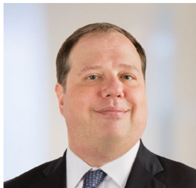
Recent Legislative Proposals and IRS Guidance on the Taxation of Digital Assets

A Practical Guidance® Article by Martin T. Hamilton, David S. Miller, Amanda H. Nussbaum, Rita N. Halabi, and Kathleen R. Semanski, Proskauer Rose LLP



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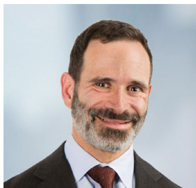

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This article summarizes recent federal bills that have been introduced (but not yet passed), proposals by the Biden Administration, and guidance issued by the Internal Revenue Service with respect to the taxation of digital assets.

Summary of the Guidance

The Responsible Financial Innovation Act (the "RFIA") introduced in Congress by Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) on June 7, 2022.

- Would exempt from tax up to $200 of income or gain per transaction (adjusted for inflation) from virtual currency used for the purchase of goods or services in a "personal transaction" (i.e., not in connection with a trade or business or otherwise for profit).
- Would appear to require the IRS to adopt regulations that defers tax from forks, airdrops, staking and other gains that accrue to a digital asset through market transactions until the gains are disposed of. These regulations would reverse Revenue Ruling 2019-24, which provides that airdrops give rise to current tax.
- Would narrow the definition of "digital asset brokers" required to report transfers of digital assets. Under RFIA, a broker would be "any person who (for consideration) stands ready in the ordinary course of a trade or business to effect sales of digital assets at the direction of their customers", which would exclude miners and stakers, digital wallet providers, network developers and other administrative or operative service providers), all of which are currently included.
- Would redefine the term "digital asset" to be more comprehensive and specific, but the new definition would not fundamentally change the current definition.
- Would extend the section 864(b)(2) "trading safe harbor" to include digital assets (which would permit U.S. hedge and private equity funds to trade digital assets on behalf of non-U.S. investors without causing those non-U.S. investors to be subject to U.S. federal income tax).

- Would treat decentralized autonomous organizations as "business entities" for U.S. federal income tax purposes, which allows them to be treated as "disregarded entities", partnerships, corporations or tax-exempt entities.
- Would allow digital assets to be "loaned" on a tax-free basis (i.e., qualify for the same rules available for securities).
- Would defer income inclusion from digital asset mining and staking until disposition of the underlying digital asset.
- Would provide that taxpayers need not obtain appraisals in order to claim a charitable deduction for donations of digital assets with a value in excess of $5,000.
- Would instruct the IRS to issue guidance on additional issues, including the tax treatment of hard forks and air drops, within a year.

The Virtual Currency Tax Fairness Act

On July 26, 2022, Senators Patrick Toomey (R-PA) and Kyrsten Sinema (D-AZ)) proposed the Virtual Currency Tax Fairness Act, which would exempt cryptocurrency transactions of $50 or less from tax.

S. 4751

On August 3, 2022, Senators Toomey, Sinema, Lummis, Mark Warner (D-VA) and Rob Portman (R-OH) introduced S. 4751, which would modify and narrow the definition of "broker" for purposes of the reporting requirements for digital assets added by the Infrastructure Investment and Jobs Act (the "Infrastructure and Jobs Act"). As noted above, the RFIA contains an identical proposal.

IRS Guidance

- The 2022 Form 1040 instructions (released in 2023) clarify the reporting of digital asset transactions.
- Announcement 2023-2provides interim guidance on digital asset broker reporting requirements until regulations are issued.
- Notice 2023-27provides preliminary guidance on the treatment of non-fungible tokens ("NFTs") as section 408(m) collectibles until regulations are issued.
- Notice 2023-34revises Notice 2014-21 to acknowledge that "certain foreign jurisdictions" (i.e., El Salvador) treat Bitcoin as legal tender, but otherwise reaffirms the conclusions in Notice 2014-21. Notice 2014-21 was the Notice that treated convertible virtual currency (i.e., crytocurrency) as property for U.S. federal income tax purposes.

