

April 3, 2020

Via Email

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

The Honorable Michael J. Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Dear Assistant Secretary Kautter, Commissioner Rettig, and Chief Counsel Desmond:

The Chamber of Digital Commerce (the “Chamber”) is pleased to submit this letter providing comments and considerations for tax information reporting of digital asset transactions. The Chamber is the world’s largest blockchain trade association. Our mission is to promote the acceptance and use of digital assets and blockchain technology, and we are supported by a diverse membership that represents the blockchain industry globally.

Through education, advocacy, and close coordination with policymakers, regulatory agencies, and industry across various jurisdictions, our goal is to develop a pro-growth legal environment that fosters innovation, job creation, and investment. We represent the world’s leading innovators, operators, and investors in the blockchain ecosystem, including leading edge start-ups, software companies, global IT consultancies, financial institutions, insurance companies, law firms, and investment firms. Consequently, the

Chamber and its members have a significant interest in blockchain and distributed ledger technology.

1 Introduction

The proliferation of blockchain technology has led to a proliferation of digital assets that operate from those ecosystems. Demand for some of those digital assets has generated many questions on how the existing tax rules may apply to various activities and transactions involving such assets. One area needing attention is tax information reporting of digital asset transactions. While we have chosen this letter to focus on the clarifications needed for tax information reporting in the context of broker reporting under Section 6045 of the Internal Revenue Code¹ and certain closely related issues, we also intend to address other relevant issues separately.

The interpretation of existing tax rules for digital assets requires further clarification to make a meaningful impact on the industry and help taxpayers meet IRS expectations. The intent of this letter is to provide helpful information as you consider issuing additional guidance. The letter begins with a description of relevant and common business models for providing services related to digital assets and a description of typical providers and users of these services in the industry. The letter then discusses the key considerations in developing guidance for tax information reporting of digital asset transactions that are most relevant to these providers and users.² Specifically, we are recommending additional guidance and clarification as it applies to:

1. Brokers
2. Barter exchanges
3. Basis reporting
4. Reporting on Form 1099-K
5. Determination of where sales are effected for information reporting purposes

2 Industry Description

In this letter, we use a number of industry terms associated with digital assets that have been applied inconsistently in certain contexts and are clarified for tax purposes, below. The IRS may want to use these clarified terms to develop a taxonomy for classifying digital asset transactions to ensure that taxpayers understand which transactions involving digital assets are subject to tax information reporting requirements. It may be

¹ Unless otherwise stated, all references to “Code,” “Section” or “I.R.C. §” refer to the Internal Revenue Code of 1986, as amended, and in effect during the taxable period involved. In addition, unless otherwise stated, all references to “Treasury Regulation,” or “Treas. Reg. §” are to the Federal Income Tax Regulations in effect during the taxable period involved. Any reference to a Chapter is to a Chapter of the Code.

² We note that while only items of income and gain/loss are typically subject to information reporting (with some exception, *e.g.*, Form 1099-K), this letter does not discuss definitions of income as they apply to virtual currency. This is a complicated and nuanced area deserving of its own letter, and we intend to address the subject separately. Therefore, for purposes of this letter, we have focused solely on events that could trigger reporting such as dispositions due to sales, trading one digital asset for another or for cash, and income from the receipt of digital assets for compensatory purposes.

appropriate to clarify existing rules and definitions as applicable to this industry using this classification, and we also suggest the IRS be open to creating new definitions for unique digital asset types and transactions if needed. Please note that the explanation of terms given in this letter are specific to tax information reporting under the IRC Sections discussed.

2.1 Industry Terms

The following are key industry terms that are important to clarify for tax information reporting purposes.

2.2 Virtual Currencies

A “virtual currency” is a digital representation of value, other than a representation of the U.S. dollar or a foreign currency (“fiat currency”), that functions as a unit of account, a store of value, or a medium of exchange. For example, virtual currencies do not have legal tender status in any jurisdiction. Many tax regulators, including the IRS,³ deem virtual currencies to be “property.”

Virtual currencies differ from digital assets used in video game arcades and virtual games primarily intended for entertainment, because the former often carry additional rights or properties and can be transferred between parties as a means of exchange for transactions that occur outside of the “game” or ecosystem. They are also convertible to fiat currency or other property because there is often considerable demand for them, and exchanges and markets (or marketplaces) exist to satisfy the demand.

