Legislative Update: The Lummis Crypto Bill and White House Report on Digital Assets

By Joshua Tompkins, K. Peter Ritter, Tony Tuths, and Jamison Sites*

On July 3, 2025, U.S. Senator Cynthia Lummis (R-WY) introduced comprehensive digital asset tax legislation (referred to herein as the "Crypto Bill").[1] Later, on July 30, 2025, the White House released a 166-page report titled "Strengthening American Leadership in Digital Financial Technology" (referred to herein as the "White House Report").[2] Given the passage of the "One Big Beautiful Bill," it would appear that the impetus for additional tax legislation this year is somewhat remote. That being said, the introduction of the Crypto Bill and the current administration's focus on digital assets do suggest that tax legislation in this sector could be possible. Even barring that, it is likely that the provisions of the Crypto Bill could be used in future broader tax legislation.

In this article, we examine the various tax provisions of the Crypto Bill and the commentary in the White House Report. Where both the Crypto Bill and the White House Report touch on an issue, we will compare and contrast the two. With the exception of the proposed changes to the definition of a digital asset, the Crypto Bill proposals would expire at the end 2035 (*i.e.*, they would not apply to taxable years beginning after December 31, 2035).

Definition of a Digital Asset

Background

Under current law, Code Sec. 6045(g)(3)(D) defines the term "digital asset" as follows:

> Except as otherwise provided by the Secretary, the term "digital asset" means any digital representation of value which is recorded on a cryptographically

JOSHUA TOMPKINS is a Partner in the Financial Institutions and Products Group of the Washington National Tax Practice of KPMG LLP. **K. PETER RITTER** is a Principal in the Financial Institutions and Products Group of the Washington National Tax Practice of KPMG LLP. **TONY TUTHS** is a Principal with KPMG LLP. **JAMISON SITES** is a Principal with KPMG LLP.

secured distributed ledger or any similar technology as specified by the Secretary.

Although the Internal Revenue Service ("IRS") uses this definition in its guidance, it is not clear that the definition in Code Sec. 6045 (a cost basis reporting statute) would be broadly applicable.

The Crypto Bill

Section 1 of the Crypto Bill would amend Code Sec. 7701 (the general definitional section of the Code) to define the term "digital asset" in the same manner as Code Sec. 6045(g)(3)(D). This change would presumably make the definition more broadly applicable. The Crypto Bill would also create several carve outs from the term "digital asset." First, the Crypto Bill removes from the definition of a "digital asset" any digital asset that is a representation of a financial asset (other than a financial asset that is a digital asset). For purposes of this rule, the term "financial asset" means an asset that trades on established markets[3] or which is used as a medium of exchange, store of value, or unit of account. The term "financial asset" explicitly excludes "payment stablecoins," which is a new term defined in the wash sale provisions of the Crypto Bill (discussed below). For other digital assets that are a representation of property other than financial assets, the Crypto Bill also provides regulatory authority for the Secretary to treat such other digital assets in the same manner as the property they represent.

The carveouts in the definition of a "digital asset" appear to be intended to encourage, or at least not constrain, the "tokenization" of financial assets and (potentially) other real-world assets.

De Minimis Gain or Loss from Sale, Exchange, or Disposition of Digital Assets

Background

Under present law, the disposition of digital assets in exchange for property or services is treated as a taxable property sale. Thus, taxpayers seeking to use digital assets as a medium of exchange may be required to comply with complex cost basis tracking requirements in order to calculate and report taxable gain or loss (although to some degree these requirements may be significantly reduced through the use of specialized software).

The Crypto Bill

Section 2 of the Crypto Bill would exclude from gross income "gain or loss from the sale, exchange, or disposition of digital assets to purchase products or services in a personal transaction." This exclusion is intended to operate similar to the current exclusion for personal use foreign currency transactions under Code Sec. 988(e)(3). However, the exclusion is not available if the sale, exchange, or other disposition is for cash, cash equivalents, or other digital assets.

The gross income exclusion has several limitations. First, under a transaction level limitation, the exclusion would not apply in the case of any sale, exchange, or other disposition for which either:

(i) The total value of the sale, exchange or other disposition exceeds $300; or

(ii) The total loss that would otherwise be recognized with respect to the sale, exchange or other disposition exceeds $300.

This limitation is asymmetrical. Gains would be included in gross income in any situation where the *value of the transaction* is greater than $300. If the taxpayer has basis in the digital asset used to effectuate the transaction, the amount of gain that would be captured would be less than $300 (perhaps significantly). Conversely, the second prong of the limitation only ensures that losses are captured to the extent *the loss* exceeds $300. This formulation creates a relatively significant limitation on the benefit of this provision, and does not have an analog in the rules for foreign currency personal use transactions.

To ensure that the transaction level limitation is not circumvented by breaking a transaction into smaller pieces, the Crypto Bill includes an aggregation requirement, where all sales, exchanges, or dispositions that are part of the same transaction (or a series of related transactions) are treated as a single sale, exchange, or disposition.

The second limitation is applied at the taxpayer level and limits the amount of gain that may be excluded for each taxable year to $5,000.[4]

The third limitation is an anti-abuse provision. It provides that, except as otherwise provided by the Secretary, the gross income exclusion does not apply to a sale, exchange, or disposition of digital assets if the principal purpose of the transaction is to eliminate gains. It would seem unlikely that the Secretary would exercise its authority to allow taxpayers to engage in transactions with the principal purpose of eliminating gains. Therefore, it is unclear why this concept was added to the third limitation.

The various dollar thresholds included in the limitations are subject to inflation adjustments. The provision also provides a broad grant regulation authority for (i) recordkeeping requirements, (ii) anti-abuse standards, (iii) allocation of basis and characterization of appreciation, and (iv) treatment of mixed transactions (transactions that involve both property eligible for the exclusion and property ineligible for the exclusion).