The Biden Administration (the "Green Book")

- Released on March 9, 2023
  - Proposes to apply wash sale rules to digital assets
  - Proposes a digital asset mining energy excise tax
  - Reproposes to apply the securities loan rules to digital assets
  - Reproposes to apply the mark-to-market rules to digital asset dealers and traders —and—
  - Reproposes requiring information reporting for digital asset transactions

I. The Responsible Financial Innovation Act

On June 7, 2022, Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced the RFIA. The RFIA proposes a comprehensive regulatory regime for digital assets, including several taxation provisions.

In addition, on July 26, 2022, Senators Patrick Toomey (R-PA) and Kyrsten Sinema (D-AZ)) proposed a much narrower bill, the Virtual Currency Tax Fairness Act, which would exempt cryptocurrency transactions of $50 or less from tax. (The RFIA has a similar exemption for transactions of $200 or less.)

On August 3, Senators Toomey, Sinema, Lummis, Mark Warner (D-VA) and Rob Portman (R-OH) introduced S. 4751, which would modify and narrow the definition of "broker" for purposes of the reporting requirements for digital assets added by the Infrastructure and Jobs Act. The RFIA contains an identical proposal.

In short, the RFIA provides several taxpayer-friendly provisions, but essentially leaves intact the IRS's existing framework for the taxation of digital assets. Under the existing framework, the exchange of a digital asset for dollars, goods or services gives rise to taxable gain, including for employees who receive digital assets as compensation. The RFIA also fails to indicate whether digital assets are subject to the straddle rules under section 1091 or the constructive sale provisions of section 1259, and whether taxpayers may mark-to-market their digital assets under section 475.

De Minimis Exclusion on Gain or Loss from Virtual Currency Transactions

The RFIA would exempt individuals from tax on up to $200 of gain or loss resulting from the disposition of

virtual currency in a "personal transaction" (generally, a transaction not for business or profit) for the purchase of goods or services. In other words, an individual could spend virtual currency to buy goods and services for personal use without paying tax on the appreciation in the virtual currency used to buy the goods and services, up to $200 of virtual currency gain per transaction. However, the sale or exchange of virtual currency for cash, cash equivalents or other digital assets (including other cryptocurrency) would not benefit from the exemption and would be taxable. In applying the $200/transaction threshold, dispositions that are part of the same transaction or series of related transactions would be aggregated.

The exclusion threshold proposed by the Virtual Currency Tax Fairness Act would only be $50, but, unlike the RFIA, transfers of virtual currency in exchange for other digital assets or virtual currency would be eligible for exclusion.[1] The definition of "virtual currency" for this purpose would include any digital representation of value that functions as a unit of account, a store of value, or medium of exchange other than a representative of the U.S. Dollar or any foreign currency.

Under both bills, the exclusion would apply for transactions entered into after December 31, 2022, and the threshold ($200 or $50) would be adjusted for inflation.

The RFIA would also authorize the IRS to issue regulations providing for information returns on virtual currency transactions that exceed the $200/transaction threshold.

Reporting Requirements for Digital Asset Brokers

The Infrastructure and Jobs Act imposes reporting requirements on digital asset brokers. Under the Infrastructure and Jobs Act, a digital asset broker is "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person"). The Infrastructure and Jobs Act's expansive definition of "broker" appears to subject miners and stakers (both of which validate transactions on the blockchain), digital wallet providers, network developers, and other administrative or operative service providers to broker requirements, even though these parties are not facilitating transactions between buyers and sellers of digital assets. The Infrastructure and Jobs Act's digital asset broker reporting requirements apply for returns required to be filed and statements required to be furnished after December 31, 2023.

