded digital assets should therefore receive the same Code § 170(f) exemption available to publicly traded securities.

[33] "Security," as defined in Code § 1236(c), is "any share of stock in any corporation, certificate of stock or interest in any corporation, note, bond, debenture, or evidence of indebtedness, or any evidence of an interest in or right to subscribe to or purchase any of the foregoing."
[34] *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554 (1991), Treas. Reg. § 1.1001.

For non-publicly traded digital assets, the transfer from the donor to the charity is recorded on a blockchain. The transfer time should be matched with the value of other digital assets of the same type if other digital assets were transferred at the same time.

In my opinion, the qualified appraiser requirement needs to be modified if not totally removed for publicly traded digital assets.

CONCLUSION

There will always be new asset classes introduced for trading in our financial markets. We are fortunate to have such a comprehensive tax Code in effect. It is flexible enough to have been called upon to tax new asset classes over the years and digital assets are no exception. We should keep the system we know works with Congressional modifications on an “as needed” basis.

ASKramer Law

Andrea S. Kramer DIGITAL ASSETS

Andrea (Andie) S. Kramer is the founding member of the boutique law firm, ASKramer Law LLC, where she provides legal counsel to clients in the digital asset, finance, and energy sectors on complex matters involving multi-jurisdictional regulation, governance, taxation, contract design, documentation, trading operations, and risk management. Previously, Kramer served as a partner at McDermott Will & Emery LLP where she was a member of the Tax Group and led the Financial Products, Trading and Derivatives Group for 30 years.

Kramer's integrated advisory services span securities, commodities, derivatives, , digital assets, other emerging asset classes, and energy trading. She represents high-net-worth individuals and family offices, as well as NFT creators, investors, traders, dealers, stakers, miners, lenders, and personal users.

Kramer's deep understanding of the unique design and transfer of digital assets, tokens, and NFTs helps her clients navigate their creation, structure, taxation, donation, and regulation as commodities or securities. She works with clients on all aspects of their taxation, including mining, staking, lending, hedging, straddles, and mixed straddles. She addresses operational and due diligence protections on the use of compliance and risk management tools.

A prodigious writer, Kramer is the co-author of a 4000-page reference book, *Financial Products: Taxation, Regulation, and Design* (CCH). This leading treatise on financial products law covering all product types has been updated annually for more than 30 years, and cited more than 150 times by courts and tax commentators. It covers the financial markets—from stocks, bonds, and US treasuries, to esoteric swaps and prediction contracts. She is recognized by *The National Law Review* as a "Go To Thought Leader" in Crypto/Blockchain (2022) and in Virtual Currencies (2020). JD Supra also names her a "Top Author" in Readers Choice Awards in Taxation (2025, 2024) and in Cryptocurrency Taxation (2021).

Kramer testified at the historic 2011 hearing of the U.S Senate Committee on Finance, and the U.S. House Committee on Ways and Means on "Tax Reform and the Tax Treatment of Financial Products." She served as an adjunct professor in the LLM program at Northwestern University School of Law, for two decades. She continues to provide training courses for legal and tax professionals, including the U.S. Treasury and the Internal Revenue Service.

Teaching

NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, IL

Adjunct Professor (1998–2017)

LL.M Tax Program Course: Taxation of Financial Derivatives (2002–2017)
Course: Regulation of Derivative Contracts—Documentation and Negotiation of Derivative Contracts (1998–2002)

INTERNAL REVENUE SERVICE, FEDERAL GOVERNMENT, UNITED STATES OF AMERICA

Instructor, Internal Revenue Service Training Program (1986–present, with the most recent course given in March 2024)

Books (current)

Financial Products: Taxation, Regulation, and Design (2025), CCH, Inc., with Nicholas C. Mowbray. *Updated annually.*

Energy & Environmental Project Finance: Law & Taxation (2025), Matthew Bender, with Nicholas C. Mowbray. *Updated annually.*