The provision is intended to create a more administrable framework for personal use transactions.[5] Notwithstanding that stated goal, the provision imposes significant recordkeeping requirements. Taxpayers must track both basis and transaction values to determine whether a particular transaction is able to be excluded under the transactional level and taxpayer level limitations. The provision also explicitly requires taxpayers to maintain books and records or separate wallets or accounts to distinguish between transactions eligible for the exclusion and transactions that are not eligible. Unfortunately, it does not appear that taxpayers would be able to opt out of the gross income exclusion provision if they thought their current process (which presumably systemically captures all gains and losses) is easier to apply.

The lack of an opt out is also unfortunate because certain taxpayers would experience a gross income *increase* on account of the exclusion. The provision excludes both gains and losses from gross income. If a taxpayer's losses exceed gains, the net losses would be excluded. The potential for this unfortunate result is increased by the asymmetry of the transaction-level limitation, which makes losses more likely to be captured than gains.

Tax Treatment of Digital Asset Lending Agreements and Related Matters

Background

Securities lending transactions are commonly used to increase the yield on holding a security and are an integral part of the "plumbing" of the capital markets. In the typical securities lending transaction, the securities owner (lender) will lend securities to a counterparty (borrower) under an agreement providing for the return of identical securities upon demand. The securities borrower is also required to pay a "borrow fee" and make "in lieu payments" (*i.e.*, payments equivalent to any dividends, interest, or other payments received on the security being lent). Securities loans are typically collateralized, with the security lender paying a rebate fee on the collateral posted.[6] The securities borrower typically has the right to dispose of the borrowed security and often borrows the security expressly for that purpose (*e.g.*, to enter into a short sale transaction).

Under current law, no gain or loss is recognized if the transfer of a security is pursuant to an agreement that meets certain requirements under Code Sec. 1058.[7] Gain or loss also is not recognized on the return of that security in exchange for rights under the agreement.[8] For this purpose, the term "securities" is defined by reference to Code Sec. 1236(c) and includes corporate stock, notes, bonds, debentures and other evidence of indebtedness, and any evidence of an interest in or right to purchase any of the foregoing.[9]

Proposed Reg. §1.1058-1(b)(3) provides that an agreement is subject to nonrecognition treatment under Code Sec. 1058 only if it provides that the lender may terminate the loan upon notice of not more than five business days. Under this proposed regulation, any securities loan with a fixed duration would be a taxable disposition of the security being loaned.[10] Outside of certain abusive transactions, there seems to be very little policy justification for this result and purposely "defective" securities loans have been used by taxpayers to trigger gains or losses without divesting of the economics of an underlying position.

The capital markets have changed significantly since Code Sec. 1058 was enacted in 1978 and the proposed regulations were published in 1983. In particular, the variety of assets and the volume of trading in such assets that are not clearly subject to Code Sec. 1058 have both increased greatly. For example, taxpayers seeking to increase yields will frequently lend digital assets in transactions that look similar to customary securities lending transactions. These transactions are not within the scope of Code Sec. 1058 because digital assets are not "securities" as defined by Code Sec. 1236(c).[11] Although it could be argued that Code Sec. 1058 is a safe harbor provision rather than the sole means of achieving nonrecognition,[12] the proposed regulations could be read to suggest otherwise.[13] For a detailed discussion of the arguments for and against recognition in the context of digital asset loans under current law, see *Cryptocurrency Loans—Taxable or Not?,* 17 J. Tax'n Fin. Prods. 1 (2020).[14]

Another area of uncertainty with securities lending arrangements is the treatment of in lieu payments. If a taxpayer holds a bond issued at a discount, the taxpayer is generally required to accrue the discount over the term of the debt using a constant yield to maturity. In *Samueli*,[15] the taxpayer took the position that accrual of discount on a debt instrument was not required when the debt instrument was loaned. If this transaction had

worked as intended, the taxpayer would have been able to defer income and convert the income from ordinary interest accruals to capital gain. The taxpayer lost, but the underlying issue of accrual methodology is also relevant to non-abusive transactions and is an area of significant uncertainty. On the other hand, not every payment on a bond or stock is taxable. Should in lieu payments in respect of principal payments or non-dividend distributions be taxed when they would not be if the underlying instrument were held directly? The law is not entirely clear.[16]

The White House Report

The White House Report notes the uncertainty with respect to digital asset loans and indicates that legislation should be enacted to amend Code Sec. 1058 to provide that it applies to loans of actively traded fungible digital assets, provided that the loan has terms similar to those currently required for loans of securities. The White House Report also recommends that the Secretary be granted authority to determine when a digital asset is actively traded, and to address differences between the standard terms of securities loans and cryptocurrency loans.

The Crypto Bill

The Crypto Bill is aligned with this White House recommendation. Section 3 of the Crypto Bill includes a proposal to expand the securities loan nonrecognition rules to include loans of actively traded digital assets (referred to as "specified assets") and would also provide nonrecognition treatment for fixed term loans, except as provided by the Secretary. Additionally, the Crypto Bill proposal requires that the lender include in gross income an amount equal to the income that otherwise would accrue to it but for a lending transaction that meets the requirements of the proposal. the Crypto Bill proposal would require that income that would be taken into account by the lender if the lender had continued to hold the loaned asset. This rule would apply to both timing and character. The proposal would provide for appropriate basis adjustments to the loan contract, including when the loaned asset is returned. Lastly, the proposal provides regulatory authority to carry out the purposes of the new ruleset to digital asset forks and airdrops, and to fees associated with digital asset lending transactions.