The RFIA would make several changes to the Infrastructure and Jobs Act's digital asset broker reporting requirements. First, the RFIA would narrow the Infrastructure and Jobs Act's definition of "broker" to apply only to "any person who (for consideration) stands ready in the ordinary course of a trade or business to effect sales of digital assets at the direction of their customers." (The revised language matches the revision proposed by Representatives McHenry (R-NC) and Ryan (D-OH) in the Keep Innovation in America Act, H.R. 6006.) Whereas the Infrastructure and Jobs Act's definition of digital asset broker included miners and stakers, digital wallet providers, network developers and other administrative or operative service providers, the RFIA's definition would limit the definition to those receiving commissions and transaction fees for actually facilitating transactions between buyers and sellers of digital assets, such as cryptocurrency exchanges.

S. 4751, introduced in the Senate by Senators Toomey, Sinema, Lummis, Mark Warner (D-VA) and Rob Portman (R-OH), would further narrow the Infrastructure and Jobs Act's definition of "broker" to "any person who (for consideration) *regularly effectuates* transfers of digital assets on behalf of another person" (emphasis added). S. 4751 would also expressly exclude persons engaging in the following activities from broker status: (i) "validating distributed ledger transactions, without providing other functions or services" and (ii) "selling hardware or software for which the sole function is to permit a person to control private keys which are used for accessing digital assets on a distributed ledger," effectively exempting miners, stakers and wallet developers from the new broker reporting requirements. The Senate has not yet voted on this bill. (A similar bill, H.R. 5082, dubbed the "Cryptocurrency Tax Clarity Act"), was introduced in the House by Representative Darren Soto (D-FL-9).)

In addition, the RFIA would narrow the broker reporting requirement added to section 6045A by the Infrastructure and Jobs Act. Section 6045A generally requires a broker to file an information return for any transfer of "covered securities" that are "digital assets" from an account maintained by the broker to a non-broker account. Under the RFIA, this requirement would apply only to transfers from accounts "wholly controlled" and maintained by the broker, and would be limited to customer information voluntarily provided by the applicable customer and held by the broker for a legitimate business purpose.

Finally, the RFIA would effectively push back the start date for digital asset reporting requirements added by the Infrastructure and Jobs Act from January 1, 2023 to January 1, 2025.

Redefinition of "Digital Asset"

The Infrastructure and Jobs Act adopts a broad definition of "digital asset". Under the Infrastructure and Jobs Act, "digital asset" means "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary." This broad definition includes virtual currencies but could also potentially include NFTs and stablecoins.

The RFIA would redefine digital asset as a "'natively electronic asset' that confers economic, proprietary, or access rights or powers"; and is "recorded using cryptographically secured distributed ledger technology, or any similar analogue". The RFIA also provides that digital asset includes virtual currency and "ancillary assets", consistent with section 2(c)(2)(F) of the Commodity Exchange Act, payment stablecoins, consistent with section 403 of the Legal Certainty for Bank Products Act of 2000, and other securities and commodities, subject to the definition in the prior sentence.

The RFIA does not define "natively electronic asset". Under the RFIA, a "payment stablecoin" is digital asset that is (i) redeemable, on demand, on a one-to-one basis for instruments denominated in U.S. dollars and defined as legal tender under U.S. or for instruments defined as legal under foreign law (excluding digital assets defined as legal tender under foreign law); (ii) issued by a business entity; (iii) accompanied by a statement from the issuer that the asset is redeemable from the issuer or another identified person; (iv) backed by one or more financial assets (excluding other digital assets); and (v) intended to be used as a medium of exchange.

Under the RFIA, an "ancillary asset" as an "intangible fungible asset that is offered, sold, or otherwise provided to a person in connection with the purchase and sale of a security through an arrangement or scheme that constitutes an investment contract." The definition of "ancillary asset" explicitly excludes assets that provide the holder with a debt or equity interest, liquidation rights, entitlement to interest or dividend payments, a profit or revenue share based solely on the entrepreneurial or management of others, or any financial interest in the entity.

