Tax Considerations for Cryptocurrency Investors (Updated)

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As readers here likely know, President Trump is keenly interested in cryptocurrencies, having said he will make the United States the "Crypto Capital of the World." This represents a marked change from the Biden Administration's approach to cryptocurrencies, which was largely focused on regulation of the securities laws by enforcement. This new political climate makes it possible for dramatic changes in the industry, with tax included. This article begins with a discussion of the Trump administration's statements and policies surrounding cryptocurrencies. It then focuses on certain tax issues relevant to investors in this space, including (1) the classification of cryptocurrencies, (2) specific lot identification, (3) considerations relevant to cryptocurrency losses, (4) considerations for charitable donations, (5) the taxation of blockchain rewards, (6) the tax treatment of forks and airdrops, (7) an update on the broker reporting rules, and (8) the interplay of recent accounting rule changes and the corporate alternative minimum tax ("CAMT").

Cryptocurrency Outlook

Donald Trump, the self-proclaimed "Crypto President," has a significant personal interest in cryptocurrency. The company that owns President Trump's social media network, Truth Social, has indicated that it plans to invest $250 million in the cryptocurrency industry.[1] There are Trump and Melania "meme" coins that reached market capitalizations as high as $15 billion[2] and $2 billion[3] (respectively) before falling to much lower values (current market capitalization is $2 billion and $320 million, respectively). Trump family members also hold significant direct investments in other cryptocurrencies.

The President has also shown a keen interest in cryptocurrency policy. On January 23, 2025, President Trump issued an executive order on "Strengthening American Leadership in Digital Financial Technology."[4] The executive order sets out policies and priorities, revokes the previous Biden Administration executive order on cryptocurrencies, establishes a working group on digital asset markets, and prohibits central bank digital currencies.

On March 6, 2025, President Trump signed an Executive Order to treat bitcoin ("BTC") as a reserve asset.[5] The reserve, known as the Strategic Bitcoin Reserve,

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includes BTC from asset forfeitures, whether criminal or civil, owned by the Department of Treasury. Additional BTC can be acquired for the Strategic Bitcoin Reserve through strategies that do not impose costs on the taxpayer. A U.S. Digital Asset Stockpile was also created, consisting of digital assets other than BTC owned by the Department of Treasury that were forfeited in criminal or civil asset forfeiture proceedings. President Trump promised to make the United States the "crypto capital of the world," appointed a "crypto czar," and is hosting a crypto summit at the White House.

However, IRS guidance to date does not address what kind of property is involved. In some rare instances, a given cryptocurrency could be treated as a debt instrument or equity. In other cases, the cryptocurrency could be part of a financial derivative. And, depending on the context, could a given cryptocurrency be classified as a commodity, a security, or something else?

From a tax perspective, there has been some reporting of a potential "zero percent crypto tax" after statements made by Eric Trump, the son of President Trump.[6] However, concrete proposals (or even statements made by actual government officials) have yet to materialize. Nevertheless, there is a very real possibility of ongoing cryptocurrency legislation (tax included) given the President's focus on the asset class and the current Congressional focus on taxes more generally. While tax-free cryptocurrency would seem to be unlikely, other less extreme policies have been proposed previously and could be reintroduced. One potential example is the Lummis-Gillibrand Responsible Financial Innovation Act, which would have (1) provided a *de minimis* exclusion on gains from the use of cryptocurrency as a medium of exchange, (2) clarified the definition of a "broker" under the Infrastructure Investment and Jobs Act (the "Infrastructure Act"), (3) expanded the securities trading safe harbor to cover digital assets, (4) specified that decentralized autonomous organizations ("DAOs") are business entities for purposes of the Internal Revenue Code of 1986, as amended (the "Code"),[7] (5) expanded Code Sec. 1058 nonrecognition treatment to digital asset lending agreements, (6) required the Internal Revenue Service ("IRS") to adopt guidance or clarifications on long-standing issues in the digital asset industry, including disposition of forks and airdrops, merchant acceptance of digital assets, digital asset mining and staking, charitable contributions of digital assets, and the legal characterization of payment stablecoins as indebtedness, (7) required the Government Accountability Office to conduct an analysis of the potential opportunities and risks of retirement investing in digital assets and to report to Congress, the Treasury Department, and Labor Department, and (8) declared that digital assets obtained from mining or staking activities do not form part of a taxpayer's gross income until the disposition of those assets.

Some of these proposals were included in the Biden Administration's Greenbook and would therefore seem to have bipartisan support.[8] The Biden Administration's Greenbook would also have clarified that cryptocurrency trades and dealers may elect mark-to-market accounting. The Biden Administration's Greenbook also included certain revenue-raising provisions affecting cryptocurrency, such as an expansion of the Code Sec. 1091 wash sale rules to cryptocurrencies and the implementation of a digital asset mining energy excise tax.

Time will tell if substantive policy changes are enacted, but cryptocurrency investors should stay abreast of developments in this area in the coming year.

Tax Classification of Cryptocurrencies

Background—Cryptocurrencies as Property

BTC, ether ("ETH"), and other cryptocurrencies are essentially digital or virtual currencies that function as a medium of exchange, a unit of account, and/or a store of value. They are all decentralized in the sense that they function by using a "peer-to-peer" model without the need for a central authority or bank. Instead, these cryptocurrencies utilize cryptography to secure and record transactions on a distributed ledger system, *i.e.*, a blockchain. Units of cryptocurrencies are often referred to using different terms, such as coins or tokens.

The proper U.S. federal income tax treatment of transactions involving a given cryptocurrency, as is the case with financial instruments generally, depends on tax classification. And on this front, the IRS has taken the view that cryptocurrencies are to be treated as "property" (and not currency) for U.S. federal income tax purposes.[9]

Accordingly, the tax rules applicable to property transactions (and not those concerning currencies) apply in the cryptocurrency context. Therefore, one can have a taxable event (and corresponding gain or loss) upon a sale or exchange, or by earning or even spending, a given cryptocurrency.

However, IRS guidance to date does not address what *kind* of property is involved. In some rare instances, a given cryptocurrency could be treated as a debt instrument[10] or equity.[11] In other cases, the cryptocurrency could be part of a financial derivative. And, depending on the context, could a given cryptocurrency be classified as a commodity, a security, or something else?

Do the investment company rules in Code Secs. 721(b) and 351(e), the mark-to-market regime of Code Sec. 475, the trading safe harbor in Code Sec. 864(b), the securities lending rules in Code Sec. 1058, the wash sale rules in Code Sec. 1091, and the "qualifying income" rules for publicly traded partnership rules in Code Sec. 7704(d) apply with respect to cryptocurrencies? The answer often depends on whether a given cryptocurrency can be classified as either a security or a commodity for these purposes.

Cryptocurrencies as Securities

The Code unfortunately does not contain a uniform definition of "securities." However, in many instances the definition of a "security" is limited to either stock or debt, and derivatives thereon,[12] meaning that most cryptocurrencies would not constitute "securities" for purposes of the Code provisions referenced above.[13] It should be noted that, while some cryptocurrencies may be classified as "securities" for U.S. federal securities law purposes,[14] this classification generally is not controlling for U.S. federal income tax purposes.

Cryptocurrencies as Commodities

As with the term "securities," the Code likewise does not contain a uniform definition of "commodities." In fact, in some instances the definition is circular.[15] That being said, while most cryptocurrencies are unlikely to be classified as securities, certainly some cryptocurrencies *can be* classified as commodities.

The Commodities Future Trading Commission (the "CFTC") views BTC, ETH, and Solana ("SOL") as commodities, and historically the IRS has given some deference to the CFTC's views as to what constitutes a "commodity" for U.S. federal income tax purposes.[16] In addition, for tax purposes it seems as if one can rely on the ordinary and common meaning of the term "commodity" from a financial point of view, which suggests that one should determine whether the item in question is traded in and listed on a commodities exchange. BTC, ETH, and SOL futures exist and are traded on the Chicago Mercantile Exchange ("CME"). Accordingly, while not entirely clear, it appears likely that these cryptocurrencies may be characterized as commodities. Whether cryptocurrencies other than BTC, ETH, and SOL also can be classified as commodities is less clear.

It should be noted that, for purposes of the commodities trading safe harbor in Code Sec. 864(b), however, not only must the cryptocurrency in question be properly classified as a "commodity," but it also must be of a kind customarily dealt in on an "organized commodity exchange" and the transaction must be "of a kind customarily consummated at such place." The applicable regulations exclude goods or merchandise in the ordinary channels of commerce from the term "commodities." Open questions in this regard therefore include: Do only futures on BTC, ETH, or SOL qualify? Do exchanges other than the CME (such as Coinbase) constitute an "organized commodity exchange"?[17]

Whether any given cryptocurrency constitutes a "commodity" is highly fact dependent and may depend on the particular Code provision involved. As more cryptocurrencies have derivatives that are actually traded on an exchange, the more likely they can be classified as commodities.

Cryptocurrencies as Money or Currency

Again, the IRS is of the view that cryptocurrency is to be classified as property and not as money or currency (legal tender). At the time the IRS stated this view in 2014, however, no cryptocurrency had been adopted as "legal tender" in any jurisdiction, a point explicitly noted by the IRS in its guidance. Later, El Salvador adopted BTC as a legal tender. Some questioned whether this might result in BTC being classified as currencies for purposes of the Code. The IRS subsequently clarified that, even in situations where a cryptocurrency has legal tender status, cryptocurrencies should not be considered currency for U.S. federal income tax purposes.[18]

Specific Lot Identification

General Rules

For taxpayers holding multiple units of a cryptocurrency with different bases and/or holding periods, the tax consequences of a sale, exchange, or other disposition can vary, in some cases quite dramatically, depending on the unit of cryptocurrency sold. To illustrate, assume a taxpayer purchased one BTC in 2014 for $300 and one

BTC in 2021 for $64,000. The taxpayer sells one BTC later in 2021 for $40,000. The taxpayer will realize either a $39,700 long-term capital gain ($40,000 amount realized – $300 basis) or a $24,000 short-term capital loss ($40,000 amount realized – $64,000 basis), depending on which unit of BTC is sold.[19]

For taxpayers holding multiple units of a cryptocurrency with different bases and/or holding periods, the tax consequences of a sale, exchange, or other disposition can vary, in some cases quite dramatically, depending on the unit of cryptocurrency sold.