As property, the tax treatment of a virtual currency will vary by the user, its purpose for being held, and the rights attributable to the holder. The guidance provided by the IRS in Notice 2014-21, and in subsequent FAQs and a revenue ruling, state that virtual currencies should be taxable as “property” and not fiat currency or a foreign fiat currency. This designation, while informative, raises a number of questions we explore below.

2.2.1.1 Types of Virtual Currencies

Different types of existing virtual currencies are described below. More accurately, “virtual currencies” should be referred to as “tokens,” “digital tokens,” or “digital assets,” because technically only sovereigns can issue “currencies.”

2.2.1.1.1 Asset-backed tokens

Asset-backed tokens are digital assets that represent some other asset, such as a fiat currency, diamonds, gold, precious metals, baskets of assets, personal property, real property, intangible property, or even fractional interests in property. Some are a digital representation of a specific asset, while others represent a right to claim an asset. The tax treatment of asset-backed tokens may differ depending upon its properties, such as

³ See IRS Notice 2014-21.

what rights are given to holders with respect to the underlying assets and how they can be used.

2.2.1.1.2 Stablecoins

Stablecoins are digital assets for which the value is pegged to an external value, such as fiat currency, cryptocurrency, or other financial asset, that is often designed to limit price volatility. The market value of stablecoins may deviate from the value of a referenced asset to which the stablecoin is pegged, due to implied transaction costs.

2.2.1.1.3 Utility tokens

Utility tokens are digital assets that allow a holder to use or exchange the token for a good or service in a functioning system or blockchain network or application. These can be used to access a platform or ecosystem or to interact with a smart contract.

2.2.1.1.4 Security tokens

For tax purposes, security tokens are digital assets that represent equity, a similar ownership interest, or other deemed right in a business or enterprise. They may function similarly to a traditional “security” as dictated by SEC frameworks. While a few enterprises have issued tokenized debt, tokenized equity, or tokenized derivatives contracts (which may be considered “securities” for tax purposes), there are many digital assets which may be considered securities by SEC standards but not for tax purposes.

The Chamber encourages the IRS to consider these differences in types of digital assets when it writes rules relating to such assets, subject to the limitations of its regulatory authority. There may be reasons for distinguishing between types for purposes of applying a substantive tax rule. Many of these reasons can be found in policies underlying various sections of the Code and which limit their operative rule to certain asset classes. A comparable level of care should be exercised when crafting rules in this space, sensitive to types of digital assets and business models which could be impacted.

2.3 Business Models and Services

This industry is evolving rapidly. We believe it is therefore helpful to provide a description of the industry’s current ecosystem, the participants, and the relevant transaction types. While many traditional businesses are now beginning to engage with digital assets, a number of emerging enterprises have created entirely new business models. While this list represents the currently known business models, it is important to maintain flexibility in any guidance to accommodate others yet to be developed.

2.3.1 Custodians

Custodians safeguard and hold digital assets, or the private keys to digital asset wallets, for their customers under agreement with the customer. The manner of safeguarding varies by custodian with some using physical security (*e.g.*, controlling physical access

to networks or other environments where the digital assets are tracked) and others using a technology-based security.

Custodians create trust in the industry by re-assuring customers (consumers, businesses, investors) that their digital assets will not be lost, stolen, or otherwise disappear. Custodians may charge customers a fee for their services, often paid in the underlying assets the custodian holds. Some custodians also enable the exchange of digital assets for other digital assets or fiat currency, while earning revenue from commissions on the exchanges. Other custodians pay customers for the amount of assets placed with them. Custodians may lend or invest the customer's digital assets for the benefit of the custodian and pay a fee to incentivize the customer to allow the custodian to hold their assets.

2.3.2 Exchanges

Exchanges facilitate trades of digital assets amongst customers or third parties, including trades of a digital asset for:

- Another digital asset (*e.g.*, a trade of bitcoin for litecoin); or
- Fiat currency (*e.g.*, trade of bitcoin for U.S. dollars).