The RFIA's definition of "digital asset" includes "other securities and commodities" that satisfy the RFIA's definition of "digital asset" mentioned above. The RFIA defines "security" to have the meaning in section 3(a) of the '34 Act. The RFIA does not define "commodity".

Digital Asset Trading Safe Harbor for Non-U.S. Persons

Under current law, non-U.S. persons engaged in a trade or business within the United States are subject to U.S. federal income taxation on a net income basis. Section 864(b)(2) provides that a non-U.S. person that trades in stocks or securities for their own account, or trades in commodities for their own account (but only if the commodities are of a kind customarily dealt in on an organized commodity exchange and if the transaction is of a kind customarily consummated on such an exchange) is not engaged in a trade or business in the United States, and, therefore, is not subject to U.S. federal taxation on a net income basis, even if the trading is engaged in by an asset manager who is physically present in the United States. The trading safe harbor is not available for dealers.

The RFIA would amend section 864(b)(2) to expressly include an analogous safe harbor for trading in digital assets. The digital asset trading safe harbor would be limited to trading in digital assets of a kind customarily dealt in on a "digital asset exchange" (defined as a centralized or decentralized platform facilitating the transfer of digital assets) and only if the transaction is of a kind customarily consummated on such an exchange.

The treatment of mining, staking, and other transactions in digital assets (other than trading) remains unclear, although presumably a taxpayer that lends digital assets on a tax-free basis under the RFIA would not be disqualified from the safe harbor.

The digital asset trading safe harbor would apply to sales and exchanges after December 31, 2022.

Decentralized Autonomous Organizations (DAOs)

A decentralized autonomous organization, or "DAO," is an organization governed wholly under rules encoded in a smart contract rather than central management. A DAO may be created for a variety of purposes, including venture capital investment, or purely social/recreational. Under current law, the treatment of a DAO for U.S. federal income tax purposes, and the application of existing tax laws to such organizations, is unclear.

The RFIA would amend section 7701(a) to treat a "decentralized autonomous organization," or "DAO," as a business entity that is not a disregarded entity for U.S. federal income tax purposes tax purposes by default. For this purpose, the RFIA defines a DAO as an organization

which uses smart contracts to effectuate collective action for a business, commercial, charitable, or similar entity, is governed primarily on a distributed basis; and is properly incorporated or organized under the laws of a State or foreign jurisdiction as a decentralized autonomous organization, cooperative, foundation or any similar entity. This definition would exclude most "pure" DAOs, which exist only as a collective of rights embodied in smart contract and are not formally incorporated or organized any external legal authority. The treatment of pure DAOs would remain unclear.

The RFIA allows social clubs to mine and stake digital assets, or to raise funds (including through digital asset donations) without being treated as engaged in a business activity and jeopardizing their tax-exempt status.

These provisions would apply to taxable years beginning after December 31, 2022.

Digital Asset Lending Transactions

Under current law, transfers of securities in a securities lending transaction described in 1058 are not subject to tax. The RFIA would expand the definition of "securities" for this purpose to include digital assets. The RFIA would require lenders to include in their gross income amounts that would accrue to them absent the lending transaction.

The RFIA would grant the IRS the authority to make rules implement this amendment, including to apply it to forks, airdrops and similar proceeds.

Digital Asset Mining and Staking

The RFIA would provide that a taxpayer engaged in digital asset mining or staking does not recognize gross income from such activities until the taxable year of the disposition of the assets produced or received in connection with such activities.

This rule would change the rule announced by the IRS in Notice 2014-21, which provides that the fair market value of mining rewards is included in income on the date the mined currency is received by the taxpayer

The RFIA does not provide an effective date for this change.

Charitable Deductions

Under current law, a tax deduction for donations of digital assets with value in excess of $5,000 is not allowed unless the taxpayer obtains a "qualified appraisal"—even if the donated assets are readily tradable on public markets. The RFIA would exempt digital assets from these substantiation requirements, even if the digital asset is not readily tradable. This change would be effective for taxable years beginning after December 31, 2022.