Consistent with prior IRS guidance, recently issued Code Sec. 1012 regulations released in July 2024 provide that taxpayers owning multiple units of cryptocurrency with different bases or holding periods may choose the units that are deemed to be sold, exchanged, or otherwise disposed of if they specifically identify which unit or units of cryptocurrency are involved in the transaction and substantiate their basis in those units.[20] If a taxpayer chooses to specifically identify the units of cryptocurrency sold that are not held in the custody of a broker, the taxpayer may do so by identifying on its books and records the particular units to be sold, disposed of, or transferred by reference to any identifier, such as purchase date and time or the purchase price for the unit, that is sufficient to identify the units sold, disposed of, or transferred.[21] The regulations provide that such identification must be made no later than the date and time of the sale, disposition, or transfer of the units in question.[22] A specific identification can be made only if adequate records are maintained for the unit of a specific digital asset not held in the custody of a broker to establish that a unit sold, disposed of, or transferred is removed from the wallet. For cryptocurrency held in the custody of a broker, identification can be made by specifying to the broker having custody of the digital assets the particular units of the digital asset to be sold, disposed of, or transferred by reference to any identifier, such as purchase date and time or purchase price, that the broker designates as sufficiently specific to identify the units sold, disposed of, or transferred.[23] Again, such identification must be made no later than the date and time of the sale, disposition, or transfer. The taxpayer is responsible for maintaining records to substantiate the identification. A standing order or instruction for the specific identification of digital assets is treated as an adequate identification made at the time of sale, disposition, or transfer.

Whether or not the units are held in the custody of a broker, if a taxpayer does not specifically identify the specific units of virtual currency that are sold, exchanged, or otherwise disposed of, the units are deemed to be sold in chronological order beginning with the earliest unit of the cryptocurrency purchased or acquired—that is, on a first in, first out ("FIFO") basis.[24]

Identification of Best Practices

As a best practice, taxpayers should retain a standing lot relief methodology in their records that can be overridden on a one-off basis if desired. A written standing methodology ensures that the taxpayer's intent is clear, and that the units being sold are identified before the disposition occurred.[25] For cryptocurrencies held with a broker, taxpayers seeking to use a non-FIFO lot relief methodology should avail themselves of the standing lot relief methodologies provided by the broker.

Given that the tax treatment of many cryptocurrency transactions is currently unclear, specific identification can perhaps limit exposure in the event that a particular tax position taken is reversed or successfully challenged. For example, it is not entirely clear whether cryptocurrency loans or "Wrapped Bitcoin" minting transactions are taxable exchanges.[26] For taxpayers taking the position that these types of transactions are not taxable, specific identification of the cryptocurrency subject to these arrangements can help limit the potential downside if the IRS takes the position that the particular arrangement constitutes a taxable event.

Rev. Proc. 2024-28 Transition Rules

Prior to the issuance of regulations under Code Sec. 1012 in July of 2024, certain taxpayers took the position that specific identification could be made using a "universal wallet approach" under which taxpayers could specifically identify a unit of cryptocurrency as being sold from a wallet even if the actual transfer occurred out of a different wallet. In Rev. Proc. 2024-28,[27] the IRS created a limited transitional rule that permits taxpayers to rely on any reasonable allocation of basis to the taxpayer's digital assets, provided certain criteria are satisfied. This safe harbor applies to taxpayers who may have specifically identified units or applied the FIFO rules. A taxpayer may make allocations on a specific unit basis or on a global basis.

Notably, the safe harbor provisions are not applicable in all scenarios. For instance, the safe harbor provisions do not apply to digital assets that are acquired or transferred on or after January 1, 2025. The safe harbor is also not applicable if the unused basis amount or its availability is pending before any U.S. court, the IRS Independent Office of Appeals, or is under IRS examination.

Under the specific unit allocation methodology, a taxpayer may make an allocation of specifically identified units of unused basis to a pool of the remaining digital asset units within each wallet. On the other hand, under a global allocation, a taxpayer may make an allocation based on a rule that specifies the order that the unused basis would be allocated to the pool of remaining digital asset units in each wallet. Under either allocation methodology, the allocation is complete on the date that the taxpayer's books and records first record the specific characteristics of the units of unused basis allocated to each pool of digital assets in the taxpayer's wallet.

A taxpayer must complete the allocation before the earlier of:

(a) The date and time of the first sale, disposition, or transfer by the taxpayer of the same type of digital asset completed on or after January 1, 2025, or

(b) Either:

  (i) The due date (including by extension) of the taxpayer's Federal income tax return or Form 1065, *U.S. Return of Partnership Income*, for the taxable year that includes January 1, 2025 (the 2025 return); or

  (ii) If the taxpayer is not otherwise required to file a 2025 return, the last date for filing the 2025 return (without extensions) of the type of return that would be applicable to the taxpayer if the taxpayer were required to file a 2025 return.

In addition, if the sale, disposition, or transfer occurs before the taxpayer has completed the global allocation, the taxpayer may make a specific identification of the remaining asset units by using a standing order. This standing order must also be applied to any remaining digital asset after the global allocation is complete.

Temporary Relief

On December 31, 2024 the IRS issued a Notice that provides temporary relief to taxpayers selling, disposing of, or transferring digital assets held in the custody of a broker by providing them additional identification methods under Code Sec. 1012.[28] For taxpayers using this relief, the rule in the final regulations that treats taxpayers whose broker offers only one identification method as having made a standing order no longer applies. In addition, the Notice specifies that taxpayers who rely on the safe harbor in Rev. Proc. 2024-28 may use this transitional relief only if all requirements in the revenue procedure are met. The relief period is for the 2025 calendar year.

Cryptocurrency Losses

Tax Loss Harvesting

Taxpayers have long used a strategy commonly described as "tax loss harvesting" to reduce their tax liability by triggering capital losses on depreciated positions to offset gains on other positions. So, for example, a taxpayer may actually sell a financial asset, trigger a tax loss, repurchase the same or similar financial asset, and then use the tax loss to offset other investment gains. Even taxpayers with overall portfolio appreciation may be able to harvest losses by (as noted above) specifically identifying high basis lots of cryptocurrency as being sold.

On December 31, 2024 the IRS issued a Notice that provides temporary relief to taxpayers selling, disposing of, or transferring digital assets held in the custody of a broker by providing them additional identification methods under Code Sec. 1012.

In the stock and securities context, tax loss harvesting is policed by (among other things) the "wash sale rules," which disallow the loss on the sale of stock or securities if the taxpayer purchases substantially identical stock or securities within the 61-day period beginning 30 days prior to the sale date and ending 30 days after the sale date.[29] Thus, a taxpayer cannot recognize a loss while maintaining economic exposure to an investment by, for example, selling depreciated stock and immediately repurchasing the same stock. Under the current law, it is not believed that the wash sale rules apply to transactions involving cryptocurrency, because most cryptocurrencies do not constitute stock or securities (as noted above).[30] Also, proposed legislation that would make cryptocurrency transactions subject to the wash sale rules has so far failed to pass. Thus, cryptocurrency investors seeking to harvest tax losses have significantly more flexibility to do so than stock or securities investors.

Although the wash sale rules are probably not currently a barrier to tax loss harvesting, they are not the government's only weapon against attempts to generate noneconomic losses. Depending on the circumstances of a particular transaction that appears to result in a loss, the loss may also be disregarded if the transaction does not result in a "*bona fide*" loss, lacks economic substance, or is a sham.[31] Such concerns could arise if a repurchase of the same or similar financial asset is made immediately after (or before) being sold. Also, even if a loss transaction is respected, taxpayers must also be mindful of other limitations on the use of capital losses, such as the overall limitations on the use of capital losses by corporate and individual taxpayers.[32]

Considerations Regarding Abandonment, Worthlessness, and Theft Losses

In addition to outright sales and exchanges of cryptocurrency, there may be other scenarios in which a tax loss is triggered, such as abandonment (*e.g.*, sending cryptocurrency to a "burn" address), worthlessness, or even theft.

Very generally, the Code allows a deduction for losses sustained during the tax year that are not compensated by insurance or otherwise.[33] For taxpayers who are individuals, the loss must also fall into at least one of the following categories: (1) it must be incurred in a trade or business, (2) it must be incurred in a transaction entered into for profit, or (3) if not connected with a trade or business or a transaction entered into for profit, it must arise from a fire, storm, shipwreck, or other casualty, or from theft.[34]

In addition, recognition of a tax loss generally requires a closed and completed transaction, fixed by an identifiable event.[35] An actual sale or exchange meets this requirement, in which case a capital loss is triggered.[36] However, when the cryptocurrency has become worthless, is abandoned, or has been stolen, it appears that there is no sale or exchange.[37] In these situations, the relevant inquiry is whether the loss deduction could constitute a miscellaneous itemized deduction and therefore effectively be non-deductible for individual taxpayers (at least through tax year 2025).

By way of background, only certain deductions are allowed in computing adjusted gross income (above-the-line deductions), such as those arising in connection with a trade or business.[38] All other deductions are itemized deductions, except for certain specified deductions (including the standard deduction). The election to itemize deductions is made by completing Schedule A to Form 1040.[39]

Generally, miscellaneous itemized deductions for any tax year are allowed only to the extent that the aggregate of the deductions exceeds two percent of adjusted gross income. However, for tax years 2018–2025, they are non-deductible.[40] Miscellaneous itemized deductions are defined generally as all itemized deductions other than medical and dental expenses, taxes, interest charitable contributions, casualty, and theft losses.[41] Therefore, casualty and theft losses are not miscellaneous itemized deductions.[42] Significantly, there is no specific carve out for abandonment or worthlessness losses, which therefore appear to be miscellaneous itemized deductions. Accordingly, loss deductions attributable to abandonment or worthlessness[43] appear to be effectively non-deductible and therefore valueless for individuals (at least through 2025).[44] This was recently confirmed by the IRS in CCA 202302011.[45]

Theft losses, however, do not appear to be miscellaneous itemized deductions. Therefore, if a cryptocurrency theft loss was incurred in connection with a transaction entered into for profit,[46] it likely is deductible as an ordinary loss (in full) so as to offset ordinary income. Very generally, a theft loss is treated as sustained during the tax year in which the taxpayer discovers the loss.[47] The deductibility of certain enumerated (non-crypto) theft losses incurred in connection with transactions entered into for profit was confirmed recently by the IRS in CCA 202511015.[48]

Considerations for Charitable Donations

Donations Generally

For taxpayers that itemize deductions, a donation of an appreciated long-term capital gain property generally can provide a double benefit: (1) the taxpayer may claim a charitable contribution deduction equal to the property's fair market value on the date of the contribution and (2) the gain is not required to be recognized by the taxpayer as taxable income.[49] This tax efficiency has made donating appreciated digital assets a common strategy used by individuals to maximize the amount of charitable giving. However, that strategy is not without traps for the unwary.