Many exchanges allow their customers an “on-ramp” or “off-ramp” to fiat currencies (*i.e.*, customers may buy or sell digital assets for fiat currencies on an exchange), via linkage to depository institutions or payment processors. Other exchanges allow only non-fiat based transactions. Exchanges also vary in the manner in which fees are charged and ability of the exchange to act as a principal or counterparty in an exchange. The following are two different types of exchanges:

- Centralized exchanges, which facilitate transfers of digital assets for customers who seek to buy or sell digital assets and fill orders from digital assets. Some of the customers' digital assets involved in these transactions are custodied by the exchange. The vast majority of digital asset transactions occur on centralized exchanges.
- Decentralized exchanges, which facilitate the exchange of digital assets between third parties but which are not controlled by any one person or enterprise.

2.3.3 E-Commerce Marketplaces and Payment Processors

Some online marketplaces or e-commerce sites may accept digital assets as a form of payment for purchases of goods and services. Such marketplaces should not be considered “exchanges” for purposes of this paper. Marketplaces that accept digital assets as a form of payment may work with third-party payment processors. Most payment processors receive digital assets from consumers and process the payment by converting the accepted digital assets to fiat currency on a real-time basis and then remitting the fiat currency to the marketplace or seller, less a fee.

2.3.4 Wallets

Wallets are software applications or other digital mechanisms for transferring and otherwise managing digital assets (e.g., hold, buy, sell, or trade). A wallet can be hosted or non-hosted. Hosted wallets are those whereby the developer of the wallet software maintains the private key to the digital assets of the user under an agreement with the user or allows the user the option to hold the private key with a third-party custodian. A non-hosted wallet facilitates engagement by users but does not maintain the private key on behalf of the user. Wallet services are often provided in conjunction with other services described above.

2.3.5 Investors

For tax purposes, an investor is a taxpayer who buys and sells for its own account, but not as part of a trade or business.⁴ Investors include individuals and entities who hold and use digital assets as a store of value. Investors may be consumers or institutional and retail investors, who hold or use digital assets for future appreciation or as an income producing asset. Investors may directly own digital assets through a purchase, or indirectly through a fund.

2.3.6 Other Users

Certain enterprises hold digital assets for a business use, such as accessing a blockchain-based platform or application needed to operate. Further, certain consumers hold digital assets for personal reasons, such as accessing a blockchain-based entertainment application or to procure goods or services.

2.3.7 Node Operators, Miners and Validators

Node operators, miners, and validators provide infrastructure support to blockchain protocols. Blockchain protocols reward them for their work with digital assets from the protocol.

2.3.8 Traders

For tax purposes, a trader is a taxpayer who buys and sells for its own account as part of its trade or business.⁵ Furthermore, to be considered a trader for tax purposes, a taxpayer must meet the following two-prong test: (1) the taxpayer's trading strategy must attempt to catch the swings in market movements; and (2) the trades must be "frequent, regular, and continuous."⁶ In the digital asset industry, a trader is typically a taxpayer who seeks to profit from the movement in the price of digital assets, normally short term, by using manual or automated processes to effect trades on its own behalf.

⁴ See Arberg v. Commissioner, T.C. Memo. 2007-244.

⁵ See Arberg v. Commissioner, T.C. Memo. 2007-244.

⁶ See Chen v. Commissioner, T.C. Memo. 2004-132.

2.3.9 Dealers

For tax purposes, a dealer is a taxpayer who regularly purchases from and sells to customers in the ordinary course of a trade or business, or who regularly offers to enter into, assume, offset, assign, or otherwise terminate positions with customers in the ordinary course of a trade or business.⁷ In the digital asset industry, an example of a dealer is a taxpayer that acts as an intermediary between buyers and sellers and seeks to profit by earning a fee in exchange for executing transactions for its customers, or a fee on a bid-ask spread between buyers and sellers. Some dealers may settle transactions out of their inventory, while others may seek to earn fees by pairing buyers and sellers.

2.3.10 Creators

Creators of digital assets are developers or entrepreneurs who created blockchain protocols and associated digital assets. Creators may be a unified business or an open sourced network of collaborators who create and define ecosystems and digital assets. Creators may develop a protocol and maintain it, or may disengage from managing or overseeing the protocol, leaving such role to other parties, open source collaboration efforts, or smart contracts. Creators typically own a tranche of the digital asset they created.