Selected Articles

Global Practice Guides, Derivatives 2025; USA Trends and Developments, Chambers and Partners, September 16, 2025.
"A Comprehensive Guide to the Deductibility of Digital Asset Losses," ASKramer Law LLC, December 27, 2023.
"The Benefits of Donating Digital Assets to Charity," ASKramer Law LLC, November 16, 2023.
"Valuing Noncash Charitable Donations, Including Digital Assets," ASKramer Law LLC, November 14, 2023.
"Digital Asset Theft Loss Deductions Are More Complicated Than You Think," ASKramer Law LLC, October 11, 2023.
"Bitcoin, Virtual Currencies, and Digital Assets," *TAXES – The Tax Magazine®*, August 22, 2023, with Nicholas C. Mowbray.
"IRS Speaks–Sort of–on NFTs and 'Collectibles'," *Journal of Taxation of Financial Products*, Vol. 20, No. 2, July 26, 2023, with Nicholas C. Mowbray et al.
"The Wash Sales Rule and How Cryptocurrencies Are Categorized," ASKramer Law LLC, July 12, 2023.
"Are Some Tokens Securities or Stock? And What Does It Mean for Taxes?" ASKramer Law LLC, June 19, 2023.
"IRS Takes a New Approach to NFT Taxes and 'Collectibles'," ASKramer Law LLC, May 1, 2023.
"Tax Return Reporting of Cryptocurrency," ASKramer Law LLC, March 21, 2023
"When Are Cryptocurrencies Appropriate Investments for Retirement Plans and IRAs? U.S. Labor Department Cautions 401(k) Plan Fiduciaries to Exercise Extreme Care," *Intellectual Property & Technology Law Journal,* Vol. 23, Number 6, June 2022, with Brian Tiemann
"Taxation of the Purchase and Sale of NFTs," *The Computer & Internet Lawyer*, Vol. 39, Number 6, June 2022.
"Introduction to NFTs," *The Computer & Internet Lawyer*, Vol. 39, Number 5, May 2022.
"The More Things Change, the More They Stay the Same – Tax and Regulatory Update About Pooled Cryptocurrency Investment Vehicles," *Journal of Taxation of Financial Products*, Vol. 19, No. 1, April 11, 2022, with Nicholas Mowbray.
"Taxation of Pooled Cryptocurrency Investment Vehicles," *Journal of Taxation of Financial Products*, Vol. 18, No. 2, July 19, 2021, with Nicholas C. Mowbray.
"More Charitable Crypto Donations Spur Calls for Rule Change," *Law360*, January 22, 2021.
"The Confused State of Virtual Currency Taxation in 2020," *TAXES: The Tax Magazine*, Volume 98, No. 10, September 4, 2020.
Series of *On the Subject* Articles "What You Need to Know About Cryptocurrency," A Bulletin from McDermott Will & Emery LLP:

- "Are Crypto Loans Taxed as Loans?" July 1, 2020.
- "Taxation of Virtual Currency Staking Activities," June 24, 2020.
- "Taxation of Virtual Currency Mining Activities," June 24, 2020.
- "Can Virtual Currency Traders Elect into Special Rules that Allow Current Deductions for Trading Losses?" June 24, 2020.
- "When Can Bitcoin Positions Be Taxed as Mixed Straddles Subject to the Special Mixed Straddle Rules?" June 17, 2020.
- "Special Tax Rules Apply to Bitcoin Futures and Options and Might Apply to Positions in Ether and Other Virtual Currencies in the Future," June 17, 2020.
- "When Virtual Currency Positions Are Subject to the Straddle Rules," June 17, 2020.
- "Specific Identification of Virtual Currency Positions," June 3, 2020.
- "The Legal Effect of IRS Pronouncements on Virtual Currency," June 3, 2020.

Additional information

By email
andie@askramerlaw.com

By telephone
312.451.5990

By mail
Andrea S. Kramer, Founding Member
ASKramer Law LLC
1832 W. Race Ave.
Chicago, IL 60622-6246