IRS Guidance

The RFIA would require the IRS, *within one year of the RFIA's enactment*, to adopt guidance relating to the following:

- Apparently to provide that forks, airdrops, and similar proceeds are not taxable until the fork, airdrop, or similar proceeds are disposed of. More specifically, the RFIA requires that regulations be issued that provide for the classification of forks, airdrops, and similar proceeds as taxable, "contingent upon the affirmative claim and disposition of the subsidiary value by a taxpayer." We believe that the phrase "subsidiary value" should be "subsidiary proceeds," which the bill defines (in new section 9802I of Title 31 of the United States Code) to include forks, airdrops, staking, and other gains that accrue to a digital asset through market transactions, use as a financial asset, or being held in custody or safe keeping by a person who provides digital asset services." Accordingly, we believe that the RFIA intends to require regulations to provide that forks, air drops, and similar proceeds are not taxable until they are disposed of. Such a regulation would reverse Revenue Ruling 2019-24, which provides that digital assets received following a hard fork are currently taxable. This guidance would also permit a taxpayer to provide information to the IRS through annual return or other appropriate means relating to the claim and disposition, or disclaimer, of such proceeds.
- On merchant acceptance of digital assets and the tax treatment of payments and receipts. We believe that the RFIA is authorizing the IRS to issue guidance on the tax treatment of payments and receipts by merchants, but not mandating any particular treatment.
- On the treatment of digital asset mining and staking (including mining and staking rewards) in which income is not realized until disposition of the assets produced or received in connection with such activity (in accordance with the proposed deferral provision for such income, as discussed above). We believe that the RFIA is requiring the IRS to issue guidance applying the rule that mining and staking rewards are not taxable until the disposition of the assets produced or received.
- On the treatment of charitable contributions of digital assets (i) greater than $5,000 and (ii) traded on an established securities market as "readily valued property" that would not require a qualified appraisal for a charitable contribution deduction under section 170(f)

(11)(A). We believe that the RFIA is requiring the IRS to issue guidance explaining how the rule is applied, which may include a definition of the term "traded on an established securities market" in the content of digital assets.

- On the characterization of "payment stablecoins" as indebtedness for U.S. federal income tax purposes. We do not believe that the RFIA is mandating that payment stablecoins be treated as indebtedness for U.S. federal income tax purposes, but is instead requiring the IRS to issue guidance indicating when they would be so treated.

The above guidance would apply prospectively for taxable years beginning after December 31, 2023.

II. IRS Guidance

1. Form 1040 Instructions

On January 20, 2023, the IRS released updated instructions for Form 1040, which switch the term "virtual currency' to "digital assets" and adopt a definition of "digital asset" that is consistent with the Infrastructure and Jobs Act. The instructions clarify how taxpayers must report digital asset transactions. Taxpayers that have (i) received (as a reward, award, or payment for property or services); or (ii) sold, exchanged, gifted, or otherwise disposed of a digital asset (or any financial interest in any digital asset) in 2022 are required to check "Yes" in the box next to the question on digital assets on page 1 of Form 1040 or 1040-SR.

Of note, the instructions provide that receiving digital assets as a result of hard forks or through mining, staking or similar activities must be reported on the Form 1040.

However, the following transactions, without more, do not need to be reported on the Form 1040: (i) holding a digital asset in a wallet or account; (ii) transferring a digital asset from one wallet or account owned by the taxpayer to another wallet or account of the taxpayer; (iii) or purchasing digital assets using U.S. or real currency, including through electronic platforms such as PayPal and Venmo.