3 Tax Information Reporting and Areas for Guidance

Tax information reporting is critical to the integrity of the U.S. tax system in that it allows the IRS to have greater confidence in income, gain, and loss amounts taxpayers report on their tax return, and provides taxpayers with the data to help taxpayers compute these amounts at the outset. This is particularly important where income, gain, or loss arises throughout the year, or where transactional activity is active or complex.

Currently, there is great uncertainty regarding how and when the existing broker tax information reporting rules under Chapter 61 apply and, more specifically, how Section 6045 applies to digital asset ecosystem participants. This uncertainty has led to reporting results that provide little insight into true net gain or loss amounts and has left large parts of the ecosystem outside the scope of Chapter 61. The IRS's guidance on virtual currency to date shed little light into the application of Section 6045 to the ecosystem.

3.1 Impacts of Tax Information Reporting Guidance on the Industry

The industry is eager to comply with IRS requirements and expectations; however, the lack of clear guidance from the IRS on information reporting makes it difficult. Foremost is the risk that the rules will be applied inconsistently across the industry, resulting in over and underreporting of information to the IRS.

⁷ Section 475(c)(1).

3.1.1 Risks the Industry Faces in the Absence of Clear Guidance

3.1.1.1 *Uncertainties around Penalties and Tax Liability*

There is a risk that the IRS could seek penalties and collection of backup withholding tax for information reporting gaps, without first providing clear guidance as to how taxpayers should comply.

3.1.1.2 *Time and Effort to Build Effective Processes*

If the IRS issued clear guidance that required taxpayers to build new systems and processes, or to make substantial operational and systems modifications in order to comply, then we request that taxpayers be given a reasonable period to comply. The industry also asks the government to consider the cost and effort to build the systems, and also customer preferences for simplified onboarding, data collection, security, and privacy. Consumers today, understandably, prefer to provide less of their private information unless clearly necessary.

3.2 Applying Existing Information Reporting Rules to the Digital Asset Ecosystem Participants

It seems clear that tax information reporting obligations, even under existing rules, may apply differently to ecosystem participants based on the relevant digital asset at issue, the role the ecosystem participant is playing, whether the participant is domestic or foreign, and whether an activity or account is offshore. But clarification of how the rules apply is needed. Our letter is focused on participants that have potential Section 6045 obligations as brokers (as opposed to Section 6041 or 6049 obligations) because that is where we see the most uncertainty currently.

3.2.1 Section 6045 “Broker” Reporting Definitions

Section 6045 requires brokers to file information returns on Forms 1099-B reporting gross proceeds and other information on customer transactions with U.S. persons.⁸ Certain definitions and concepts are central to the application of Section 6045:

- A **broker** is any person who, in the ordinary course of a trade or business, stands ready to **effect sales** to be made by others.⁹ Brokers are defined to include dealers, barter exchanges, and any other person who (for consideration) regularly acts as a middleman with respect to property or services.¹⁰
- **Effecting sales** refers to a broker acting as agent for a party in a sale in a manner where it ordinarily would know the gross proceeds from the sale, or by acting as principal in the sale.¹¹

⁸ Section 6045(a).

⁹ Treas. Reg. § 1.6045-1(a)(1).

¹⁰ *Id.* See also Section 6045(c)(1)(B).

¹¹ Treas. Reg. § 1.6045-1(a)(10).

- A **sale** is any disposition of **securities, commodities**, options, regulated futures contracts, securities futures contracts, or forward contracts, but only to the extent that cash is received on the disposition.¹²
- **Securities** are defined as stocks, bonds, interests in a trust or partnership, and certain derivatives.¹³
- **Commodities** are defined as any “type” of personal property (other than securities) (a) the trading of regulated futures contracts in which has been approved by the Commodity Futures Trading Commission, or (b) the IRS designates as a commodity by notice in the Federal Register.¹⁴
- Brokers who transact in **covered securities** are also required to perform additional reporting relating to acquisition date, holding period, basis, and transactions subject to the wash sale rules.¹⁵
- A **barter exchange** is “any person with members or clients that contract either with each other or with such person to trade or barter property or services either directly or through such person.”¹⁶

Whether an entity is a broker for purposes of the Section 6045 rules cannot be determined without going through each of these definitions as they each build on each other. For example, someone who stands ready to affect sales is not a broker if the thing they stand ready to sell does not also qualify as property subject to the definitions above.

