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## United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

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To Members of the Digital Asset Community and Other Interested Parties:

The rapid emergence of digital assets has raised novel regulatory issues, including the appropriate treatment under our federal tax law. The Internal Revenue Code of 1986, as amended (IRC), draws distinctions between types of property, with no straightforward classification for digital assets. This uncertainty creates complex reporting issues for taxpayers, and warrants examining how the IRC can provide clearer guidance for taxpayers on the treatment of digital asset transactions. In recent months, the Committee on Finance initiated a bipartisan effort to identify key questions that lie at the intersection of digital assets and tax law. To provide background on current law, Chair Wyden and Ranking Member Crapo asked the Joint Committee on Taxation to compile a report on the taxation of digital assets. [\[linked here\]](#)

Today, we seek your help to better understand how Congress can address the tax challenges and opportunities presented by digital assets. To that end, we ask the following questions:

### **Marking-to-Market for Traders and Dealers (IRC Section 475)**

- Should traders of digital assets be permitted to mark to market? Why?
- Should dealers of digital assets be permitted or required to mark to market? Why?
- Should the answer depend on the type of digital asset? How should digital assets be determined to be actively traded (under IRC Section 475(e)(2)(A))?

### **Trading Safe Harbor (IRC Section 864(b)(2))**

- When should the policies behind the trading safe harbor (of encouraging foreign investment in U.S. investment assets) apply to digital assets? If those policies should apply to (at least some) digital assets, should digital assets fall under IRC Section 864(b)(2)(A) (trading safe harbor for securities), IRC Section 864(b)(2)(B) (trading safe harbor for commodities), or should the answer depend on the regulatory status of the specific digital asset? Why?

- Another possibility is that a new, separate trading safe harbor could apply to digital assets. In that case, should the additional limitation on commodities eligible for the trading safe harbor apply? Why?
- To the extent that the additional limitation on commodities for the trading safe harbor applies, how should the terms “an organized commodity exchange” and “transactions of a kind customarily consummated” (in IRC Section 864(b)(2)(B)(iii)) be interpreted in the context of different kinds of digital asset exchanges?

### **Treatment of Loans of Digital Assets (IRC Section 1058)**

- Please describe the different types of digital asset loans.
- If IRC Section 1058 expressly applied to digital assets, would companies allowing customers to lend digital assets institute a standard loan agreement to comply with the requirements of that section? What challenges would compliance present?
- Should IRC Section 1058 include all digital assets or only a subset of digital assets? Why?
- If a digital asset is lent to a third party and the digital asset incurs a hard fork, protocol change, or air drop during the term of the loan, is it more appropriate for there to be a recognition of income for the borrower upon such transaction or subsequently by the lender when the asset is returned? Please explain.
  - Are there any other transactions similar to a hard fork, protocol change, or air drop that may occur during the term of a loan? If so, please explain whether it is more appropriate for the borrower or the lender to recognize income upon such transaction.

### **Wash Sales (IRC Section 1091)**

- In what situations do taxpayers take the position that economic substance (IRC Section 7701(o)) applies to wash sales with regards to digital assets?
- Are there existing best practices for reporting transactions in digital assets that are economically equivalent to wash sales?
- Should IRC Section 1091 apply to digital assets? Why or why not?
- Should IRC Section 1091 apply to other assets beyond digital assets? If so, what assets and why or why not?

### **Constructive Sales (IRC Section 1259)**

- In what situations do taxpayers take the position that economic substance (IRC Section 7701(o)) applies to constructive sales with regards to digital assets?
- Are there existing best practices for reporting transactions in digital assets that are economically equivalent to constructive sales?
- Should IRC Section 1259 apply to digital assets? Why?
- Should IRC Section 1259 apply to other assets beyond digital assets? If so, what assets and why?

## **Timing and Source of Income Earned from Staking and Mining**

- Please describe the various types of rewards provided for mining and staking.
- How should returns and rewards received for validating (mining, staking, etc) be treated for tax purposes? Why? Should different validation mechanisms be treated differently? Why?
- Should the character and timing of income from mining and staking be the same? Why or why not?
- What factors should be most important when determining when an individual is participating in mining in the trade or business of mining?
- What factors should be most important when determining when an individual is participating in staking in the trade or business of staking?
- Please describe examples of the arrangements for those participating in staking pool protocols.
- Please describe the appropriate treatment for the various types of income and rewards individuals staking for others or in a pool receive.
- What is the proper source of staking rewards? Why?
- Please provide feedback on the Biden Administration's proposal to impose an excise tax on mining.

## **Nonfunctional Currency (IRC Section 988(e))**

- Should a *de minimis* nonrecognition rule like the rule in IRC Section 988(e) apply to digital assets? Why?
  - What threshold is appropriate and why?
- Are there existing best practices that would prevent taxpayers from avoiding tax obligations if a nonrecognition rule were to apply? What reporting regime would help taxpayers comply?

## **FATCA and FBAR Reporting (IRC Sections 6038D, 1471-1474, 6050I, and 31 U.S.C. Section 5311 et seq.)**

- When do taxpayers report digital assets or digital asset transactions on FATCA forms (e.g. Form 8938), FBAR FinCEN Form 114, and/or Form 8300? If taxpayers report some categories and not others, please explain and identify which categories of digital assets are reported and not reported with respect to each of these forms.
  - Should FATCA, FBAR, and/or 8300 reporting requirements be clarified to eliminate ambiguity about whether they apply to all, and/or some categories of, digital assets? Why?
- Given the policies behind FBAR and FATCA, should digital assets be more integrated into those reporting regimes? Are there barriers to doing so? What are they?
- How do stakeholders consider wallet custody when determining compliance requirements with FATCA, FBAR, and Form 8300? Please provide examples of wallet custody arrangements and identify which types of arrangements FATCA, FBAR, and/or Form 8300 reporting requirements should or should not apply to.

## Valuation and Substantiation (IRC Section 170)

- Digital assets do not currently qualify for the IRC Section 170(f)(11) exception for assets that have a readily available valuation on an exchange. Should the substantiation rules be modified to account for digital assets? If so, in what ways and for which types of digital assets? More specifically, would something different need to be done for those publicly traded digital assets?
- What are the characteristics of an exchange and the digital asset for which this exemption would appropriately apply and why?

The Committee will collect answers to these questions on a rolling basis until September 8, 2023. Interested parties are requested to submit electronic copies of their answers to the following questions to Committee staff at [responses@finance.senate.gov](mailto:responses@finance.senate.gov). Should we have questions about your responses, Committee staff will reach out to you directly.

Thank you in advance for your thoughtful responses.

Sincerely,



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Ron Wyden  
Chairman  
Committee on Finance



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Mike Crapo  
Ranking Member  
Committee on Finance