Qualified Appraisal Rules

To claim a charitable contribution deduction, a taxpayer must satisfy certain substantiation requirements. In general, for contributions of property for which a deduction of more than $5,000 is claimed, the taxpayer must obtain a qualified appraisal of such property for the taxable year in which the contribution is claimed.[50]

To be a "qualified appraisal," an appraisal must be conducted by a "qualified appraiser" in accordance with generally accepted appraisal standards and meet certain other requirements described in the relevant regulations.[51] The term "qualified appraiser" means an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations, (2) regularly performs appraisals for which the individual receives compensation, and (3) meets such other requirements described in regulations.[52]

A qualified appraisal is not required for donations of certain readily valued property specifically set forth in the Code and regulations; namely, cash, stock in trade, inventory, property primarily held for sale to customers in the ordinary course of business, publicly traded securities, intellectual property, and certain vehicles.[53] The only possible category here for cryptocurrency held for investment is that for "publicly traded securities," which term is defined by the applicable regulations by reference to Code Sec. 165(g)(2).[54] Code Sec. 165(g)(2) defines security as (1) a share of stock in a corporation; (2) a right to subscribe for, or to receive, a share of stock in a corporation; or (3) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form.

Most mainstream cryptocurrencies do not fall within the definition of security under Code Sec. 165(g)(2). However, this is not necessarily universally true, and it is possible that certain digital assets do in fact qualify as securities under this definition.[55] Regardless of the security status of a particular asset, on purely policy grounds, liquid digital assets certainly ought to be excluded from the qualified appraisal requirement, given the readily available pricing information. Unfortunately, in CCA 202302012 the IRS concluded that (1) a qualified appraisal is required for cryptocurrency donations if a deduction greater than $5,000 is claimed and (2) the reasonable cause exception will not excuse noncompliance with the qualified appraisal requirement. In the IRS' view, this result followed given that the cryptocurrency involved was not a "security" as defined in Code Sec. 165(g)(2). This means that taxpayers making donations of digital assets with a fair market value greater than $5,000 will need to obtain qualified appraisals to claim a tax deduction.[56] This unintuitive requirement represents a significant trap for the unwary.

Taxation of Blockchain Rewards

PoW and PoS Consensus Mechanisms

There are generally two types of blockchain consensus mechanisms—proof of work ("PoW") and proof of stake ("PoS").

PoW operates using a "peer-to-peer" model that is decentralized in the sense that no single company or person operates the network. Instead, so-called "blockchain" technology, which is sometimes referred to as distributed electronic ledger technology, enables this peer-to-peer model to function. Whenever a given cryptocurrency transaction occurs, it is first broadcast to its network so as to be verified or validated. Validation occurs using cryptography (that is, encryption and decryption). Once confirmed, each transaction is then recorded with other transactions in a "block" of computer code and is then added and linked to previous blocks to form a chain—hence, the term "blockchain." The updated ledger is then distributed across the network, such that all computers on the network are constantly verifying that the blockchain is accurate. In a PoW consensus process, "miners" compete with each other to solve a cryptographic puzzle. The winning miner is given the right to create a new block that is then broadcast to the network and is rewarded with newly minted/created cryptocurrency and, in some cases, also a portion of transaction fees.[57]

Under a PoS consensus process, "validators" lock-up—("stake")—the blockchain's native cryptocurrency and receive rewards (paid in the blockchain's native cryptocurrency) when they create new blocks or validate blocks created by other validators. In most PoS systems, validators are chosen at random to create blocks and are responsible for checking and confirming blocks they do not create. Although validator selection is random, the chances of being selected generally increase with the size of the stake, much like a weighted lottery. If the selected validator successfully verifies a given transaction or creates a new block, then the network updates the blockchain and staking rewards are awarded to the validator (and potentially delegators).

In a PoS system, the number of transactions a network can handle can be increased if the network is willing to require that validators comply with rigorous hardware and technical requirements. Stringent requirements create a barrier to entry and tend to reduce the number of validators. Thus, there is a tradeoff between speed/scalability and decentralization. Different blockchains have taken different approaches when managing this tradeoff. For example, on the Ethereum consensus layer, hardware requirements are minimal, and users can validate, themselves, directly by using only a laptop computer (*i.e.*, self-stake).[58] On Solana, the technical and hardware requirements create a significantly higher barrier to entry. Thus, although anyone can technically participate in a PoS network as a validator, self-staking is practically out of reach for many casual investors.

As an alternative to self-staking, users can stake by delegating their cryptocurrency to others who perform the actual validation function on their behalf. Generally, delegation is noncustodial and therefore does not result in a transfer of the staked cryptocurrency to the validator. In this noncustodial delegated staking scenario, staking rewards are split between the validator and the delegated staker by the blockchain itself. That is, no part of the staking reward paid to the delegated staker comes from the validator.

Another potential option, however, is custodial staking. In custodial staking, users transfer custody of their cryptocurrency to a third party and allow that third party to stake their cryptocurrency. The third-party validator then receives the rewards and shares a portion of the rewards with the staker (usually, a fixed return). In this scenario, the reward payments come from the third-party validator (and not the blockchain), because the validator is, in the eyes of the blockchain, the owner of the cryptocurrency being staked and therefore entitled to the full staking reward. This approach is often employed by exchanges, such as Coinbase, that hold custody of one's cryptocurrency.

The last approach to staking is liquid staking. In liquid staking, users transfer their cryptocurrency to a platform that stakes the cryptocurrency. In exchange, users receive a transferrable wrapped version of the staked token that is freely transferrable. The downside to this approach is that the third party, rather than the user, selects the validators to whom the underlying currency will be delegated to (*i.e.*, there is some loss of control). However, the benefit to this solution over the others is that the wrapped token is transferrable and can therefore be used in decentralized finance ("DeFi") transactions, while at the same time generating staking rewards.

IRS Position: Immediate Income Recognition

In its earliest cryptocurrency guidance (Notice 2014-21), the IRS addressed the timing question related to mining rewards and indicated that such rewards constituted gross income upon receipt.[59] The IRS did not express a position on the tax characterization of blockchain rewards but possibilities that would align with immediate income inclusion include service income, prizes or awards, or some other type of "gross income." Therefore, it is presumably some kind of ordinary income (as opposed to capital gain). The guidance provided in Notice 2014-21 does not meaningfully address other considerations related to blockchain rewards. For example, the guidance does not consider the source of mining income. It also only tangentially addresses whether mining activities constitute a trade or business by indicating that an individual engaged in mining as a trade or business is subject to self-employment tax.[60] This presupposes the existence of a trade or business (indicating that mining can, at least under certain circumstances, be a trade or business), but does not elaborate any criteria that might be considered when determining if a trade or business exists.

The IRS did not directly address the treatment of staking income until much later in Rev. Rul. 2023-14,[61] which considers a situation where a cash-method taxpayer staked a digital asset and received new units of the digital asset as a staking reward. In the facts provided, the taxpayer initially and for a brief period lacked the ability to sell, exchange, or otherwise dispose of any interest in the staking rewards. The IRS again addressed the timing question only and ruled that the fair market value of the staking rewards constituted gross income includable at the time the taxpayer obtained dominion and control over the staking rewards, *i.e.*, the date as of which the taxpayer had the ability to sell, exchange, or otherwise dispose of the cryptocurrency received as a reward. The IRS noted that this result follows even if the staking occurs indirectly through a cryptocurrency exchange (*i.e.*, custodial staking, presumably).

As with the prior guidance in Notice 2014-21 dealing with mining rewards, the IRS did not provide a detailed rationale or basis for this conclusion, and it is not clear how exactly the IRS views staking rewards (*e.g.*, as service income, prizes or awards, or "other gross income"). This could influence other questions associated with staking income, such as the source of the income. The facts of the case are also limited, as it considers an individual cash-basis taxpayer. Would a similar conclusion be reached for an accrual method taxpayer? Or would staking income be required to be taken into account as it economically accrues? If it should be accrued, how should a taxpayer value the accrual? The IRS ruled that the result was unaffected by whether the taxpayer staked directly or through a custodian. However, the IRS did not weigh in on the other potential consequences of custodial or liquid staking arrangements.[62] Lastly, like Notice 2014-21, the revenue ruling does not provide meaningful guidance on the source of staking income and the situations in which staking activities could rise to the level of a trade or business.

Reinforcing its position as set forth in Rev. Rul. 2023-14, the IRS subsequently released CCA 202444009, which involved the freezing of staking rewards on a cryptocurrency platform with facts that seem to resemble FTX. The taxpayer here was an individual cash-method taxpayer who staked cryptocurrency on a platform. The user agreement with the platform provided that staking rewards would be credited to the taxpayer's account (following any applicable lock-up or waiting period), with the taxpayer then able to sell, exchange, or transfer the rewards. Staking rewards were in fact credited to the taxpayer's account, but later in the year the platform froze all customer accounts and filed a Chapter 11 bankruptcy petition such that the taxpayer was unable to sell, exchange, or transfer the credited awards. Citing Rev. Rul. 2023-14, the IRS again noted that the fair market value of staking rewards constituted gross income at the time the taxpayer gained dominion and control over the rewards. Here, according to the IRS the taxpayer was in actual receipt of the rewards when they were credited to his or her account, such that the taxpayer had dominion and control at that time prior to the freeze.[63] Accordingly, the taxpayer was required to include the amount of the rewards in gross income for the year, notwithstanding the fact that subsequent events during the year limited access to the rewards.