3.2.2 Section 6045 & Digital Assets

This section identifies possible applications of the Section 6045 rules to digital assets and highlight areas where further guidance is needed.

3.2.2.1 Brokers that Are not Barter Exchanges

The absence of any mention of digital assets (or virtual currency) in Section 6045 has resulted in uncertainty as to whether the Section applies to transactions in digital assets. This is particularly true for businesses that qualify as “brokers” under Section 6045 but are not barter exchanges.

The Section 6045 rules relating to brokers which are not barter exchanges only apply to “effecting sales” in “securities” and “commodities” as defined above. Under existing guidance, digital assets such as bitcoin and ether are not “securities” as defined in Section 6045, and any designations made by the Securities and Exchange Commission or the Financial Crimes Enforcement Network are not determinative for tax purposes. Similarly, a digital asset is not clearly a “commodity” for purposes of Section 6045 either. The rule states a digital asset would be a “commodity” where (a) it is a “type” of

¹² Treas. Reg. § 1.6045-1(a)(9).

¹³ Treas. Reg. § 1.6045-1(a)(3).

¹⁴ Treas. Reg. § 1.6045-1(a)(5).

¹⁵ Section 6045(g).

¹⁶ Treas. Reg. § 1.6045-1(a)(4).

personal property (or an interest therein) for which trading in regulated futures contracts has been “approved” by the Commodity Futures Trading Commission (“CFTC”), or (b) the IRS designates the digital asset to be a commodity by notice in the Federal Register.¹⁷

Prior to 2019, the futures trading that occurred in bitcoin was the result of the CFTC self-certification process.¹⁸ The (a) self-certification process, and (b) approval process, of the CFTC for futures trading are distinct, and many believed that the CFTC action (or inaction) on bitcoin futures did not rise to the level of the “approval” contemplated in triggering the reporting of transactions in digital assets. Moreover, whether digital assets other than bitcoin are the same “type” of asset as bitcoin is a separate question, as “type” is not a technical tax term.

During 2019, press reports indicated that the CFTC approved LedgerX¹⁹ as a “contract market” and ErisX²⁰ to trade bitcoin futures contracts. It is not clear, however, that these actions qualify as the “approval” required under Section 6045 to qualify bitcoin (or any other digital asset) as a commodity, especially in light of the CFTC’s own statements in 2017 that self-certifications completed in those periods do not constitute an “approval.”²¹

3.2.2.2 Clarifications Needed about “Brokers”

We suggest that the IRS and Treasury clarify:

- When a digital asset should be treated as a “security” under Section 6045;
- Whether the CFTC actions meet the standard causing a digital asset to be treated as a “commodity” under Section 6045;
- Whether a digital asset other than bitcoin is the same “type” of asset as a CFTC – approved bitcoin futures contract; and
- How future CFTC self-certifications or similar activity should be seen as qualifying other digital assets as “commodities” under Section 6045.

Alternatively, the IRS could clearly move away from reliance on CFTC actions and adopt a policy regarding those digital assets that are to be treated as “commodities” for tax information reporting purposes under the IRS’s authority to make such a designation under Treas. Reg. § 1.6045-1(a)(5)(iii).

The Chamber also suggests that the IRS’s rules first focus on the reporting that centralized exchanges, as opposed to decentralized, would do given that the vast majority of trading occurs on centralized exchanges.

¹⁷ Treas. Reg. § 1.6045-1(a)(5).

¹⁸ See Press Release, CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange, COMMODITY FUTURES TRADING COMM’N (Dec. 1, 2017), <https://www.cftc.gov/PressRoom/PressReleases/pr7654-17>.

¹⁹ Press Release, *CFTC Approves LedgerX LLC as a Designated Contract Market*, COMMODITY FUTURES TRADING COMM’N (June 25, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7945-19>.

²⁰ *Current Futures Products*, ErisX, <https://www.erisx.com/product/futures/> (last visited Feb. 19, 2020).

²¹ See CFTC *supra* note 18.