The various elements of this proposal would go a long way towards easing some of the uncertainty in this complex area and provide a much-needed overhaul of an antiquated statute.[17] But the devil will be in the details. For example, the barriers to a given individual or entity creating a new digital asset through a hard fork are almost non-existent, but most new digital assets never achieve market acceptance. In recognition of this fact, most digital asset loans provide for in-kind in lieu payments of hard fork currencies only in situations where the new digital asset is economically meaningful. These arrangements are certainly within the "spirit" of Code Sec. 1058 and ought to be given nonrecognition treatment. However, drawing definitive lines as to what does and does not qualify is always difficult. In this regard, prevailing market practice might serve as the best guide. It is also notable that the expanded scope of Code Sec. 1058 (as proposed) would not encompass all actively traded assets for which the provision could be relevant. For example, many publicly traded partnership interests may be loaned, but there is currently a dearth of guidance as to how those transactions should be treated.

Loss from Wash Sales of Specified Assets

Background

Under the wash sale rules of Code Sec. 1091(a), taxpayers who sell stock or securities at a loss are generally prohibited from recognizing the loss if they acquire "substantially identical" stock or securities within a specified "window period" that begins 30 days before the sale and ends 30 days after the sale. If the wash sale rules apply, the disallowed loss is preserved through the application of special basis and holding period rules that tack the basis and holding period of the stock or security that was sold to the replacement stock or security.[18]

The IRS has ruled that commodities[19] and foreign currencies[20] are not securities subject to the wash sale rules. There is also general agreement among commentators that digital assets are not subject to the wash sale rules under current law, for the reasons discussed in *Cryptocurrencies and the Definition of a Security for Code Sec. 1091*, 18 J. Tax'n Fin. Prods. 2 (2021).[21]

Under current law, the treatment of certain derivative transactions under the wash sale rules is not entirely clear. For example, the tax community is divided on whether certain derivative instruments such as total return swaps should be treated as a contract or option to acquire the underlying stock or security.[22] In addition, it is not clear from the statutory language of the basis tacking rules how basis from the sale of a stock or security tacks to an option contract that triggers a wash sale.[23]

The White House Report

The White House Report acknowledges that taxpayers are carrying out wash sale trades in digital assets to capture tax losses and recommends that the wash sale rules be

amended to add digital assets to the list of assets subject to the rule. However, the White House Report suggests that stablecoins be excluded from the wash sale provisions.

The Crypto Bill

The Crypto Bill is aligned with this recommendation. Section 4 of the Crypto Bill would expand the wash sale rules to cover digital assets, notional principal contracts and derivative instruments with respect to digital assets, and any security (as defined by Code Sec. 475(c)(2)). This expanded definition would eliminate the scope uncertainties under current law with respect to certain derivative instruments, widely held trusts, and widely held partnerships. It would also have the effect of bringing within the scope of the wash sale rules instruments that were generally understood to not be subject to the rules under current law, such as foreign currency derivatives. Because the statute would not be amended to apply to physical foreign currency, this would have the somewhat odd effect of subjecting derivatives over currency to the wash sale rules, but not physical foreign currency trades.

The expanded wash sale rules would not apply to transactions entered into by dealers or to stablecoin transactions. The provision does not appear to include exceptions for personal use transactions, *de minimis* transactions, hedging transactions, or other business needs transactions.

The Crypto Bill would also change the basis adjustment provisions of Code Sec. 1091. The Crypto Bill proposal would explicitly provide that basis does in fact tack on to the replacement position, regardless of whether it is a physical security or a derivative instrument. The Crypto Bill proposal would, however, attack a common planning strategy where a taxpayer: (i) sells stock at a loss, (ii) acquires a derivative instrument on the stock (thereby triggering a wash sale), (iii) purchases replacement stock (which is not a wash sale because the derivative already triggered a wash sale), and (iv) terminates the derivative to trigger the loss. The Crypto Bill would provide that in situations where replacement stock is acquired after the derivative instrument is acquired, the basis adjustment is to the replacement stock, not the derivative instrument. The Crypto Bill also provides a broad grant of regulatory authority to address abusive basis adjustment practices.

Mark-to-Market Election

Background

Code Sec. 475 requires dealers in securities to use the mark-to-market method of accounting for inventory and non-inventory securities held at year end.[24] Gain or loss recognized under this mark-to-market method of accounting is generally characterized as ordinary gain or loss.[25] For purposes of Code Sec. 475, a "security" includes corporate stock, interests in widely held or publicly traded partnerships and trusts, debt instruments, and certain derivative financial instruments.[26] Although the IRS has taken the position that digital assets are property for federal income tax purposes,[27] as of yet no guidance has been issued on the question of whether any particular digital asset is a "security" for purposes of Code Sec. 475. Nevertheless, many practitioners take the position that digital assets are not securities, as defined by Code Sec. 475(c)(2).[28]

Dealers in commodities and traders in securities or commodities may elect to use the mark-to-market method of accounting.[29] For this purpose, Code Sec. 475(e)(2)(A) defines the term "commodity" to include "any commodity which is actively traded."[30] Thus, there are two requirements—an asset must be (i) a commodity and (ii) actively traded. Under current law, it is not entirely clear whether digital assets meet this definition.[31]

With respect to the first requirement, Code Sec. 475(e)(2)(A) does not attempt to define the term "commodity" in general. In similar self-referential situations where the term being defined is used in the definition, the courts have generally held that an item must fit within the common understanding of the term to fall within the definition.[32] In common parlance, the term "commodity" generally connotes fungibility with other assets of a similar class and grade. Many digital assets satisfy this requirement.[33] However, the term commodity might also impart a tangible asset connotation, which arguably would not be satisfied by digital assets.[34]

With respect to the requirement that the commodity must be actively traded, the statute cross-references Code Sec. 1092(d)(1). Futures on BTC, ETH, and SOL are traded on the Chicago Mercantile Exchange (a Commodities Futures Trading Commission-regulated commodities exchange), but other digital assets are not similarly traded. Although not entirely clear, most practitioners believe mainstream digital assets are actively traded because the exchange on which they trade operates similar to a traditional commodities exchange.[35]

The White House Report

The White House Report suggests that Code Sec. 475 should be amended to apply to actively traded fungible digital assets.

