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COMMENTARY

*Is Bitcoin No Longer Private?—Proposed IRS Regulations May
Require Brokers to Report Cryptocurrency Transactions*

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On August 25, 2023, the Internal Revenue Service (“IRS”) proposed regulations that, if adopted, will dramatically change the nature of cryptocurrency transactions.¹ Cryptocurrency brokers may be required to report transactions, gains, and losses to the IRS, starting with transactions conducted in 2025.²

There are many benefits to using cryptocurrency, but privacy is a key benefit for many investors.³ Cryptocurrency transactions are recorded publicly on the blockchain but the identities of the parties remain anonymous.⁴ For years, the IRS has treated cryptocurrencies like property for income taxes and has required individuals to report many types of cryptocurrency transactions on Form 8949 and Form 1040, Schedule D.⁵ The proposed regulations don’t change that. Instead, the proposed regulations seek to increase compliance and clarify what needs to be reported.⁶

In the News Release for the potential new regulations, the IRS indicated that the regulations would specifically target compliance by “wealthy taxpayers”.⁷ In the United States, employers file IRS Form W-2 for wage-earning employees, inhibiting a wage-earner’s ability to evade income taxes. On the other hand, third parties were not previously

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¹ I.R.S. News Release IR-2023-153 (Aug. 25, 2023).

² *Id.*

³ Joanne Gelfand, *The How and Why of Crypto Anonymity and the Court Challenges That May Undo It All in the Face of Market Upheaval*, 9 ST. THOMAS J. COMPLEX LITIG. 21, 22 (2023).

⁴ *Id.*

⁵ *Frequently Asked Questions on Virtual Currency Transactions*, IRS, <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions> (Aug. 18, 2023).

⁶ IR-2023-153, *supra* note 1.

⁷ *Id.*

required to report income earned in cryptocurrency transactions, enabling those who earn their income in cryptocurrency transactions to potentially evade taxes if they fail to disclose their own tax obligations.⁸ Despite anonymity being a reason for the use of digital currencies, there are other reasons why someone might hold assets in cryptocurrencies.⁹ Crypto investors are not tax cheaters per se, but the IRS wants to increase compliance and it has found that tax compliance increases when third parties must report transactions.¹⁰

The IRS plans to require brokers to report gross proceeds from digital asset sales made in 2025. For sales in 2026 and beyond, brokers would need to report the adjusted bases, gains, and losses.¹¹ The IRS is launching a new tax form, Form 1099DA, for brokers.¹² The new tax form will likely save taxpayers time when calculating gains and losses because they can use the information their broker provides.¹³

Who or what is a “broker” under these new regulations? The proposal defines five main categories of brokers: “digital asset trading platforms, digital asset payment processors, certain digital asset hosted wallet providers, and persons who regularly offer to redeem digital assets that were created or issued by that person,” and certain “real estate reporting persons.”¹⁴ Entities that fit into these categories will need to figure out how to comply with the new reporting requirements and how to appease customers’ desire for privacy. Some platforms may limit access to United States-based customers to avoid complying with new regulations.¹⁵ Customers who value the anonymity of cryptocurrency will need to decide if they still want to invest in cryptocurrency. If the anonymity of cryptocurrency is fading, perhaps a different type of investment may be more appealing. There is no telling what will happen to the cryptocurrency industry if its key feature of anonymity ceases to be legally feasible in the United States.

The IRS is accepting written comments on the proposed regulations until October 30, 2023 and the hearing is scheduled for November 7, 2023. Interested parties can submit comments on the proposed regulations on the Federal Register website at: <https://www.federalregister.gov/documents/2023/08/29/2023-17565/gross-proceeds-and-basis-reporting-by-brokers-and-determination-of-amount-realized-and-basis-for>.

⁸ Joshua D. Blank & Ari Glogower, *The Tax Information Gap at the Top*, 108 IOWA L. REV. 1597, 1600 (2023).

⁹ Ariz. St. Univ., *Cryptocurrency 101: What Does it Mean to be Crypto-self-banked?*, ASU ENTERPRISE TECHNOLOGY, <https://tech.asu.edu/cryptocurrency-101-what-does-it-mean-be-crypto-self-banked> (last visited Sept. 6, 2023).

¹⁰ Blank & Glogower, *supra* note 8, at 1612.

¹¹ Prop. Treas. Reg. § 1, § 31, § 301, 88 Fed. Reg. 59576, 59616 (Aug. 29, 2023).

¹² IR-2023-153, *supra* note 1.

¹³ Shehan Chandrasekera, *IRS’s New Crypto Tax Rules Pose a Threat to DeFi*, FORBES DIGITAL ASSETS (Sept. 6, 2023), <https://www.forbes.com/sites/shehanchandrasekera/2023/09/06/irss-new-crypto-tax-rules-pose-a-threat-to-defi/?sh=2c83ef6b2a0e>.

¹⁴ Prop. Treas. Reg., 88 Fed. Reg. at 59576.

¹⁵ Chandrasekera, *supra* note 13.