3.2.2.3 Basis Reporting

Section 6045(g) requires basis reporting for “covered securities” as well as an indication as to whether any gain or loss is long or short term. Commodities (including derivatives in the commodity) are included in the definition of covered securities if the IRS determines that basis reporting is appropriate.²² Conversely, a broker is not required to report basis or the character of gain or loss for noncovered securities. Section 6045(g) uses the same definition of commodities as that which was discussed above. Given the uncertainties discussed above, there is currently not any clear mandate for brokers that requires basis reporting under Section 6045 for digital assets.

In addition to this uncertainty, it is often the case that a broker does not know the basis of a digital asset that is transferred into a taxpayer’s account or wallet on the exchange²³. Some exchanges have begun requiring taxpayers to indicate whether the transfer is from another wallet of the taxpayer or a third party. This is relevant to the basis determination, as a transfer between wallets or accounts of the same taxpayer does not affect basis, while a purchase into an account or wallet would take a basis equal to the fair market value at the time of acquisition.²⁴

It would take substantial effort, time, and cost to upgrade software to report basis figures for digital assets. As such, the Chamber requests that if the IRS and Treasury adopt rules requiring basis reporting requirements, the requirements (a) allow time for software design and implementation, and (b) only be imposed in a way that provides assurance that basis data would be meaningful for compliance and enforcement purposes. Imposing substantial cost burdens on brokers to report cost basis when the data has little compliance or enforcement value is not, we think, in the interest of sound tax administration or a valuable expenditure of resources.

3.2.2.4 Clarifications Needed about “Basis Reporting”

We suggest that the IRS and Treasury clarify:

- When a digital asset or digital asset-based derivative instrument is a “covered security” for basis reporting purposes;
- When an exemption from basis reporting applies because, despite reasonable efforts, the basis is not known by the broker – which is often the case for digital assets which are not purchased on the broker’s platform, or provide standards of

²² Section 6045(g)(3)(B)(iii).

²³ Different than traditional securities, digital assets may have an originating purchase with a broker, an exchange, or directly from another source. There are difficulties for exchanges reporting taxpayers’ cost bases if the digital assets are transferred between multiple exchanges and/or wallets. Importantly, the originating wallet may not be held or controlled by a broker or exchange.

²⁴ A system that wholly relies on this self-certification of basis may not be entirely reliable. However, the IRS and Treasury could address this reliability issue with regulations that create a presumption that the taxpayer’s basis in a digital asset is zero unless the taxpayer can demonstrate otherwise with documentation and/or transactional data. This will place the onus on the taxpayer to maintain accurate records.

when “0” or “unknown” basis may be reported when circumstances exist that do not allow accurate tracking;²⁵ and

- Whether average cost basis is a permissible method to determine the basis of an asset sold. The current regulations under the Section 1012 regulations would not seem to allow that.

3.2.3 Brokers that Are Barter Exchanges

As noted above, the rules relating to Form 1099 reporting for barter exchanges are distinct from those that apply to brokers that effect sales of commodities and securities. The concept of “barter exchanges” under the existing rules were not created with digital assets in mind.

3.2.3.1 Clarifications Needed about “Barter Exchange” Reporting

We suggest that the IRS and Treasury clarify:

- Whether and when a taxpayer facilitating exchanges of digital assets for other digital assets among third parties qualifies as a barter exchange; and
- Whether and when a taxpayer that facilitates the exchange of virtual currencies for goods and services qualifies as a barter exchange. A distinction should also be made between the direct exchange of digital assets for goods or services of a merchant, and an exchange that is effected through a third party that converts all digital assets sent to the merchant into fiat currency.

3.2.4 Forms 1099-K

Some taxpayers that operate exchanges for digital assets or marketplaces that accept digital assets as a form of payment have opted to file Forms 1099-K (under Section 6050W relating to third party settlement organizations).²⁶

3.2.4.1 Clarifications Needed about “Form 1099-K reporting”

The Service should revisit this guidance and apply it to the various business models discussed in this letter to clarify when Form 1099-K reporting does or does not apply. The IRS should also clarify whether its expectation is that certain business models require Form 1099-B reporting rather than Form 1099-K reporting, as discussed above.