The Crypto Bill

The Crypto Bill would align with this suggestion by creating a new category of assets—"actively traded" digital

assets and derivatives of those digital assets (referred to as "specified assets")—that may be marked to market at the election of a dealer or trader in those assets.

The potential availability of a mark-to-market method of accounting for digital assets would be useful for a variety of reasons. Mark-to-market accounting generally provides a clear reflection of income with respect to assets that are traded in established markets, and for financial accounting purposes taxpayers may be required to mark inventory or trading positions to market. Allowing taxpayers to use their financial accounting valuations for tax purposes may reduce tax compliance costs. The mark-to-market method of accounting would also mitigate the impact of the newly applicable wash sale provisions for electing taxpayers. In addition, it would be helpful for digital asset straddle positions, which are arguably already subject to the loss deferral, capitalization, and special holding period rules under Code Secs. 263(g) and 1092.

Digital Asset Mining and Staking

Background

Blockchains achieve network security using one of two general 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.

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 don't 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. In PoS systems, it may be possible to also earn fees from users.[36]

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.[37] 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, 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.[38] 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 on 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,[39] 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.[40] 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 lockup 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.[41] 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 creates a possibility of uneconomic taxable income. Consider the following example:

> Scott receives 100 XTZ as a staking reward on October 3, 2025 when the price of XTZ is $9.14. On February 24, 2026, 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 2025 (100 XTZ × $9.14/XTZ) and pays $338 of tax. In 2026, Scott recognizes a $649 loss for the difference between the amount realized on the sale ($265) and his basis in the XTZ that were 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 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.[42]

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.[43] 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.[44]

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 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.[45] 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.[46] 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.[47] 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,[48] and BTC miners have publicly made this argument.[49]

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."[50] 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.[51] 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 asked questions ("FAQs"), which apply only in (the presumably most common) situations where cryptocurrency is held as a capital asset.[52]

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 2025. When the XTZ is sold in 2026, Scott recognizes a $265 capital gain and pays $53 of tax. Scott has cumulative pre-tax income of $265 and 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 investors, on account of the limitations on the use of capital losses[53] and the preferential rates afforded to capital gains.[54] It is also significant for other investor classes. For foreign investors the distinction is relevant in that gain generally is not considered fixed, determinable, annual, or periodical ("FDAP") income subject to U.S. tax.[55] 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.[56]

The White House Report

The White House Report suggests that Treasury and the IRS review the previously issued guidance related to the timing of income recognition for mining and staking rewards and "consider whether to clarify, modify, or reverse that guidance, taking into account any recent intervening developments since the issuance of such guidance." In the context of legislation, the White House Report indicates that if Congress changes the timing of mining and staking rewards income, Congress should also address second-order issues, such as whether the character of income should be ordinary on disposition, what rules should apply to determine the order of dispositions of ordinary versus capital units, and potential differences between the fair market value of rewards at the time of receipt compared with the fair market value of rewards at the time of sale or other disposition.

The Crypto Bill

The Crypto Bill would amend Code Sec. 451 to defer the income recognition of blockchain rewards until the rewards are sold, with the amount being treated as ordinary income. Commentary notes that this "aligns the taxation of mining and staking rewards with the actual realization of economic benefit" and also notes that this new system would prevent cash flow problems (as illustrated by the examples above). While this timing result generally is favorable to taxpayers, this proposal is a departure from a pure self-created property approach, which as discussed might allow capital gain treatment on disposition.

The Crypto Bill would also amend Code Sec. 863 to provide that for foreign investors any income related to validation of digital asset transaction will be sourced to the residence of the taxpayer. This is a favorable result and should prevent FDAP withholding on blockchain awards.

Charitable Contributions and Qualified Appraisals

Background

For taxpayers that itemize deductions,[57] a donation of an appreciated long-term capital gain property generally can provide a double benefit: (i) the taxpayer may claim a charitable contribution deduction equal to the property's

fair market value on the date of the contribution and (ii) the gain is not required to be recognized by the taxpayer as taxable income.[58] This tax efficiency has made donating appreciated digital assets a common strategy used by individuals to maximize the amount of their charitable giving. However, that strategy is not without traps for the unwary.

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.[59]

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.[60] The term "qualified appraiser" means an individual who (i) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations, (ii) regularly performs appraisals for which the individual receives compensation, and (iii) meets such other requirements described in regulations.[61]

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.[62] 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).[63] Code Sec. 165(g)(2) defines a security as (i) a share of stock in a corporation; (ii) a right to subscribe for, or to receive, a share of stock in a corporation; or (iii) 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 a 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.[64] 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 (i) a qualified appraisal is required for cryptocurrency donations if a deduction greater than $5,000 is claimed and (ii) 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 are required to obtain qualified appraisals to claim a tax deduction under current law (at least in the view of the IRS).[65]

The White House Report

The White House Report suggests that legislation remove the requirement of a qualified appraisal for charitable donations of digital assets worth more than $5,000.

The Crypto Bill

The Lummis commentary describes the appraisal requirement as a "bureaucratic barrier" discouraging charitable giving. In line with the White House Report recommendation, the Crypto Bill would amend Code Sec. 170 to treat "actively traded" digital asset contributions in the same manner as a publicly traded security (which is not subject to an appraisal requirement under current law if the security is capital gain property and market quotations are readily available).

What Was Not Included in the Crypto Bill

The Crypto Bill proposals would go a long way towards addressing many of the areas of uncertainty in digital asset taxation. However, there is no perfect overlap between the Crypto Bill and the White House Report, and below we examine several issues raised by the White House Report that were not addressed by the Crypto Bill.