As a matter of policy, the IRS approach does create a possibility of uneconomic taxable income. Consider the following example:

> Scott receives 100 XTZ as a staking reward on October 3, 2024 when the price of XTZ is $9.14. On February 24, 2025, Scott sells the XTZ received as a staking reward for $265. For purposes of this example, assume that Scott: (i) is subject to a 37 percent marginal ordinary income tax rate, (ii) is subject to a 20 percent capital gains tax rate, (iii) holds XTZ as a capital asset, and (iv) has no capital gains, other sources or capital losses, and would not benefit from capital loss carrybacks or carryovers.
>
> Under the IRS position, Scott recognizes $914 of ordinary income in 2021 (100 XTZ × $9.14/XTZ) and pays $338 of tax. In 2025, Scott recognizes a $649 loss for the difference between the amount realized on the sale ($265) and his basis in the XTZ that was sold ($914). If the XTZ is a capital asset in Scott's hands, this loss is capital and generally cannot be used to offset ordinary income. As a result of this staking activity, Scott has a cumulative pre-tax income of $265 and an after-tax loss of $73 ($265 received on sale, minus $338 of taxes paid). Thus, it is possible that the tax consequences of the activity can transform a pre-tax economic income position into an economic loss.[64]

Alternative Position: Self-Created Property Theory

Prior to the release of Rev. Rul. 2023-14, the taxpayers, in *Jarrett*, took the position that staking rewards received on the Tezos blockchain were not required to be included in taxable income until sold and therefore sought a tax refund.[65] The theory for this position was that the Tezos rewards received by the taxpayer consisted of newly created cryptocurrency, and the creation of property is not itself a taxable event.[66]

The IRS granted the Jarretts a refund, but in doing so did not provide any rationale, analysis, or admission of the Jarretts' technical position. The Jarretts rejected the IRS' refund offer and sought a court ruling that would create a precedent and prevent the IRS from challenging their position in the future. The case, however, was dismissed as moot and it is clear, in light of the subsequent release of Rev. Rul. 2023-14, that the IRS disagrees with the position.[67] Undeterred, in 2024 the Jarretts appear to have filed yet another refund claim for a subsequent year, again asserting the self-created property theory as the basis for the refund.[68] Nevertheless, the self-created property theory has yet to be addressed by the courts, and the IRS' published position is not binding on taxpayers or the courts.[69] Also, although the self-created property characterization is most commonly discussed in the context of staking rewards, similar arguments could be made in the context of a PoW consensus model, at least to the extent the rewards constitute newly created cryptocurrency (as opposed to transaction fees paid by other blockchain participants). There have been legislative proposals that would have achieved this result,[70] and BTC miners have publicly made this argument recently.[71]

Under the self-created property characterization, income or loss is not recognized until the cryptocurrency received as a blockchain reward is later sold, exchanged, or otherwise disposed of in a taxable transaction. If the recognition of income is tied to a sale or exchange event, does this mean that the entire amount of economic income or profit from the staking activity could be treated as capital gain? Some commentators have indicated that the answer to this question is "no."[72] Although this conclusion might be intuitive, the character of a gain on a sale or exchange as ordinary or capital depends on the nature of the asset being sold, not whether the receipt of the asset was previously subject to tax.[73] The character of an asset as ordinary or capital is instead determined under the long-standing statutory framework set forth in Code Sec. 1221. In most situations, blockchain rewards are considered capital assets. This is implicit in the IRS frequently answered questions ("FAQs"), which apply only in (the presumably most common) situations where cryptocurrency is held as a capital asset.[74]

As a matter of policy, the self-created property approach would have the benefit of alleviating the issue of character mismatches that might otherwise occur under the IRS approach. Consider the following results (based on the same facts as the previous example):

> Under the self-created property characterization, Scott recognizes no income and pays no tax in 2024. When the XTZ is sold in 2025, Scott recognizes a $265 capital gain and pays $53 of tax. Scott has a cumulative pre-tax income of $265 and a cumulative after-tax income of $212 ($265 received on sale, minus $53 of taxes paid). This is a marked difference in result from the previous example, where economic income was transferred into an overall economic loss as a result of the tax consequences of the staking activity.

The characterization of staking rewards income as capital gain or ordinary income is significant for taxable inventors, on account of the limitations on the use of capital losses[75] and the preferential rates afforded to capital gains.[76] It is also significant for other investor classes. For foreign investors, gain generally is not considered fixed, determinable, annual, or periodical ("FDAP") income subject to U.S. tax.[77] For tax-exempt investors, gain (other than dealer property gain described in Code Sec. 512(b)(5)(A) or (B) or gain that is considered debt-financed by reason of Code. Sec. 514) is not subject to tax as unrelated business taxable income.[78]

It will be interesting to see if the IRS' interpretation here will be reversed in the future, either through a successful court challenge or through future legislation.

Tax Treatment of Forks and Airdrops

A quick note on nomenclature. As a technical matter, a "hard fork" is an upgrade that can make previous transactions and blocks either valid or invalid (*i.e.*, it is not backward-compatible). A "soft fork" is an upgrade to the software that is backward-compatible. However, in the IRS guidance, the term "hard fork" has been used to refer to a situation in which a single blockchain permanently splits and a "soft fork" refers to a situation in which there is no division of the blockchain. In the discussion that follows, we will use the terms "hard fork" and "soft fork" in the same manner as the IRS.

Soft Forks

The earliest guidance on soft forks was included in the IRS cryptocurrency FAQs, which state:

> **Question:** Do I have income when a soft fork of cryptocurrency I own occurs?
>
> **Answer:** No. A soft fork occurs when a distributed ledger undergoes a protocol change that does not result in a diversion of the ledger and thus does not result in the creation of a new cryptocurrency. Because soft forks do not result in you receiving new cryptocurrency, you will be in the same position you were in prior to the soft fork, meaning that the soft fork will not result in any income to you.[79]

Notwithstanding the position in the FAQs, there remained some uncertainty as to the scope of this "soft fork exception," particularly in situations where the soft forks would result in fundamental changes to the blockchain.[80] However, the IRS reconfirmed its position in CCA 202316008, which indicates that a soft fork resulting in a change from a PoW consensus mechanism to a PoS consensus mechanism is not a taxable transaction.[81] This guidance seems to indicate the IRS position is based on the fact that a "new" asset is not received in a soft fork.

Hard Forks

The IRS has ruled that a taxpayer has ordinary income equal to the value of any "new" cryptocurrency received as a result of a hard fork.[82] But the IRS also ruled that a taxpayer does not have gross income as a result of a hard fork of a cryptocurrency the taxpayer owns if the taxpayer does not receive units of a new cryptocurrency.[83] In this regard, the IRS FAQs state:

> **Question:** One of my cryptocurrencies went through a hard fork but I did not receive any new cryptocurrency. Do I have income?
>
> **Answer:** A hard fork occurs when a cryptocurrency undergoes a protocol change resulting in a permanent diversion from the legacy distributed ledger. This may result in the creation of a new cryptocurrency on a new distributed ledger in addition to the legacy cryptocurrency on the legacy distributed ledger. If your cryptocurrency went through a hard fork, but you did not receive any new cryptocurrency, whether

> through an airdrop (a distribution of cryptocurrency to multiple taxpayers' distributed ledger addresses) or some other kind of transfer, you don't have taxable income.[84]
>
> **Question:** One of my cryptocurrencies went through a hard fork followed by an airdrop and I received new cryptocurrency. Do I have income?
>
> **Answer:** If a hard fork is followed by an airdrop and you receive new cryptocurrency, you will have taxable income in the taxable year you receive that cryptocurrency.[85]

The IRS ruling addressing hard forks and airdrops indicates that dominion and control of the cryptocurrency received in a hard fork is central to determining when the value of the cryptocurrency should be subject to tax.[86] The FAQs also include a dominion and control requirement:

> **Question:** How do I calculate my income from cryptocurrency I received following a hard fork?
>
> **Answer:** When you receive cryptocurrency from an airdrop following a hard fork, you will have ordinary income equal to the fair market value of the new cryptocurrency when it is received, which is when the transaction is recorded on the distributed ledger, provided you have dominion and control over the cryptocurrency so that you can transfer, sell, exchange, or otherwise dispose of the cryptocurrency.[87]

The IRS' position on hard forks has been the subject of significant criticism.[88] One fundamental shortcoming of the IRS guidance is that the amount of income is measured by reference to the value of the "new" digital asset. In many hard forks and in token migrations, the "new" asset attracts nearly all of the value attributable to the blockchain and the "old" digital asset is rendered nearly worthless. The IRS' approach does not take this diminution in value into account.[89] The IRS' focus on temporal ordering rather than the relative values, market capitalization, or other more substantive features seems unmoored from what most would consider sound tax policy.

The structure of the Internal Revenue Code has the potential to make what is already a bad result (phantom income) even worse. Taxpayers are taxed on their gross income, less adjustments and allowable deductions.[90] Gross income is broadly defined as "all income from whatever source derived" and examples include gains from dealings in property, prizes and awards, and treasure trove.[91] In contrast, deductions are only allowable to the extent specifically provided.[92] This creates an unforgiving landscape in which items that are characterized as "income" (under an extremely broad definition of that term) are subject to tax but offsetting and related economic losses may not always be allowed as a deduction. For example, assume that a digital asset worth $100 undergoes a hard fork and the new digital asset has a value of $99 and the old digital asset has a value of $1 after the fork. In this situation, the taxpayer would ostensibly be taxed on the full $99 value of the new token and, unless the taxpayer disposed of the old token, would not receive a corresponding tax loss deduction for the $99 reduction in the value of the old token. What's more, even if the taxpayer sold the old token so as to realize the loss, the loss would likely be capital and unable to be used to offset the ordinary income inclusion associated with the new asset. Oddly, the tax result could be even worse if the old digital asset became entirely worthless, because the losses would be miscellaneous itemized deductions for which individual taxpayers cannot claim a benefit under current law, as discussed above.