3.3 Transactions in/outside of the United States

The definition of broker includes both U.S. and foreign brokers. However, Chapter 61’s application to transactions occurring outside of the United States is limited to Section 6045’s definition of a “sale” to which the statute can apply. In particular, if a sale is affected at an office outside the United States, only a U.S. payor or U.S. intermediary is deemed to be a broker and required to report.²⁷ Similarly, under Section 6050W,

²⁵ There is precedent for this under the Section 6045A regulations, which takes into account the complexities of ascertaining the accurate basis information.

²⁶ An example of the uncertainty is that Form 1099-K reporting is specifically discussed in IRS Notice 2014-21, which is subsequently silent about the tax information reporting required of brokers.

²⁷ Treas. Reg. § 1.6045-1(a)(1).

presumption rules to determine U.S and non-U.S. status of payees differ depending on whether a transaction takes place inside or outside the United States. Clarity on how such transactions should be viewed under these rules is necessary to help taxpayers know when and how to comply.

3.3.1 Clarifications Needed about where Transactions Take Place

The IRS and Treasury should provide clarity on what factors (*e.g.*, location of purchaser’s invoicing address, the location of “download” or “receipt, or actions taken to access a wallet”) determine whether a digital asset “sale” is effected outside of the United States.

4 Conclusion

We believe Treasury and/or the IRS should issue clear guidance defining tax information reporting obligations for the circumstances discussed above. As the General Accounting Office (“GAO”) noted in its recent report advocating clarification of tax information reporting obligations,²⁸ taxpayers, including those businesses in the digital asset industry, have “The Right to be Informed” under the IRS’s Taxpayer Bill of Rights in terms of having the right to know what they need to do to comply with the tax laws. The current guidance on information reporting for the digital asset industry does not identify how digital asset businesses should comply.

Issuing clearer guidance stands only to benefit the IRS and the industry. The IRS would benefit from clear expectations about the type of tax information it is to receive on Forms 1099 or other information returns. The industry would benefit from having clear expectations about reporting obligations so it can plan, budget, and invest in personnel, systems, processes, software, and other infrastructure in order to comply.

Given the time and effort businesses will require to build systems and remediate populations to comply, the Treasury and IRS should provide at least a 24-month implementation period beginning on the date of the publication of the final regulations in the Federal Register to implement Form 1099 reporting and backup withholding. These periods will allow sufficient time for affected payors to understand the rules, gather necessary tax documentation (*e.g.*, Forms W-8 and Forms W-9), and notify customers of the new rules. The IRS and Treasury have provided generous transition periods to allow adaptation and to minimize industry disruption with respect to other complex tax information reporting obligations in the past.²⁹

²⁸ See U.S. Gen. Accountability Office, *GAO 20-188, Virtual Currencies: Additional Information Reporting and Clarified Guidance Could Improve Tax Compliance* (2020).

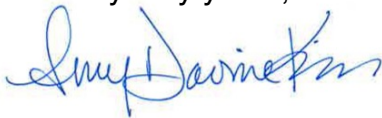
²⁹ For example, a four-and-a-half-year transition was allowed for payment processors with Form 1099-K obligations under Section 6050W before full enforcement of backup withholding and information reporting penalties. This included issuance of Notices 2011-88 and 2011-89 in October of 2011 to allow an additional, last minute extension (until 2013) for backup withholding, as well as an agreement to accept “good faith efforts” with respect to Form 1099 filing/issuance obligations in the first year the new Form 1099 filings were due in 2012. Similar transition periods and extensions were provided for the Foreign Account Tax Compliance Act (FATCA) under Sections 1471-1474, and for cost basis reporting under Section 6045.

In the case of digital assets and virtual currencies there has been no clarifying legislation, regulations, or clear guidance addressing the information reporting obligations for the activities discussed in this letter. Even with extensive statutory and regulatory mandates for Form 1099-K, FATCA, and cost basis reporting, transitions periods to comply were still needed in those cases. Thus, if anything, the lack of any clear statutory or regulatory mandates and guidance in this case, justifies the need for an adequate transition period after any clarifying guidance is issued. The Treasury and IRS should consider similar, adequate transition periods to implement any clarifying guidance.

* * *

The Chamber is pleased to serve as a resource to the Treasury and IRS on these matters, and we look forward to working with you to consider and address them.

Very truly yours,



Amy Davine Kim
Chief Policy Officer