Substantive Tax Issues

Corporate Alternative Minimum Tax

The White House Report notes that although the corporate alternative minimum tax ("CAMT") does not specifically target the digital asset sector, it has a potential punitive effect on the sector's growth that could be inconsistent with the policy goals of the President's Executive Order #14219, which directs agencies to identify and remove certain regulations and other guidance that among other things, impede private enterprise and entrepreneurship. The White House Report therefore recommends that the Treasury and IRS publish guidance with respect to the determination of "adjusted financial statement income,"

a component of the CAMT calculation, for certain investment assets.

Staking—Grantor Trust Classification

Exchange-traded funds ("ETFs") are normally structured as grantor (fixed investment) trusts for tax purposes. One of the requirements of grantor trust classification is that there is no "power to vary" the investments of the trust. Currently, ETFs have generally committed to abandoning any digital assets received on account of a hard fork or airdrop in an attempt to ensure there is no power to vary the assets of the trust. A secondary question is whether staking the digital assets of the trust would constitute an impermissible power to vary. The White House Report suggests that the Treasury and IRS should publish guidance addressing whether a trust that otherwise qualifies as a grantor trust fails to qualify as such if the trust stakes digital assets owned by the trust.

Wrapping

Wrapping is a technique used to convert a digital asset native to one blockchain into a digital asset native to a different blockchain. These transactions raise the question as to whether the exchange of the original asset for the wrapped token is a taxable exchange.[66] The White House Report states that the Treasury and IRS should publish guidance addressing whether wrapping and unwrapping transactions are taxable transactions. Relatedly, the White House Report suggests that future guidance could address whether the tokenization of an asset creates a new asset for tax purposes.

Other Substantive Tax Issues

The White House Report also suggests that guidance could address: (i) how to value thinly traded digital assets and assets traded on multiple exchanges; (ii) non-fungible tokens, including whether they are treated as collectibles for purposes of Code Secs. 408(m) and 1(h)(5); (iii) losses on digital assets, including the standards and acceptable proof for worthlessness and abandonment and when losses may be deducted if they are held by a taxpayer that becomes bankrupt; (iv) guidance relating to thefts of digital assets; (v) the application of the investment company rules of Code Secs. 351 and 721 to digital assets;[67] (vi) distributions of digital assets in partnership liquidations (*i.e.*, the "marketable securities" rules); (vii) the application of the hot asset rules to sales of partnerships holding digital assets; (viii) expanding the classes of assets that may be held by regulated investment companies to include digital assets; (ix) the treatment of digital assets for purposes of the subpart F, global intangible low-taxed income ("GILTI"), and passive foreign investment company ("PFIC") rules; (x) the tax treatment of blockchain splits and blockchain mergers; (xi) the rules applicable to digital assets with respect to retirement accounts; and (xii) the tax consequences of repatriation by an offshore foundation.

Priority Legislative Recommendations

Stablecoins

The White House Report notes that the classification of stablecoins as debt under current law is unclear. This classification is relevant for a number of reasons, including the wash sale rules (addressed by the Crypto Bill) and the excise tax on bearer bonds.[68] The White House Report suggests that legislation be enacted to characterize stablecoins as debt and also consider the applicability of rules that would impede the widespread use of stablecoins (*e.g.*, the excise tax on bearer debt).

Trading Safe Harbors

Code Sec. 864(b)(2) provides generally that non-U.S. traders in securities or commodities may trade through an independent U.S. agent, or trade for their own account with U.S.-based personnel, without being treated as engaged in the conduct of a trade or business in the United States. Under current law, it is unclear whether trading in digital assets can qualify under these safe harbors. The White House Report suggests amending Code Sec. 864(b)(2) to include actively traded fungible digital assets.

Taxpayer Reporting

De Minimis Digital Asset Receipts

It is common for taxpayers holding digital assets to receive or have the opportunity to receive new digital assets that may have minimal or speculative value. For example, a taxpayer may also receive unsolicited airdrops of, or claims to, a newly created digital asset as a marketing promotion by the creators of the new digital asset. Frequently, these assets are difficult to value and often decline rapidly in value after receipt. Under IRS guidance, taxpayers must include the fair market value of these assets in income when they have dominion and control over the assets. The White House Report suggests that Treasury and the IRS issue administrative guidance that addresses *de minimis* receipts of digital assets to alleviate the administrative burden and uneconomic tax treatment of receiving these assets. It is noted that the guidance could apply not only to airdrops, but also to staking, hard forks, and mining rewards for taxpayers who do not operate a node or carry out digital asset mining.

Code Sec. 6038D Digital Asset Reporting

Code Sec. 6038D requires an individual who holds an interest in one or more specified foreign financial assets with an aggregate value of at least $50,000 during a taxable year to attach a statement with required information to the individual's tax return. A specified foreign financial asset means a financial account maintained by a foreign financial institution and certain specified foreign assets not held in a financial account maintained by such a financial institution. Penalties apply to taxpayers who fail to provide the required information, and the time for IRS assessment of tax and the statute of limitations for assessment are extended beyond the deadlines that otherwise apply. The White House Report notes that legislation could be enacted to require taxpayers to report foreign digital asset accounts. If such legislation is enacted, the White House Report suggests that it be coordinated with any Crypto-Asset Reporting Framework ("CARF") and foreign bank and financial accounts ("FBAR") reporting.

Third-Party Information Reporting

Form 1099-DA

Code. Sec. 6045 requires brokers of digital assets to report gross proceeds (and in some cases cost basis and gain/loss) to their customers. Currently, there is no transfer reporting for digital assets similar to the transfer reporting currently in place under Code Sec. 6045A for stocks and securities. The White House Report also suggests that Treasury and the IRS consider proposing regulations requiring basis information to be reported when digital assets are transferred between centralized digital asset exchanges.