2. Announcement 2023-2

On December 23, 2022, the IRS released Announcement 2023-2, which provides interim guidance on digital asset broker requirements and states that the IRS and Treasury intend to issue new regulations pursuant to section 80603 on the application of sections 6045 and 6045A to digital asset transactions. Until such regulations are finalized, brokers (i) may report gross proceeds and basis as required under existing law and regulations as of December 23, 2022; (ii) may furnish statements on transfers of covered securities as required by existing law and regulations as of December 23, 2022; and (iii) will not be subject to additional reporting or filing requirements under sections 6045 and 6045A.

3. Notice 2023-27

On March 21, 2023, the IRS released Notice 2023-27, which provides preliminary guidance on the treatment of NFTs as collectibles under section 408(m) and states that the IRS and Treasury intend to issue guidance to that effect. Notice 2023-27 also requests public comments by June 19, 2023 on its guidance and to develop further guidance on this proposed treatment.

Section 1(h)(4) and (5) provide that the sale or exchange of a collectible (as defined in section 408(m), but including coins and bullion), that is a capital asset held for more than a year is subject to tax at a 28% rate rather than the 20% rate. For these purposes, "collectible" means any work of art, rug or antique, metal or gem, stamp or coin, alcoholic beverage or any other tangible personal property specified by the Treasury. However, section 408(m)(3) excludes certain coins and bullion from this definition (but, as mentioned above, section 1(h)(4) and (5) includes them).

Section 408(m)(1) provides that, if an individual retirement account (an "IRA") acquires a collectible, the acquisition is treated as a distribution from the IRA equal to the IRA's cost of that collectible. In addition, if an individually directed account under a qualified section 401(a) plan acquires a collectible, the acquisition is treated as a distribution from the account equal to the account's cost of that collectible.

Until further guidance is issued, the IRS intends to apply a look-through test to determine whether an NFT is a section 408(m) collectible. Under this test, an NFT is a section 408(m) collectible if its associated right or asset constitutes a section 408(m) collectible. For instance, an NFT that certifies ownership of a gem would be considered a section 408(m) collectible because the underlying gem is a collectible. Furthermore, Notice 2023-27 states it is unclear whether applying the look-through test to an NFT whose associated right or asset is a digital file, which the IRS and Treasury consider treating as a "work of art", would result in that NFT being treated as a section 408(m) collectible.

4. Notice 2023-34

On April 24, 2023, the IRS released Notice 2023-34, which revises Notice 2014-21 to acknowledge that "certain foreign jurisdictions" (i.e., El Salvador) treat Bitcoin as legal tender, but otherwise reaffirms the conclusions in Notice

2014-21. Notice 2014-21 was the Notice that treated convertible virtual currency (i.e., cryptocurrency) as property for U.S. federal income tax purposes.[2] In describing virtual currencies, Notice 2014-21 provided that "In some environments, it operates like "real" currency — i.e., the coin and paper money of the United States or of any other country that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in the country of issuance — but it does not have legal tender status in any jurisdiction."

For more information about Notice 2014-21, read our blog post here.

III. The Green Book

On March 9, 2023, the Biden Administration released the Fiscal Year 2024 Budget, and the Green Book, which summarizes the Administration's tax proposals contained in the Budget. The 2024 Green Book contains several proposals related to the taxation of cryptocurrency transactions. Most of this year's proposals were previously proposed by the Biden Administration. However, there are two new proposals related to the taxation of cryptocurrency transactions: A proposal to expand the wash sale rules to digital assets and a proposal to impose a digital asset mining energy excise tax. For more information about the Green Book's other proposals, read our blog post here.

Apply the Wash Sale Rules to Digital Assets

Section 1091(a) currently disallows a loss where a taxpayer that is not a dealer sells or disposes of stock or securities at a loss and, within 30 days before or after the sale or disposition, acquires or enters into a contract or option to acquire substantially identical stocks or securities. Because digital assets are not "securities" for these purposes, the wash sale rules of section 1091 do not apply to digital assets.

The Green Book proposes to expand the wash sale rules of section 1091 to apply to "digital assets." **This is a new proposal**.