Another aspect of hard fork events that is notably absent from the IRS' guidance is the treatment of on-chain assets. If blockchain assets are duplicated on the new and old chains, might the value of those assets be includable in taxable income as well? It seems likely that the IRS would conclude that those "new" assets are also taxable. Unfortunately, the value of those assets might be extremely difficult to determine in some cases, given the unique characteristics of some assets (*e.g.*, non-fungible tokens ("NFTs")).[93]

For these and other reasons, it is not entirely clear a court would agree with the IRS' position.[94] Another possible approach would be to apportion tax basis between the two digital assets based on their relative fair market values or, if the legacy digital asset is worthless, simply allocate all tax basis to the new digital asset. This approach has been applied when tangible and intangible property has been divided.[95]

Airdrops

An airdrop occurs when the holder of a digital asset receives an unrelated digital asset on a promotional basis. This typically results from a marketing strategy by the creators of a new digital asset to attract attention to their project. Airdrops have been likened to a prize or treasure trove that should be treated as ordinary income upon receipt.[96]

Broker Reporting

Background

On November 15, 2021, President Biden signed the Infrastructure Act into law.[97] Among other provisions, the Infrastructure Act amended Code Sec. 6045 to define a "broker" to include "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person" and define a "specified security" to include "any digital asset."[98] The practical implication of these changes was to require cryptocurrency brokers to provide their customers and the IRS with information reporting similar to that provided to traditional brokerage customers on Form 1099 (*i.e.*, proceeds, cost basis in the assets sold, the gain or loss on the sale, and whether the gain or loss is long term or short term).[99]

Proposed regulations were released on August 23, 2023.[100] Notably, these regulations included within the scope of the definition of a broker a "digital asset middleman." This term was defined to include parties that would know or be in a position to know the identity of the party that makes the sale and the nature of the transaction, potentially giving rise to gross proceeds. The scope of this rule would have generally subject DeFi platforms and most wallet software providers to broker reporting requirements.[101] As noted by many commentators, this broad scope was seemingly at odds with certain aspects of the statutory text, legislative history of the Infrastructure Act, and previous interpretations of the term broker.

From a textual standpoint, there are various potential issues. First, as defined, a broker is a "person." The term "person" is broadly defined by Code Sec. 7701(a)(1) to include an individual, trust, estate, partnership, association, company, or corporation. In situations where a DeFi protocol is sufficiently decentralized, it is not clear that this requirement would be met. The preamble to the proposed regulations acknowledged this, but nevertheless suggested that many DeFi platforms met this standard.[102] This is at odds with the positions generally taken by the industry.[103] Another aspect of the definition of a "broker" under the statute is that the broker "effectuates transfers." In the case of DeFi, the protocol does not "effectuate transfers": it merely provides a platform on which users can make transfers with each other. Many had noted the similarity to a traditional stock exchange, which was not treated as a broker under the previous regulations because it merely provides a facility in which others effect sales.[104] There was also the requirement that the broker effectuate transactions for "consideration." In many cases, DeFi platforms do not themselves obtain remuneration directly from users. Nevertheless, the regulations would have broadly interpreted the meaning of "consideration" to encompass many different legal arrangements, such as situations in which the purported broker profits from advertising or through some other means than fees charged to customers.

In addition to these technical questions, there was also a question as to the practicality of subjecting decentralized entities to a reporting regime. If the entity does not have employees, who should be charged with complying with the information reporting rules? If the entity does not have an owner in the traditional sense, who do you enforce against? If a broker does not take possession of the assets being sold, how should the broker fulfill its backup withholding obligations?[105]

The complexities associated with the regulations led the IRS to delay the effective date of digital asset cost basis reporting, much to the dismay of certain members of Congress.[106] The government received over 44,000 written comments on the proposed regulations, particularly in respect of the digital asset middleman rules.[107]

On July 9, 2024, the Treasury Department and the IRS published final regulations on brokers referred to as "custodial brokers" given that these brokers take custody of digital assets.[108] These final regulations generally require custodial brokers (*i.e.*, brokers that take possession of the digital assets) to report gross proceeds to both customers and the IRS beginning with sales occurring on or after January 1, 2025, and to provide cost basis information on sales occurring on or after January 1, 2026 (for digital assets acquired on or after that date). Brokers subject to these reporting requirements include operators of custodial digital asset trading platforms, certain digital asset-hosted wallet providers, digital asset kiosks, and certain processors of digital asset payments (PDAPs). These regulations were significantly less controversial than the proposed regulations because they were aimed at traditional brokers and largely excluded digital asset middlemen and payment processors. The rules for noncustodial brokers were reserved in this regulation package.

The rules for noncustodial brokers (the "DeFi Broker Rules") were finalized in the final days of the Biden Administration on December 30, 2024.[109]

Legal Challenges

The legal challenges to the December 30, 2024 regulations came almost immediately. The day the final regulations were published, Blockchain Association, Texas Blockchain Council, and DeFi Education Fund ("The Blockchain groups") filed a lawsuit against the IRS, challenging that the new rule that the Treasury imposed on the DeFi industry violates the Administrative Procedure Act ("APA") and is unconstitutional.[110] The case stated that in order for the DeFi industry participants to comply with the new reporting requirements, it would disrupt DeFi's direct user-to-user framework and potentially increase the risk with intermediated transactions. It also contended that the rule violates the APA because Treasury failed to consider the comments during the comment period and the negative impacts on the DeFi industry, inclusive of any cost-benefit implications.

Congressional Review Act

Under the Congressional Review Act, Congress can review and potentially overturn certain Federal agency actions by passing a joint resolution of disapproval that is introduced within 60 days of the date on which the rule is submitted to Congress for review.[111] The DeFi Broker Rules were disapproved under the Congressional Review Act and nullified.[112] However, the rules for custodial brokers were not repealed.[113] Rules that do not take effect or do not continue due to a Congressional Review Act joint resolution of disapproval may not be reissued in substantially the same form, and new rules that are substantially the same as disapproved rules may not be issued absent a change in the law.[114]

The upshot of all this activity is that cryptocurrency investors should expect to receive gross proceeds reporting from custodial brokers starting in 2025 and should begin to receive cost basis reporting from custodial brokers starting in 2026 (for cryptocurrencies acquired after January 1, 2026). Investors will not receive reporting from DeFi platforms or wallet software providers absent a change in law in the future.

Other Reporting Relief

In January of 2024, the IRS announced that businesses generally would not be required to report certain cryptocurrency transactions that fall within Code Sec. 6050I.[115] The Infrastructure Act previously amended Code Sec. 6050I to include "digital assets" (in addition to cash), such that any person engaged in a trade or business that receives more than $10,000 in cryptocurrency is required to file a Form 8300. The IRS indicated that the transitional guidance here is in effect until final regulations under Code Sec. 6050I are released.

CAMT Considerations

The Inflation Reduction Act ("IRA") introduced a 15-percent CAMT on the "adjusted financial statement income" ("AFSI") of certain large corporations defined as "applicable corporations" (very generally, corporations reporting at least a $1 billion three-year average of adjusted pre-tax net income on their consolidated financial statements), including certain related entities.[116] AFSI generally starts with net income or loss reported on an applicable financial statement ("AFS") (defined by reference to Code Sec. 451(b)(3)), which could then be modified by an array of adjustments. An applicable corporation is liable for the CAMT to the extent its "tentative minimum tax" exceeds its regular U.S. federal income tax liability (including the base erosion and anti-abuse tax ("BEAT") under Code Sec. 59A), prior to taking into account general business credits under Code Sec. 38. Applicable corporations subject to the CAMT are allowed to claim a credit for CAMT paid against regular tax in future years, but the credit cannot reduce that future year's tax liability below the computed CAMT for that year.

Years after CAMT was enacted, the Financial Accounting Standards Board ("FASB") issued Accounting Standards Update 2023-08 (the "ASU"). This update is effective for all entities for fiscal years beginning after December 15, 2024 and requires that cryptocurrency assets qualifying under the criteria below be reported at fair value, with changes in fair value recognized in net income. Additionally, it requires that entities disclose significant holdings, contractual sale restrictions, and changes during the reporting period. The ASU applies to assets that meet all of the following criteria:

1. Meet the definition of intangible asset as defined in the FASB Accounting Standards Codification;
2. Do not provide the asset holder with enforceable rights to or claims on underlying goods, services, or other assets;
3. Are created or reside on a distributed ledger based on blockchain or similar technology;
4. Are secured through cryptography;
5. Are fungible; and
6. Are not created or issued by the reporting entity or its related parties.[117]

With the possible exception taxpayers taking the possibility that cryptocurrencies are commodities for which an election under Code Sec. 475(f) or (e) is available, cryptocurrency holdings are not marked to market for tax purposes. Under the ASU, cryptocurrency holdings will be marked to market for financial accounting purposes, which could impact AFSI for applicable corporations.[118] For large holders of cryptocurrency such as MicroStrategy, the potential CAMT liability creates a significant risk.

In response, Coinbase, Inc. and MicroStrategy Incorporated, two large corporate holders of digital assets, made three proposals in a comment letter on the proposed CAMT regulations.[119] The first proposal requests that Treasury include a provision in the final regulations that excludes unrealized gains and losses in computing AFSI on all investments that are marked to market for book but not for tax purposes. The second proposal requests that any accounting standard updates made after CAMT's enactment will not be considered for tax purposes unless the IRS specifically incorporates them within the CAMT regulations. The third and final proposal requests that the final regulations include a provision that states that AFSI shall be adjusted to exclude the resulting unrealized gains or losses per the required marked-to-market treatment per the ASU. The IRS has yet to respond to these requests, but it is possible that a sympathetic Trump administration would be inclined to accommodate. Cryptocurrency investors that also invest in companies operating in the digital asset ecosystem should be mindful of this potentially significant tax exposure and stay abreast of developments in this space.