The White House Report also notes that, unlike traditional financial institutions, digital asset exchanges communicate with their customers exclusively. Because of the demonstrated ability to obtain information from digital asset exchanges electronically, the White House Report suggests that Treasury and the IRS propose regulations that provide brokers that facilitate sales or exchanges of digital assets through electronic means with a less burdensome method of obtaining consent from their customers to furnish Form 1099-DA payee statements in an electronic format.

Crypto-Asset Reporting Framework

CARF is an international tax transparency standard that seeks to improve tax compliance for transactions involving digital assets by requiring that digital asset service providers report certain transactions to the tax administration or agency of the provider's jurisdiction, which would then exchange appropriate information with other jurisdictions participating in CARF.

The White House Report states that regulations implementing CARF in the United States would discourage U.S. taxpayers from moving their digital assets to offshore digital asset exchanges. Implementing CARF would promote the growth and use of digital assets in the United States and alleviate concerns that the lack of a reporting program could disadvantage the United States or U.S. digital asset exchanges.

The White House Report indicates that Treasury and the IRS should consider proposing regulations to implement CARF that take into account stakeholder concerns (such as other information reporting requirements under Code Sec. 6045) and streamline reporting to the extent possible.

Code Sec. 6050I Reporting

If a trade or business receives more than $10,000 of cash in a transaction for, among other things, goods or services, the business generally must report that information to the IRS and to FinCEN.

The Infrastructure Investment and Jobs Act expanded the scope of reporting to the IRS by requiring reporting if a taxpayer uses digital assets to make payment. The implicit premise of this expansion is that using digital assets to pay for real-world goods and services normally purchased with money has the same effect as converting the digital assets to cash (which is required to be reported to the IRS) and using the cash to pay for the goods and services (which is also required to be reported to the IRS). The Infrastructure Investment and Jobs Act did not expand FinCEN's corresponding rule.

The White House Report notes the discrepancy between IRS reporting under Code Sec. 6050I and the FinCEN reporting and suggests that conforming changes be considered. The White House Report also suggests that the dollar threshold for reporting be reexamined and future regulations take into account privacy and scope concerns raised by industry participants, as well as the potential that these rules will create a disincentive for using digital assets as a means of payment.

Conclusion

Although the Crypto Bill would fall short of addressing every issue, if it were to be enacted it would be a significant step forward in addressing many longstanding industry issues. The White House Report suggests that there is a degree of focus on these issues by the administrative branch, although it remains unclear whether the focus will translate into concrete legislative action.

ENDNOTES

* 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.

Two pieces of guidance were issued after the publication of this article: Notice 2025-63 and Rev. Proc. 2025-31. Notice 2025-63 addresses the treatment of borrow fees on securities loan, and Rev. Proc. 2025-31 provides guidance on staking within exchange traded trusts. Please note that the article does not incorporate the implications of this subsequent guidance.

1 Available at: *www.lummis.senate.gov/wp-content/uploads/Lummis-Crypto-Tax-Bill.pdf*.

2 Available at *www.whitehouse.gov/wp-content/uploads/2025/07/Digital-Assets-Report-EO14178.pdf*.

3 The term "established markets" is not defined. It is possible that the term would be defined along the same lines as the term "established financial market" under Reg. §1.1092(d)-1(b).

4 The exact language used is: "If, after applying [the gross income exclusion] to a transaction, the taxpayer's total gain for the taxable year from transactions [subject to the gross income exclusion] exceeds $5,000, no further exclusion shall apply for such year." Although the quoted language simply refers to "gain" it seems relatively clear that the drafters intended the $5,000 limitation to be measured by reference to the net, rather than gross, gain subject to the exclusion.

5 The commentary included on Senator Lummis' website states: "*This provision recognizes the impracticality of tracking every small digital asset transaction, such as buying coffee with Bitcoin, which creates enormous compliance burdens for ordinary users. The $300 threshold strikes a reasonable balance between tax compliance and practical usability of digital assets as a medium of exchange.*" *See www.lummis.senate.gov/press-releases/lummis-unveils-digital-asset-tax-legislation/*.

6 Frequently the rebate fee will exceed the borrow fee and the two will be netted with only one party making a payment to the counterparty. The tax characterization of rebate fees and borrow fees is not clear, but general market practice is to treat the net payment as interest in the common situation where the rebate fee exceeds the borrow fee. *See* SIFMA, *Re: Guidance on Securities Loan and Repo Payments*, available at: *www.sifma.org/resources/submissions/sifma-submits-comments-to-the-us-department-of-treasury-and-the-irs-requesting-guidance-on-securities-loan-and-repo-payment/*

7 Code Sec. 1058(a).

8 *Id.*

9 Code Secs. 1058(a) and 1236(c).

10 *See* Proposed Reg. §1.1058-1(e)(1).

11 This assumes that the digital asset in question is a security within the meaning of Code Sec. 1236(c). This is not clearly the case in all situations. For example, a DAO token could be characterized as corporate stock for tax purposes (because the DAO is treated as a corporation as a general matter or under Code Sec. 7704). Tokenized securities could also be considered Code Sec. 1236(c) securities, as could stablecoins (which are treated by many market participants as debt instruments for tax purposes).

12 *See ABA Committee Reports on Securities Lending Transactions*, 91 TNT 107-33 (May 15, 1991) ("In general, *Section 1058(a)* provides that no gain or loss is recognized by the owner of securities when the owner transfers securities for the contractual obligation of the borrower to return identical securities. It constitutes a safe harbor from the recognition of gain or loss where a taxpayer exchanges securities pursuant to an agreement that meets the statutory requirements."); *NYSBA Tax Section Report Addresses Treatment of Securities Loans*, 2011 TNT 112-22 (June 10, 2011) ("There is nothing in the language of [section 1058] itself or the history of the statute to suggest that it was intended to be more than a safe harbor ... In our view, section 1058 should operate as a safe harbor.").