The proposal provides the Treasury authority to further expand the wash sale rules to any security, commodity or other asset traded on an established market as necessary to prevent abuse, and the basis and holding period rules applicable to purchased assets would be revised to reflect the expanded scope of these rules; however, the Green Book provides that these expanded rules would not be intended to apply to ordinary course business transactions (not including trading) involving digital assets.

The Green Book also proposes that if a taxpayer incurs a loss on the sale of a section 1091 asset, and a related party purchases the same or substantially identical asset within 30 days of the sale, the taxpayer would be required to defer the loss until the related party disposes of the asset. For this purpose, "related party" would mean, (i) in the case of an individual taxpayer, members of their family or taxfavored accounts, or an entity controlled by the taxpayer or its family members; and (ii) in the case of an entity taxpayer, an entity the taxpayer controls, is controlled by, or is under common control with. The proposal provides the IRS with authority to issue regulations to expand this definition.

The Green Book also provides that the wash sale rules would be amended to address derivatives more comprehensively, including by modifying the basis rules to prevent abuse. However, the Green Book does not provide additional information with respect to this provision.

The proposal would be effective for taxable years beginning after December 31, 2023.

Impose Digital Asset Mining Energy Excise Tax

The Green Book would impose an excise tax of 30% of the costs of electricity used to mine digital assets. The excise tax would apply to any firm engaged in digital asset mining, whether the computational capacity is owned or leased by the taxpayer. **This is a new proposal**.

In addition, the proposal would require firms that mine for digital assets to report the amount and type of electricity used, as well as the value of that electricity, if purchased externally. Taxpayers that lease computational capacity would be required to report the value of the electricity used by the lessor and attributable to the leased capacity; this value would serve as the tax base.

The excise tax would be phased in over three years at a rate of 10% in the first year, 20% in the second year, and 30% in the third year.

The proposal would be effective for taxable years beginning after December 31, 2023.

Repropose Applying the Securities Loan Rules to Digital Assets

Under current law, securities loans that satisfy certain requirements are taxfree under section 1058.[3] Taxpayers that loan securities pursuant to agreements that fail to satisfy section 1058 may be taxable initially and when they receive back the loaned securities.

The Green Book would repropose the 2023 proposal to expand section 1058 to apply to "actively traded digital assets" recorded on cryptographically secured distributed ledgers, so long as the loan agreement contains similar terms to those currently required for loans of securities.[4] The securities loan agreement must (i) provide for the return to the transferor of securities identical to the securities transferred; (ii) require payments made to the transferor of amounts equal to all interest, dividends, and distributions on the security during the term of the loan; (iii) not reduce the risk of loss or opportunity for gain of the transferor of the securities in the securities transferred; and (iv) meet other requirements as the IRS may prescribe by regulation. Section 1058(b).

The Treasury would also have the authority to define "actively traded" and extend section 1058 to "nonactively traded" digital assets. In addition, the proposal would require a lender to include in gross income amounts that would have been included had the lender not loaned the digital asset (i.e., "substitute payments").

The proposals would be effective for taxable years beginning after December 31, 2023.

Repropose Application of the MarktoMarket Rules to Digital Asset Dealers and Traders

Sections 475(e) and 475(f) allow commodities dealers and commodities and securities traders to marktomarket their commodities and securities and treat the gains and losses as ordinary gain or loss. The Green Book would repropose the 2023 proposal to extend the marktomarket election to actively traded digital assets, derivatives on actively traded digital assets, and hedges of those digital assets. The proposal clarifies that digital assets would be treated as a third category of assets, distinct from securities and commodities, to be governed by rules similar to those for actively traded commodities.

The proposal would be effective for taxable years beginning after December 31, 2023.

Repropose Requiring Information Reporting for Digital Asset Transactions

The Green Book contains the following two proposals, which would increase information reporting obligations.