ENDNOTES

* This article is an update to a prior article on the topic published in the JOURNAL in 2022. *See* Ritter, Suit, Tompkins and Raglan, *Year-End Tax Considerations for Cryptocurrency Investors*, 19 J. TAX'N FIN. PRODS. 3 (2022).

The information in this article is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the authors only, and does not necessarily represent the views or professional advice of KPMG LLP.

1 *See Coins, watches and more: A look at Trump's crypto-related ventures, by the numbers*, The Associated Press (Feb. 17, 2025), *apnews.com/article/trump-crypto-watch-sneakers-meme-coin-2b49fd975e2cce7a6f61e068f6fd04af*.

2 *coinmarketcap.com/currencies/official-trump/*.

3 *coinmarketcap.com/currencies/melania-meme/*.

4 *www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology/*.

5 Fact Sheet: President Donald J. Trump Establishes the Strategic Bitcoin Reserve and U.S. Digital Asset Stockpile (Mar. 6, 2025), *www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-establishes-the-strategic-bitcoin-reserve-and-u-s-digital-asset-stockpile/*.

6 *Eric Trump's Zero Crypto Tax Policy: Bold Idea Or Dream?*, Forbes (Jan. 27, 2025), *www.forbes.com/sites/shehanchandrasekera/2025/01/27/eric-trumps-zero-crypto-tax-policy-bold-idea-or-dream/*.

7 Unless otherwise indicated, all references to "Code Sec. " and "Reg. §" are to the Internal Revenue Code of 1986 (the "Code"), as amended, or the applicable regulations promulgated pursuant to the Code (the "regulations"), respectively.

8 *See* Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals (Mar. 11, 2024) (the "Greenbook"). The Greenbook proposed to expand Code Sec. 1058 nonrecognition treatment to digital asset lending agreements.

9 *See* Notice 2014-21, IRB 2014-16, 938; IRS, Frequently Asked Questions on Virtual Currency Transactions, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*. Technically, the IRS guidance applies only to virtual currencies that are "convertible," *i.e.*, have an equivalent value in real currency or that act as a substitute for real currency.

10 For example, if there is an unconditional obligation to pay a sum certain at a fixed maturity date or upon demand, with the ability to enforce payment (*i.e.*, creditor remedies), it may be possible to characterize a given transaction as a loan or debt. Some have posited that this treatment could apply to certain stablecoins denominated in fiat currency.

11 For example, with certain initial coin offerings or ICOs, the issued/sold coins represent an equity ownership interest in the issuing entity. In other cases, a coin or token may represent tax ownership of the underlying property; that is, blockchain technology is simply used to enable, track, and transfer of ownership of a given asset, such that the coin or token in question is not really a cryptocurrency like BTC or ETH.

12 *See, e.g.*, Code Secs. 165, 351, 354, 368, 475, and 731.

13 The government has indicated that cryptocurrencies are not securities under Code Sec. 165(g)(2)(C). *See* CCA 202302011 (Jan. 10, 2023) and CCA 202302012 (Jan. 10, 2023), discussed *infra*.

14 *See SEC v. W.J. Howey Co.*, SCt, 328 US 293, 66 SCt 1100 (1946). The authors do not practice securities law and this article is in no way intended to make a statement as to the securities law classification of any cryptocurrency.

15 One example of a circular definition is that set forth in Code Sec. 475, which states that for purposes of Code Secs. 475(e) and (f), the term "commodity" is defined to include any commodity that is actively traded (within the meaning of Code Sec. 1092(d)(1)).

16 *See* Rev. Rul. 73-58, 1973-1 CB 337 ("The word 'commodities' is used in 864(b)(2)(B) of the Code in its ordinary financial sense and includes all products that are traded in and listed on commodity exchanges located in the United States. Furthermore, the word 'commodities' includes the actual commodity and commodity futures contracts.").

17 *See* James R. Brown & Franziska Hertel, *Virtual Currencies and the Commodity Trading Safe Harbor*, 159 TAX NOTES 1731 (Jun. 18, 2018); NYSBA Report No. 1461—Report on Cryptocurrency and Other Fungible Digital Assets (Apr. 18, 2022), available at 2022 TNTI 76-15.

18 Notice 2023-34, IRB 2023-19, 837.

19 This example and the discussion that follows assume that cryptocurrencies are capital assets in the hands of the taxpayer.

20 *See* Reg. §1.1012-1(j); T.D. 10000, 89 FR 56480 (July 9, 2024). S*ee also* IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 39, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*.

21 *See* Reg. §1.1012-1(j)(2). *See also* IRS, Frequently asked Questions on Virtual Currency Transactions, Q/A 40, *www.irs.gov/individuals/*

international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions.

22 Reg. §1.1012-1(j)(2).

23 *See* Reg. §1.1012-1(j)(3)(ii).

24 *See* Reg. §1.1012-1(j)(1), (3)(i). *See also* IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 41, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*.

25 Reg. §1.1012-1(j)(3)(ii) ("A standing order or instruction for the specific identification of digital assets is treated as an adequate identification made at the time of sale, disposition, or transfer."). *See also* Reg. §1.1012-1(c)(8) ("[a]n adequate identification of stock is made at the time of sale, transfer, delivery, or distribution if the identification is made no later than the earlier of the settlement date or the time for settlement required by Rule 15c6-1 under the Securities Exchange act of 1934, 17 CFR 240.15c6-1 (or its successor). A standing order or instruction for the specific identification of stock is treated as an adequate identification made at the time of sale, transfer, delivery, or distribution.").

26 For a detailed discussion of the potential arguments as to why these two types of transactions might not be taxable exchanges, *see* Tompkins and Raglan, *Cryptocurrency Loans—Taxable or Not?*, 17 J. Tax'n Fin. Prods., No. 1 (2020); and Ritter, Tompkins, and Dalbey, *Wrapped Bitcoin—Two Sides of the Same (Bit)coin?*, 18 J. Tax'n Fin. Prods. 2 (2021).

27 IRB 2024-31, 326.

28 Notice 2025-7, IRB 2025-5, 1. The relief appears to be in response to a request made by Coinbase Global, Inc. on October 14, 2024. *See Crypto Exchange Seeks Clarity on Digital Asset Reporting Regs*, 2024 TNTF 202-26 (Oct. 14, 2024).

29 Code Sec. 1091(a); Reg. §1.1091-1(a).

30 For a detailed discussion of the reasons why most practitioners believe the wash sale rules do not currently apply to cryptocurrencies, *see* Tompkins and Kunkel, *Cryptocurrencies and the Definition of a Security for Code Sec. 1091*, 18 J. Tax'n Fin. Prods. 2 (2021).

31 *See, e.g.*, *F.R. Horne*, 5 TC 250, Dec. 14,610 (1945) (the court determined that the wash sale rules did not apply, nevertheless denied a deduction for the purported loss on the basis that it was not "real"); Rev. Rul. 77-185, 1977-1 CB 48 (loss denied because there was no real change of position in a true economic sense). *See also* Reg. §1.165-1(b).

32 *See generally* Code Sec. 1211. Losses in actively traded cryptocurrencies may also be deferred by the straddle rules of Code Sec. 1092. A detailed discussion of these rules and the other potential limitations on the deduction of cryptocurrency losses are outside the scope of this article.

33 Code Sec. 165(a).

34 Code Sec. 165(c)(1)-(3). Note that per Code Sec. 165(h)(5), non-federally declared disaster casualty losses arising in tax years beginning after December 31, 2017 and before January 1, 2026 are generally non-deductible under Code Sec. 165(c)(3).

35 Reg. §1.165-1(b).

36 Note that Code Sec. 165(f) provides that losses from sales or exchanges of capital assets are allowed only to the extent provided in Code Secs. 1211 and 1212. Therefore, those losses can offset capital gains (both long term and short term) and can offset up to $3,000 per year of an individual's ordinary income. Furthermore, the losses can be carried forward by individuals indefinitely.

37 Code Sec. 165(g)(1) provides that if any "security" held as a capital asset becomes worthless during the tax year, the loss is treated as a loss from a sale or exchange, occurring on the last day of the tax year. A similar rule is provided for the abandonment of a "security" in Reg. §1.165-5(i). As noted above, however, most cryptocurrency other than potentially certain stablecoins are not treated as a "security" for this purpose. *See also* Reg. §1.165-2(a) (for general authority re abandonment losses); Tompkins and Dalbey, *Current Events Roundup: Stock Buyback Excise Tax, Corporate AMT, and Digital Asset Guidance*, 19 J. Tax'n Fin. Prods., No. 4 (2023) (for a discussion of the situations where a cryptocurrency might be classified as a Code Sec. 165 security).

38 Code Sec. 62(a)(1).

39 Code Sec. 63(e)(2).

40 Code Sec. 67(g).

41 Code Sec. 67(b).

42 *See also* Code Sec. 67(b)(3).

43 It should be noted that the IRS has strictly construed the worthlessness requirement. *See, e.g.*, CCA 202302011 (Jan. 10, 2023). Cryptocurrencies that have lost most of their value may still have *some* value, especially if there is some kind of revival plan. In these situations, a taxpayer may be better off simply selling or exchanging the cryptocurrency so as to trigger a capital loss.

44 If abandonment or worthlessness arises in connection with a trade or business, however, then perhaps the deductions are not miscellaneous itemized deductions and can be taken as "above-the-line" business deductions.

45 For further discussion of these issues, *see* Tompkins and Dalbey, *Current Events Roundup: Stock Buyback Excise Tax, Corporate AMT, and Digital Asset Guidance*, 19 J. Tax'n Fin. Prods. 4 (2023).

46 As noted above, personal theft losses, covered by Code Sec. 165(c)(3), are not currently deductible. *See* Code Sec. 165(h)(5). *See also* Code Sec. 165(h)(3)(B), which cross-references Code Sec. 165(c)(3), such that personal casualty losses include theft losses for this purpose.

47 Code Sec. 165(e); Reg. §1.165-1(d)(3).

48 (Jan. 17, 2025). *See also* Rev. Proc. 2009-20, IRB 2009-14, 749 (which provides a safe-harbor for certain criminally fraudulent investment arrangements, such as Ponzi schemes). Note that to take a theft loss one generally needs to show no likelihood of recovery (*i.e.*, no "reasonable prospect of recovery" per Reg. §1.165-8(a)(2)), and as is shown in CCA 202302011 (Jan. 10, 2023), this may be difficult to prove.