13 *See* Proposed Reg. §1.1058-1(e)(1) ("If a transfer of securities is intended to comply with section 1058 and fails to do so because the contractual obligation does not meet the requirements of section 1058(b) and §1.1058-1(b), gain or loss is recognized in accordance with section 1001 and §1.1001-1(a) upon the initial transfer of the securities.").

14 *See also* Shulman, *Loans of Securities, Digital Assets, and Other Fungible Property*, Tax Notes Federal, Vol. 173, October 25, 2021; and NYSBA Report No. 1461—Report on Cryptocurrency and Other Fungible Digital Assets, April, 18, 2022.

15 CA-9, 2011-2 USTC ¶50,697, 661 F3d 399.

16 Much of the guidance in this area has focused on the tax consequences to the short seller, but arguably there should be parity between the two parties. The general rule is that an in lieu payment is deductible by the short seller and does not result in a basis adjustment. *See e.g.*, Rev. Rul. 60-177 ("[T]he 'short-seller' is required to pay the lender an amount equal to the cash dividend on the stock borrowed to cover the short sale while the stock is on loan. Such an amount, commonly known as a 'short dividend,' is credited to the lender's account by his broker. The 'short-seller' is entitled to a deduction, for Federal income tax purposes, for the amount which he paid to the lender."). However, the IRS' position appears to be that in lieu payments with respect to return of capital distributions are capital expenditures of the short seller, rather than deductible expenses. *See* Rev. Rul. 72-521 ("The additional shares purchased in the case of a nontaxable stock dividend as well as the compensating payment in the case of a liquidating dividend are each in the nature of a repayment of principal. The amount paid in either case is part of the cost of replacing the borrowed stock and is, hence, a capital expenditure."); GCM 38604 ("Any expenditures incurred by the short seller to obtain securities for delivery in the short sale should be capitalized (added to the cost of the covering transaction) rather than immediately deducted."). In *Main Line Distributors, Inc.*, CA-6, 63-2 USTC ¶9655, 321 F2d 562 (1963), the court rejected the IRS's position that a nontaxable distribution was a capital expenditure, stating: "[i]t is our view that the [in lieu] payment is allowed as a deduction, not because it is a repayment of a particular kind of 'dividend' which the lender would have received if the stock had not been borrowed, but because it is a repayment to the lender of what he has lost by lending his stock to the borrower, which the borrower is obligated to repay by reason of his contract with the lender. It is a contractual expense incurred by the taxpayer as a necessary cost of obtaining for a temporary period the use of the stock of another, irrespective of whether it is a taxable or nontaxable dividend to the purchaser." The court went on to deny the taxpayer's deduction on other grounds, but the discussion quoted above does inject a degree of uncertainty as to the proper treatment of an in lieu payment in respect of a nontaxable distribution (such as a return of capital). For further discussion, *see* Jeff Maddrey, *Accounting for Income from Securities Lending Transactions,* 12 J. Tax'n Fin. Prods. 2 (2014).

17 The commentary provided on this provision describes the potential taxability of digital asset loans as an "absurd result." *www.lummis.senate.gov/press-releases/lummis-unveils-digital-asset-tax-legislation/*.

18 Code Sec. 1091(d); Reg. §1.1091-2 and Code Sec. 1223(3); Reg. §1.1223-1(d).

19 GCM 34630 (1971); Rev. Rul. 71-568, 1971-2 CB 312. *See also Corn Products Refining Co.*, CA-2, 54-2 USTC ¶66,082, 215 F2d 513; *Sicanoff Vegetable Oil Co.*, 27 TC 1056, Dec. 22,310 (1957), *rev'd* on *other grounds* CA-7, 58-1 USTC ¶9233, 251 F2d 764.

20 Rev. Rul. 74-218, 1974-1 CB 202.

21 There have been prior proposals to revise Code Sec. 1091 to include digital assets. See the budget reconciliation legislation known as the "Build Back Better Act" passed by the House of Representatives on November 19, 2021, pursuant to instructions in S. Con. Res. 14, the Concurrent Budget Resolution for FY2022, S.Con.Res.14,

117th Cong. (2021–2022). Substantively identical proposed wash sale rules were introduced in the Senate by Senator Ron Wyden on December 11, 2021. For a discussion of this prior proposal *see* Joshua Tompkins and Liz Dyor, *Related Party Wash Sale Transactions: An Evaluation of the Current State of the Law and Recent Legislative Proposals,* 19 J. Tax'n Fin. Prods. 2 (2022); NYSBA Report No. 1456—*Comments on Wash Sale Provisions of the House Proposals for the Build Back Better Act*, January 14, 2022. Subsequently, a bill from Sens. Cynthia M. Lummis, R-Wyo., and Kirsten E. Gillibrand, D-N.Y. introduced in July 2023 set forth provisions related to digital assets and wash sales.

[22] *See, e.g.,* L. Farr and M.S. Farber, *Dirty Linen: Airing Out the Wash Sale Rules,* 3 J. Tax'n Fin. Prods. (2002).

[23] Code Sec. 1091(d) provides:

> If the [acquired] property consists of stock or securities the acquisition of which (or the ... option to acquire which) resulted in the nondeductibility ... of loss from the sale ... of substantially identical stock or securities, then the basis shall be the basis of the stock or securities so sold ... increased or decreased ... by the difference, if any, between the price at which the property was acquired and the price at which such substantially identical stock or securities were sold ....

In situations where a taxpayer sells stock and enters into an option to acquire such stock, it is not entirely clear that Code Sec. 1091(d) tacks basis to the option. Instead, the statute could be read to tack basis only on stock or securities acquired through the exercise of that option. Obviously, this would be a harsh result ungrounded in any policy concern and we are unaware of the IRS taking this position.

[24] Code Sec. 475(a).

[25] Code Sec. 475(d)(3)(A)(i).

[26] Code Sec. 475(c)(2).

[27] Notice 2014-21, IRB 2014-16, 938.