1. Financial Institutions and Digital Asset Brokers

The Foreign Account Tax Compliance Act ("FATCA") requires foreign financial institutions to report to the IRS information about accounts held directly or indirectly by U.S. taxpayers. FATCA also requires brokers to report information about their customers to the IRS, including the identity, gross proceeds from sales of securities and certain commodities, and cost basis information for certain securities of customers.

The Green Book would repropose the 2023 proposal to expand FATCA's reporting requirements to all financial accounts owned by foreign persons and maintained at a U.S. office, as well as certain nonU.S. source payments. In addition, financial institutions, including U.S. digital asset exchanges, would be required to report information about certain passive entities and their substantial foreign owners, and digital asset brokers would be required to report gross proceeds and other information with respect to their customers.

The proposals would be effective for returns required to be filed after December 31, 2025.

2. Taxpayers with Foreign Digital Asset Accounts

Section 6038D requires taxpayers with an interest in certain foreign assets with an aggregate fair market value of more than $50,000 during a taxable year to report the name and address of the financial institution where an account is maintained, the account number, and identifying information about assets not held in a financial account.

The Green Book reproposes to amend section 6038D(b) to require reporting with respect to any account that holds digital assets maintained by a foreign digital asset exchange or other foreign digital asset service provider ("foreign digital asset accounts"). Under the proposal, only taxpayers holding an aggregate value in excess of $50,000 (or a higher amount prescribed by the IRS) in foreign digital asset accounts and the other foreign assets subject to section 6038D. The Treasury would have the authority to prescribe regulations to expand the scope of foreign digital accounts.

The proposal would be effective for returns required to be filed after December 31, 2023.

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David S. Miller, Partner, Proskauer Rose LLP

David Miller is a partner in the Tax Department. David advises clients on a broad range of domestic and international corporate tax issues. His practice covers the taxation of financial instruments and derivatives, private and public REITs, cross-border lending transactions and other financings, international and domestic mergers and acquisitions, multinational corporate groups and partnerships, private equity and hedge funds, bankruptcy and workouts, high-net-worth individuals and families, and public charities and private foundations. He advises companies in virtually all major industries, including banking, finance, private equity, health care, life sciences, real estate, technology, consumer products, entertainment and energy.

David is strongly committed to pro bono service, and has represented more than 500 charities. In 2011, he was named as one of thirteen "Lawyers Who Lead by Example" by the New York Law Journal for his pro bono service. David has also been recognized for his pro bono work by The Legal Aid Society, Legal Services for New York City and New York Lawyers For The Public Interest.

David has been consistently recognized by leading industry publications, such as Chambers Global, Chambers USA, Best Lawyers and The Legal 500. Clients surveyed by Chambers USA said, "We bring him in on complex matters because he has the experience and the gravitas." David is one of 17 lawyers in the United States in The Legal 500's Hall of Fame for US Tax (non-contentious).

David has taught the taxation of financial instruments at Columbia Law School, and tax policy at New York University School of Law. He is also a frequent author and has written a number of articles and chapters in various tax publications. David is the former chair of the tax section of the New York State Bar Association.

Prior to joining Proskauer, David was a partner at Cadwalader, Wickersham & Taft LLP.

Amanda H. Nussbaum, Partner, Proskauer Rose LLP

Amanda H. Nussbaum is the chair of the Firm's Tax Department as well as a member of the Private Funds Group. Her practice concentrates on planning for and the structuring of domestic and international private investment funds, including venture capital, buyout, real estate and hedge funds, as well as advising those funds on investment activities and operational issues. She also represents many types of investors, including tax-exempt and non-U.S. investors, with their investments in private investment funds.

Amanda has significant experience structuring taxable and tax-free mergers and acquisitions, real estate transactions and stock and debt offerings. She also counsels both sports teams and sports leagues with a broad range of tax issues.

In addition, Amanda advises not-for-profit clients on matters such as applying for and maintaining exemption from federal income tax, minimizing unrelated business taxable income, structuring joint ventures and partnerships with taxable entities and using exempt and for-profit subsidiaries.

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