49 Code Sec. 170(a). The deduction for property gifted to a private foundation may be limited to the taxpayer's basis in the property. Code Sec. 170(e)(1)(B)(ii).

50 Code Sec. 170(f)(11)(C).

51 Code Sec. 170(f)(11)(E)(i). *See also* Reg. §§1.170A-17 and 1.170A-13, as applicable.

52 Code Sec. 170(f)(11)(E)(ii). *See also* Reg. §1.170A-17(b).

53 *See* Code Sec. 170(f)(11)(A)(ii)(I); Reg. §1.170A-16(d)(2)(i).

54 Reg. §1.170A-13(c)(7)(xi).

55 *See* Tompkins and Dalbey, *Current Events Roundup: Stock Buyback Excise Tax, Corporate AMT, and Digital Asset Guidance*, 19 J. Tax'n Fin. Prods. 4 (2023), for a discussion of the situations where a cryptocurrency might be classified as a Code Sec. 165 security.

56 CCA 202302012 (Jan. 10, 2023) determines that the reasonable cause standard was not met because the taxpayer did not attempt to obtain a qualified appraisal. The IRS also noted that the appraisal requirement is described on Form 8283, such that a reasonable person reviewing their return should be aware of the requirement. CCA 202302012 (Jan. 10, 2023) then went on to say that "the reasonable cause exception was not intended to provide taxpayers with the choice of whether to obtain a qualified appraisal, but to provide relief where an unsuccessful attempt was made in good faith to comply with the requirements of section 170." Although the cases cited in CCA 202302012 (Jan. 10, 2023) (*H.C. Schweizer*, 124 TCM 232, Dec. 62,113(M), TC Memo. 2022-102; *D. Pankratz*, 121 TCM 1178, Dec. 61,831(M), TC Memo. 2021-26; and *J. Crimi*, 105 TCM 1330, Dec. 59,453(M), TC Memo. 2013-51) certainly support that contention, the properties donated in those cases did not have a readily apparent value (those cases involved the donation of art, oil fields, and undeveloped land). Therefore, taxpayers might possibly attempt to distinguish the donation of digital assets on the grounds that a reasonable person exercising ordinary business care and prudence would not expect that a formal appraisal of actively traded property would be required (because the appraisal would presumably be based on the same trading value the taxpayer used to determine the amount of the donation). Taxpayers might also argue that they reasonably believed cryptocurrencies were securities under the tax law in light of the widely publicized SEC actions treating cryptocurrencies as securities. Nonetheless, obtaining an appraisal is clearly the best course of action.

57 The rewards structure varies by blockchain and also over time. For example, in the Bitcoin blockchain the rate at which new bitcoin is created slows down over time. The reward for mining each block of bitcoin—which is done every 10 minutes—halves every 210,000 blocks. The current rewards system is expected to continue until the year 2140, when the proposed 21 million supply limit for bitcoin is reached. Thereafter, miners will be rewarded solely with transaction fees.

[58] The capital requirements are more significant. To be a validator on the Ethereum consensus layer, one must stake a minimum of 32 ETH. At the time of writing, that would have a value of over $80,000.

[59] Notice 2014-21, IRB 2014-16, 938, Question and Answer #8.

[60] Notice 2014-21, IRB 2014-16, 938, Question and Answer #9.

[61] IRB 2023-33, 484.

[62] For example, the transfer of cryptocurrency to a custodian subject to an agreement, on the part of the custodian, to return identical cryptocurrency could potentially be viewed as a taxable disposition. *See* Tompkins and Raglan, *Cryptocurrency Loans—Taxable or Not?*, 17 J. TAX'N FIN. PRODS. 1 (2020), for further discussion of cryptocurrency transfers subject to an agreement to return identical cryptocurrency. Liquid staking arrangements could potentially be characterized as a taxable disposition or, alternatively, as an ongoing interest in the underlying cryptocurrency. Liquid staking arrangements also raise questions as to whether the participants are engaged in a joint venture. For further discussion, *see* Proof of Stake Alliance, U.S. Federal Income Tax Analysis of Liquid Staking (undated), available at *static1.squarespace.com/static/62f147feb8108a08e666aea5/t/63f3fd27f0b0fc45f7d906c2/1676934439845/U.S._Federal_Income_Tax_Analysis_of_Liquid_Staking.pdf*.

[63] Interestingly, the IRS also cited Reg. §§1.451-1(a) and 1.451-2(a) "constructive receipt" principles in its analysis, and noted (in a footnote) that any rewards that accrued but were not credited to the taxpayer's account before it was frozen would not be includible in income, as the taxpayer could not sell, exchange, or transfer such rewards prior to the freeze; that is, because they were not actually or constructively received, the taxpayer would not have dominion and control in this scenario.

[64] Because of these potentially negative tax consequences, certain industry participants have advocated for a change in the IRS position. *See* MARA, Level the Paying Field for Bitcoin Miners (undated), available at 2025 TNTF 58-37.

[65] No. 3:21-cv-00419 (M.D. Tenn.) (May 26, 2021).

[66] *See, e.g.*, Reg. §1.61-4 (farmer recognizes income when crops are sold, not when they are grown); Reg. §1.61-3(a) (miner recognizes income when minerals are sold, not when they are mined). Arguments could also be made that inflationary staking rewards do not represent a true accession to wealth. In addition, proponents of the self-created property approach also frequently point to the economic results that can occur under the IRS position in situations where the cryptocurrency declines in value after receipt. That is, because ordinary income would be recognized for the fair market value of staking rewards when earned, if the staker sells those rewards after a price decline, the staker would generally realize a capital loss at such latter date (*i.e.*, an unfavorable timing and character result).

A detailed discussion of the technical basis for the self-created property characterization can be found in Abraham Sutherland, *Cryptocurrency Economics and the Taxation of Block Rewards*, 165 TAX NOTES FED. 749 (Nov. 4, 2019); Abraham Sutherland, *Cryptocurrency Economics and the Taxation of Block Rewards, Part 2*, 165 TAX NOTES FED. 953 (Nov. 11, 2019). For competing views on the current state of the law and what constitutes sound tax policy, *see* Reuven S. Avi-Yonah & Mohanad Salaimi, *New Framework for Taxing Cryptocurrencies*, 175 TAX NOTES FED. 1391 (May 30, 2022); Omri Marian, *Law, Policy, and the Taxation of Block Rewards*, 175 TAX NOTES FED. 1493 (Jun. 6, 2022); Reuven S. Avi-Yonah, *A Response to Professor Marian on Cryptocurrency Tax Policy*, 175 TAX NOTES FED. 1731 (Jun. 13, 2022); Amanda Parsons, *May I Pay More? Lessons From Jarrett for Blockchain Tax Policy*, 176 TAX NOTES FED. 2063 (Sep. 26, 2022); David Forst & Sean McElroy, *Jarrett Is Based on Law, Not 'Blockchain Interests'*, 177 TAX NOTES FED. 423 (Oct. 17, 2022); Omri Marian, *Taxation of Staking Rewards Is Based in Law, Not Hyperbole*, 177 TAX NOTES FED. 579 (Oct. 24, 2022).

[67] *See Memorandum Granting Motion to Dismiss, Jarrett*, No. 3:21-cv-00419 (Sept. 30, 2022), available at *www.govinfo.gov/content/pkg/USCOURTS-tnmd-3_21-cv-00419/pdf/USCOURTS-tnmd-3_21-cv-00419-0.pdf*.

[68] *See Jarrett*, M.D. Tenn., No. 3:24-cv-01209 (M.D. Tenn. filed Oct. 10, 2024). The case is currently still pending.

[69] *See Halliburton Co.*, 100 TC 216, 232, Dec. 48,914 (1993), *aff'd*, CA-5, 25 F3d 1043 (1994), and *aff'd sub nom. Halliburton*, CA-5, 25 F3d 1043 (1994) ("[A] ruling or other interpretation by the Commissioner is only as persuasive as her reasoning and the precedents upon which she relies."). Given the limited analysis in the ruling, it is not clear that a judge would find it entirely persuasive.

See Ritter and Tompkins, *Proof of Stake—What's Really at Stake on the Tax Front?*, 19 J. TAX'N FIN. PRODS. 1 (2022), for a detailed discussion of the possible approaches to staking reward taxation.

[70] *See* Lummis-Gillibrand Responsible Financial Innovation Act, S.4356, 117th Cong., §208.

[71] *See* MARA, Level the Paying Field for Bitcoin Miners (undated), available at 2025 TNTF 58-37.

[72] *See, e.g.*, Unchained Podcast Episode 320, Your 2021 Crypto Taxes: How to Handle NFTs, DAOs, Airdrops and More (Feb. 15, 2022), at 44:00; Omri Marian, *Law, Policy, and the Taxation of Block Rewards*, 175 TAX NOTES FED. 1493 (Jun. 6, 2022); Amanda Parsons, *May I Pay More? Lessons From Jarrett for Blockchain Tax Policy*, 176 TAX NOTES FED. 2063 (Sep. 26, 2022); Omri Marian, *Taxation of Staking Rewards Is Based in Law, Not Hyperbole*, 177 TAX NOTES FED. 579 (Oct. 24, 2022). *But see* David Forst & Sean McElroy, *Jarrett Is Based on Law, Not 'Blockchain Interests'*, 177 TAX NOTES FED. 423 (Oct. 17, 2022).