[28] As a technical matter, this may not necessarily be true in all cases. Included in the definition of a security under Code Sec. 475(c)(2)(C) is any "note, bond, debenture, or other evidence of indebtedness." Some commentators have suggested that "traditional" (non-algorithmic) stablecoin investments could be classified as debt instruments because holders have a legally enforceable claim to demand that the sponsor redeem its stablecoin for U.S. dollars and have a reasonable expectation that the sponsor will have sufficient liquid assets to meet a redemption demand. *See* New York State Bar Association, *Report No. 1461—Report on Cryptocurrency and Other Fungible Digital Assets* (April 18, 2022). However, given the "stable" nature of stablecoins, this point appears to be more academic than practical because there would presumably be only trivial mark to market adjustments for such assets. A more significant question is whether certain DAO tokens could be considered an interest in a widely held partnership (a security under Code Sec. 475(c)(2)(B)) or potentially a corporation (a security under Code Sec. 475(c)(2)(A)) if the DAO is a publicly traded partnership treated as a corporation under Code Sec. 7704.

[29] Code Secs. 475(e) and (f), respectively.

[30] Also included in the definition of a "commodity" is any notional principal contract with respect to any actively traded commodity, and certain other derivative financial instruments and hedges with respect to such commodities. Code Sec. 475(e)(2)(B)–(D).

[31] For a more detailed discussion of the tax implications of this determination, *see* Vadim Novik, *Hot Commodities and Hotshot Market Makers: Why Should I Care Whether Virtual Currencies Are Commodities for Purposes of Section 475?*, Taxation of Financial Products & Transactions 2022, Chapter 8.

[32] *See, e.g., MoneyGram Int'l, Inc.*, CA-5, 2021-1 USTC ¶50,159, 999 F3d 269, 274.

[33] One obvious exception to this general rule would be non-fungible tokens ("NFTs").

[34] The question of whether intangible property such as a digital asset can be a "commodity" is reminiscent of the jurisdictional battle in the late 1970s and early 1980s between the SEC and CFTC over the classification of financial instruments such as Treasuries and GNMAs as "commodities" for purposes of regulating futures contracts on those assets, a battle that finally was resolved by a jurisdictional accord reached between the SEC and CFTC in the Futures Trading Act of 1982, P.L. No. 97-444. *See, e.g., Board of Trade of the City of Chicago v. SEC*, CA-7, 677 F2d 1137 (1982), *vacated as moot*, 459 US 1026 (1982).

[35] *See* New York State Bar Association, *Report No. 1461—Report on Cryptocurrency and Other Fungible Digital Assets* (April 18, 2022).

[36] For a more detailed description of PoW and PoS systems and the tax considerations associated with each, *see* Ritter and Tompkins, *Proof of Stake—What's Really at Stake on the Tax Front?*, 19 J. Tax'n Fin. Prods. 1 (2022).

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

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

[39] IRB 2023-33, 484.

[40] 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*.

[41] 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.

[42] 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.

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

[44] *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, and as noted in our numerical example above, 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* Shakow, *Taxing Bitcoin and Blockchains: What the IRS Told Us (and Didn't)*, Tax Notes Fed. (Jan. 13, 2020); 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 (June 6, 2022); Reuven S. Avi-Yonah, *A Response to Professor Marian on Cryptocurrency Tax Policy*, 175 Tax Notes Fed. 1731 (June 13, 2022); Amanda Parsons, *May I Pay More? Lessons From Jarrett for Blockchain Tax Policy*, 176 Tax Notes Fed. 2063 (Sept. 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).

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

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

[47] *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] 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.

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

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

[50] *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).

[51] 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).

[52] IRS, Frequently Asked Questions on Virtual Currency Transactions, Question and Answer #4 and #6 *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 shouldn't bear on the character of the blockchain rewards as ordinary or capital.

[53] Code Sec. 1211.

[54] Code Sec. 1(h).

[55] Reg. §§1.1441-2(b)(2), (b)(3), and (c). This conclusion assumes that the foreign investor is not engaged in United States trade or business.

[56] Code Sec. 512(b)(5). If the staking rewards are not treated as gain, then it is presently unclear whether such reward constitutes unrelated business taxable income. *See* Ritter and Tompkins, *Proof of Stake—What's Really at Stake on the Tax Front?*, 19 J. Tax'n Fin. Prods. 1 (2022).

[57] A more limited deduction is available for taxpayers choosing the standard deduction.

[58] 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).

[59] Code Sec. 170(f)(11)(C).

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

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

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

[63] Reg. §1.170A-13(c)(7)(xi).

[64] *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.

[65] CCA 202302012 (Jan. 10, 2023) determined 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.

[66] This question was examined in detail in Ritter, Tompkins, and Dalbey, *Wrapped Bitcoin—Two Sides of the Same (Bit)coin?*, 18 J. Tax'n Fin. Prods. 2 (2021).

[67] The treatment of digital assets under these rules has become increasingly relevant with the advent of publicly traded digital asset treasury companies.

[68] It is not clear that stablecoins are subject to the excise tax under current law. In LTR 9704005 (Oct. 23, 1996), the IRS ruled that the excise tax did not apply to an instrument that did not bear interest. *See also* LTR 9743047 (July 30, 1997). Most stablecoins that exist today are non-interest bearing. Interest bearing stablecoins would need to contend not only with the excise tax, but also with the potential inapplicability of the Code Sec. 871(h) portfolio interest exception.

In addition to the argument that the excise tax is inapplicable on account of the non-interest bearing nature of stablecoins, some have argued that the blockchain could be considered a registry for purposes of the registered form requirement. *Cf.* LTR 9626056 (Apr. 11, 1996) (bankruptcy court judgement considered to be in registered form because it provided a record of the owner). However, one flaw to this argument is that the blockchain does not typically identify the actual owner of the digital asset wallet, it simply shows the wallet address.