

Proposed Regulations Would Impose New Reporting Requirements on Transactions Involving Cryptocurrency and Other Digital Assets

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In response to a provision in the 2021 Infrastructure Investment and Jobs Act, the Department of the Treasury and the Internal Revenue Service (IRS) have issued proposed regulations that would impose new tax reporting requirements for digital asset brokers starting with the 2026 tax filing season, with respect to sales and exchanges of digital assets taking place on or after Jan. 1, 2025.

The proposed regulations would add anyone “that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales [of digital assets] to be made by others” to the definition of a broker required to provide tax forms with certain information—including names, addresses, taxpayer identification numbers, the type of digital asset sold, gross proceeds, and, under certain circumstances, basis information—to the IRS and customers with respect to transactions in which digital assets are exchanged for cash, stored-value cards, different digital assets, broker services, or other property that is subject to reporting under existing law. This revised definition would include centralized and decentralized digital asset trading platforms, crypto payment processors, and certain online wallet providers.

For purposes of the proposed regulations, a digital asset is “any digital representation of value that is recorded on a cryptographically secured distributed ledger (or similar technology).” The IRS has indicated that this definition is intended to be expansive and cover “all types of digital assets,” including not just

cryptocurrencies, like bitcoin (BTC) and ether (ETH), but also other digital assets, such as stablecoins and non-fungible tokens (NFTs). However, the proposed regulations are not intended to apply to assets that exist only in a closed system (such as video game tokens that can only be used in-game and cannot be sold outside the game or for fiat currency) or to “uses of distributed ledger technology (or similar technology) for ordinary commercial purposes that do not create new transferable assets, such as tracking inventory or processing orders.”

These reporting rules contain a number of exceptions and exclusions, including as follows:

- Exceptions to broker reporting of securities and commodities sales under current law, such as sales effected on behalf of certain exempt recipients (e.g., certain corporations, financial institutions, tax-exempt organizations, or governments or political subdivisions thereof) would also apply to digital asset sales.
- Persons providing only distributed ledger validation services, whether through proof-of-work (i.e., mining), proof-of-stake (i.e., staking), or any similar consensus mechanism, and persons selling hardware or licensing software that does not provide direct access to trading platforms but instead solely permits persons to control private keys used to access digital assets, would not be treated as brokers subject to these reporting requirements.
- Transactions “in which a customer receives new digital assets without

disposing of something else in exchange,” such as those in which a customer receives new digital assets in a hard fork or airdrop, would not be reportable under the proposed regulations.

The proposed regulations also include rules for reporting sales of certain financial contracts involving or referencing digital assets (such as options on digital assets) and certain reportable real estate transactions in which digital assets are received as consideration.

Furthermore, the proposed regulations provide the tax rules for determining a taxpayer’s amount realized on the disposition of digital assets and the taxpayer’s basis in purchased digital assets. Specifically, the proposed regulations address exchanges of digital assets for services or other property, including different digital assets, and dispositions of less than all of a taxpayer’s holdings of a particular digital asset if the taxpayer purchased those holdings at different times or for different prices. With respect to the latter, if the taxpayer does not specifically identify on its books and records

(or, if the digital asset is in the custody of a broker, notify the broker of) the units of the particular digital asset being disposed of, the units would be treated as “disposed of in order of time from the earliest units acquired” (i.e., first in, first out). The proposed regulations also provide rules for allocating transaction costs when one digital asset is exchanged for another digital asset, pursuant to which any allocation made by the parties effecting the exchange would be disregarded and the total digital asset transaction costs would be split equally between the disposition of the transferred digital asset and the acquisition of the received digital asset.

A proposed new tax reporting form called Form 1099-DA is meant to help brokers satisfy these reporting requirements. Brokers would need to send this form to both the IRS and digital asset holders to assist with their own tax preparation.

The Department of the Treasury and the IRS are taking written comments on the proposed regulations until Oct. 30, 2023, and a public hearing has been scheduled for Nov. 7, 2023.

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