[73] The enactment of Code Sec. 1221(a)(3) (dealing with certain self-created intangibles) and its repeated expansion demonstrates that, absent inclusion in a category of ordinary assets under Code Sec. 1221, self-created property is a capital asset that gives rise to capital gain when sold. If that were not the case, there would be no reason for Code Sec. 1221(a)(3) to exist. The case law predating Code Sec. 1221(a)(3) is also informative in that it shows that courts and IRS would likely evaluate whether self-created property is an ordinary or capital asset through the statutory framework of Code Sec. 1221 (and in particular Code Sec. 1221(a)(1)). Thus, if a taxpayer adopts the self-created property characterization and is confident that their cryptocurrency rewards are not a category of ordinary property under Code Sec. 1221, the taxpayer should be able to achieve capital gains treatment on the sale of the rewards tokens. For further discussion, *see* Ritter and Tompkins, *Proof of Stake—What's Really at Stake on the Tax Front?*, 19 J. TAX'N FIN. PRODS. 1 (2022). *See also* David L. Forst & Sean P. McElroy, *Jarrett Is Based on Law, Not 'Blockchain Interests,* 177 TAX NOTES FED. 423 (Oct. 17, 2022).

[74] IRS, Frequently Asked Questions on Virtual Currency Transactions, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*. Although the IRS would certainly disagree with the underlying premise of the self-created property theory (and there is certainly a fair degree of doubt as to the viability of that theory), that should not bear on the character of the blockchain rewards as ordinary or capital.

[75] Code Sec. 1211.

[76] Code Sec. 1(h).

[77] Reg. §1.1441-2(b)(2), (b)(3), (c).

[78] Code Sec. 512(b)(5).

[79] IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 30, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*.

[80] Ritter, Suite, Tompkins, and Raglan, *Year-End Tax Considerations for Cryptocurrency Investors*, 19, 3 J. TAX'N FIN. PRODS. 23–26 (2022).

[81] CCA 202316008 (Mar. 27, 2023). The IRS concluded that there is no gain or loss (per Code Sec. 1001) and no gross income (per Code Sec. 61(a)). It appears this guidance many have been based on the so-called Ethereum "merge." For further discussion, *see* Ritter, Suite, Tompkins, and Raglan, *Year-End Tax Considerations for Cryptocurrency Investors*, 19, 3 J. TAX'N FIN. PRODS. 23–26 (2022).

[82] Rev. Rul. 2019-24, IRB 2019-44, 1004; CCA 202114020 (Mar. 22, 2021).

[83] Rev. Rul. 2019-24, IRB 2019-44, 1004.

[84] IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 22, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*.

[85] IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 23, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*.

86 Rev. Rul. 2019-24, IRB 2019-44, 1004; CCA 202114020 (Mar. 22, 2021).

87 IRS, Frequently Asked Questions on Virtual Currency Transactions, Q/A 24, *www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions*. Also, in Q/A 25, the IRS indicates that the basis of property received in a hard fork is equal to the amount included in income.

88 *See, e.g.*, Stevie D. Conlon, Anna Vayser, & Robert Schwaba, *New IRS Rev. Rul. 2019-24 and a Related FAQ: Not the Bitcoin Tax Guidance Taxpayers Were Looking for*, 16 J. Tax'n Fin. Prods. 4 (2019); *Lawmakers Express Concerns with Cryptocurrency Guidance*, 2020 TNTF 1-13 (Dec. 20, 2019) (reprinting lawmakers' letter to IRS Commissioner); Chamberlain, Mock & Kisska-Schulze, *Disappearing Forks and Magical Airdrops*, 165 Tax Notes Fed. 791 (Nov. 4, 2019); *Individual Raises Issues with Cryptic Cryptocurrency Guidance*, 2019 TNTF 200-219 (Oct. 15, 2019) (reprinting letter from Monte Jackel to IRS Chief Counsel); Ravichandran & Fiore, *Cryptocurrency Forks: A Response to the IRS's Recent Guidance*, 166 Tax Notes Fed. 1261 (Feb. 24, 2020); Stevie D. Conlon, Anna Vayser & Robert Schwaba, *IRS GUIDANCE—CCA 202114020 Clarifies the Tax Treatment of Hard Forks of Virtual Currencies*, 18 J. Tax'n Fin. Prods. 2 (2021).

89 As noted by other commentators, if hard forks did not reduce the value of the old digital asset, why not fork as much as possible to create value? *See* Chamberlain, Mock & Kisska-Schulze, *Disappearing Forks and Magical Airdrops*, 165 Tax Notes Fed. 791 (Nov. 4, 2019).

90 Code Sec. 63(a).

91 Code Sec. 61(a); Reg. §1.61-14.

92 *New Colonial Ice Co. v. Helvering*, SCt, 4 ustc ¶1292, 292 US 435, 440, 54 SCt 788 (1934) ("Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.").

93 *See* Matthew Erskine, *Uncertainty in the Valuation of Non-Fungible Tokens*, Forbes (Feb. 2, 2022), *www.forbes.com/sites/matthewerskine/2022/02/02/uncertainty-in-the-valuation-of-non-fungible-tokens/?sh=b0f2ec16ddd2*.

94 It is also worth mentioning that the IRS position has only been articulated in published guidance. Even before the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, SCt, 603 US 369, 144 SCt 2244 (2024), published guidance is only entitled to deference to the extent it is persuasive. *See Skidmore v. Swift & Co.*, SCt, 323 US 134, 140, 165 SCt 161 (1944); *Halliburton Co.*, 100 TC 216, Dec. 48,914 (1993) (revenue rulings not entitled to special deference).

95 *See L.E.Gamble*, 68 TC 800, Dec. 34,604 (1977) (basis in pregnant racehorse partitioned between the mare and the colt); *Heiner v. Mellon*, SCt, 38-2 ustc ¶9311, 304 US 271, 58 SCt 926 (basis of a parcel allocated to the subdivisions when the parcel was partitioned); Reg. §1.61-6(a) ("When a part of a larger property is sold, the cost or other basis of the entire property shall be equitably apportioned among the several parts, and the gain realized or loss sustained on the part of the entire property sold is the difference between the selling price and the cost or other basis allocated to such part."); Reg. §1.358-1(a)(2)(i) (basis of stock surrendered in a nontaxable transaction allocated to the stock and securities received on the basis of their relative fair market values).

96 Reg. §1.61-14(a) (treasure trove is income).

97 Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (Nov. 15, 2021).

98 Code Sec. 6045(c)(1)(D), (g)(3)(D).

99 Reporting for traditional brokers is made on Form 1099-B. Reporting for digital asset transactions is made on Form 1099-DA.

100 REG-122793-19, 88 FR 59576 (Aug. 29, 2023).

101 There was a limited exception for the licensing of software for which the sole function is to permit persons to control private keys that are used for accessing digital assets on a distributed ledger if such functions are conducted by a person solely engaged in the business of selling such hardware or licensing such software. However, software that provides users with direct access to trading platforms from the wallet platform is not an example of software with the sole function of providing users with the ability to control private keys to send and receive digital assets. This "exception to the exception" would have resulted in many wallet software providers being subject to reporting, which is arguably at odds with Congressional intent.

102 *See* 88 FR at 59586 ("As used in these proposed regulations, the term person generally has the meaning provided by section 7701(a)(1), which provides that the term generally includes an individual, a legal entity, and an unincorporated group or organization through which any business, financial operation or venture is carried on, such as a partnership. The term person includes a business entity that is treated as an association or a partnership for Federal tax purposes under §301.7701-3(b). Accordingly, a group of persons providing facilitative services that are in a position to know the customer's identity and the nature of the transaction effectuated by customers may be treated as a broker whether or not the group operates through a legal entity if the group is treated as a partnership or other person for U.S. Federal income tax purposes.").

103 DeFi platforms do not typically file tax returns or issue K-1s to governance token holders. In many cases, doing so would be impossible because the identity of the governance token holders is unknown (which may itself suggest that the standard for a tax entity is not met).

104 Reg. §1.6045-1(b), Ex. 2 (ii).

105 When the DeFi Broker Rules (defined at endnote 109) were finalized, the IRS also issued transitional relief guidance to address some of these practical considerations. For example, Notice 2025-3, IRB 2025-4 would provide transitional relief from backup withholding tax liabilities for DeFi brokers.

106 *See Senators Call for Implementation of Crypto Reporting Rules*, 2023 TNTF 195-15 (Oct. 10, 2023).

107 All posted comments are available at *www.regulations.gov*.

108 T.D. 10000, 89 FR 56480 (Jul. 9, 2024).

109 T.D. 10021, 89 FR 106928 (Dec. 30, 2024).

110 *Blockchain Ass'n*, No. 3:24-cv-03259 (N.T. Tex.), available at 2024 TNTF 249-15.

111 5 USC secs. 801(a), 801(d), and 802.

112 H.J. Res. 25, 119th Cong.; S.J. Res. 3, 119th Cong.

113 The Joint Committee on Taxation description of the Congressional Review Act actions indicates the rules for custodial brokers finalized in July 2024 will not be affected and those rules are not within the Congressional Review Act window (60 days after the issuance of regulations). *See* Joint Comm. on Tax'n, Description of H.J. Res. 25, A Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Department of the Treasury relating to "Gross Proceeds Reporting by Brokers That Regularly Provide Services Effectuating Digital Asset Sales," JCX-11-25 (Feb. 24, 2025). With that said, we understand that some legislative experts have argued the Congressional Review Act definition of a "rule" may also implicate the regulations for custodial brokers finalized in July of 2024.

114 5 USC sec. 801(b)(2).

115 *See* Announcement 2024-4, IRB 2024-6, 665.

116 If the corporation is a member of a foreign-parented multinational group ("MNG"), the $1 billion AFSI threshold is modified to also include non-effectively connected income financial statement profits of foreign corporations (which is not AFSI by its terms) and is supplemented by a special three-year average $100 million AFSI test that only takes into account the group's actual AFSI (*i.e.*, U.S. ECI-related adjusted financial statement profits of foreign corporations and AFSI of domestic corporations, including controlled foreign corporation ("CFC") income).

117 Accounting for and Disclosure of Crypto Assets, FASB, *fasb.org/page/PageContent?pageId=/projects/recentlycompleted/accounting-for-and-disclosure-of-crypto-assets.html* (last visited Apr. 9, 2025).

118 The change also has the potential to result in an entity being classified as an applicable corporation that would not otherwise be so classified. In general, once classified as an applicable corporation a taxpayer generally remains an applicable corporation.

119 *See Crypto Companies Request Unrealized Gain Exclusion From Corporate AMT*, 2025 TNTG 13-34 (Jan. 2, 2025).