



Submitted electronically via the Federal eRulemaking Portal at www.regulations.gov

October 25, 2023

Internal Revenue Service
CC:PA:LPD:PR
REG-122793-19,
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comment on Notice of Proposed Rulemaking and Notice of Public Hearing on Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions

To whom it may concern:

Investor Choice Advocates Network (“ICAN”) writes in response to the Notice of Proposed Rulemaking (REG-122793-19) (the “Proposed Regulations”) seeking comments from the digital asset community and other interested parties to address the reporting of gross proceeds and basis by brokers and determination of amount realized and basis for digital asset transactions.¹

ICAN is a nonprofit, public interest organization working to expand access to markets—including markets for digital assets—for underrepresented investors and entrepreneurs who do not share the same access and market power as those with more assets and resources.

We appreciate the opportunity to provide comments to the Notice of Proposed Rulemaking. Feedback to the Department of Treasury and Internal Revenue Service is critical as the government considers developing a framework for enhancing U.S. economic competitiveness and innovation related to digital assets and infrastructure.

A. Background

The Internal Revenue Code (26 U.S.C. § 6045(a)) requires brokers to file with the IRS annual information returns showing the gross proceeds realized by customers from various sale transactions² when required by the Secretary of the Treasury to do so. A return must provide such details regarding gross proceeds realized by customers from various sale transactions and other information as required by the Secretary.³ In 2008, the reporting requirements for brokers were revised to ensure that every broker required to file a return under section 6045(a) reporting the gross proceeds from the sale of a “covered security” must include in the return (1) the customer’s adjusted basis in the security and (2) whether any capital gain or loss with respect to the security is long-term or short-term.⁴

The Infrastructure Investment and Jobs Act (“Infrastructure Act”), enacted in 2021, expanded on the definition of broker to include “any person who (for consideration) is responsible for regularly providing any service *effectuating* transfers of digital assets on behalf of another person.”⁵ Under existing Treasury Regulation § 1.6045-1(a)(1), a broker is defined to mean “any person . . . U.S. or foreign, that, in the ordinary course of a trade or business during the calendar year, stands ready to *effect* sales to be made by others.” (emphasis added).

¹ 88 Fed. Reg. 59,576 (Aug. 29, 2023).

² A disposition is treated as a sale subject to reporting only if the property disposed of is a security, commodity, option, regulated futures contract, securities futures contract, or forward contract and the disposition is for cash. Treas. Reg. § 1.6045-1(a)(9).

³ IRC § 6045(a).

⁴ IRC § 6045(g).

⁵ I.R.C. § 6045(c)(1)(D) (emphasis added).

In the Preamble to the Proposed Regulations the Treasury Department stated:

Similarly, the potential characterization of digital assets as securities, commodities, or derivatives for purposes of any other legal regime, such as the Federal securities laws and the Commodity Exchange Act, is outside the scope of these proposed regulations.

We believe the government may pursue its interest in increasing tax compliance through digital asset broker reporting and support providing taxpayers with the information they need to report their digital asset transactions without taking a position on whether digital assets are securities. We are concerned that promulgation of final regulations that require broker reporting of digital asset transactions could be cited by other government agencies that digital assets should be considered “securities” for purpose of the securities statutes, rules, and regulations.

We recommend that the final regulations make clear that the regulations are inapplicable to federal and state securities laws. We further recommend that the Secretary of the Treasury exercise some reluctance in promulgating rules in the area of digital assets. Taking a position that a digital asset is a security under the Tax Code without waiting for further guidance from Congress or the Courts, could achieve an unintended result – expanding the definition of a security under the securities regulations. Finally, the proposed rule could result in taking a step that is beyond the rulemaking authority Congress originally provided to the Department of the Treasury, stretching the limits of the *Chevron* deference doctrine.⁶

B. Enforcement Actions Taken by the Securities and Exchange Commission

The U.S. Securities and Exchange Commission (“SEC”) has taken an extremely aggressive litigation posture with regard to regulation of digital assets including cryptocurrencies, Non-Fungible Tokens (“NFTs”) and other digital assets.

The following is a sampling of the enforcement actions taken by the SEC which will have the unfortunate impact of pushing development of digital asset ecosystems out of the United States. Thus, depriving U.S. investors of a potentially lucrative asset class.

- *SEC v Ripple Labs, Inc., et al.* (Case No. 20-cv-10832) in which the court dismissed several of the SEC’s central claims regarding the existence of a security offering. (Order, ECF No. 874; *see SEC v. Ripple Labs, Inc.*, [No. 20 Civ. 10832](#), [2023 WL 4507900](#) (S.D.N.Y. July 13, 2023) (granting in part and denying in part the parties’ cross-motions for summary judgment).
- *SEC v. Celsius Network Limited*, (Case No. 23-cv-06005 S.D.N.Y.), in which the SEC alleged Celsius Network Limited (Celsius) and its founder and former CEO, Alex Mashinsky, violated registration and anti-fraud provisions of the federal securities laws, including by failing to register the offers and sales of Celsius’s crypto lending product, the Earn Interest Program.
- *SEC v. Coinbase, Inc., et al.*, (Case No. 23-cv-4738 S.D.N.Y.), in which the SEC alleged Coinbase, Inc. operated its crypto asset trading platform as an unregistered national securities exchange, broker, and clearing agency. The SEC also alleged Coinbase failed to register the offer and sale of its crypto asset staking-as-a-service program. Coinbase has contested the allegations, and the matter is being actively litigated.
- *SEC v. Binance Holdings Limited, et al.* (Case No. 23-cv-01599 D.D.C.), in which the SEC alleged Binance Holdings Ltd. (“Binance”), Binance.com; U.S.-based affiliate, BAM Trading Services Inc. (“BAM Trading”); and their founder, Changpeng Zhao, committed a variety of securities law violations. Defendants have contested the allegations, and the matter is being actively litigated.
- *SEC v. Bittrex, Inc., et al.* (Case No. 23-cv-580 W.D. Wash.), in which the SEC alleged crypto asset trading platform Bittrex, Inc. and its co-founder and former CEO William Shihara operated an unregistered national securities exchange, broker, and clearing agency.

⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 461 U.S. 837 (1984). Recently, The U.S. Supreme Court accepted review of *Loper Bright Enterprises v. Raimondo*, which may determine the fate of the deference doctrine established in *Chevron* in 1984.

- *SEC v. Payward Ventures, et al. (d/b/a Kraken)* (Case No. 23-cv-00588 N.D. Cal.), in which the SEC alleged Payward Ventures, Inc. and Payward Trading Ltd., both commonly known as Kraken, failed to register the offer and sale of their crypto asset staking-as-a-service program.
- *SEC v. Genesis Global Capital, LLC and Gemini Trust Company, LLC*. (Case. No. 23-cv-287 S.D.N.Y.), in which the SEC alleged Genesis Global Capital, LLC and Gemini Trust Company, LLC failed to register the offer and sale of securities to retail investors through the Gemini Earn crypto asset lending program.

Many of the defendants in the foregoing actions, some members of Congress, certain past and present members of the Commission and its staff, and some federal court judges disagree with some of the positions taken by the SEC. These enforcement actions and the threat of more like them are having an entirely predictable outcome. Companies are reconsidering whether to continue or expand their operations in the United States and looking at alternatives abroad:

Coinbase, the largest crypto exchange in the United States, has opened a business in Bermuda. Gemini, a rival firm based in New York, is seeking a license in the United Arab Emirates. And Bittrex, an exchange in Seattle, has shut down its U.S. operations.⁷

Industry experts see this exodus as well as more friendly jurisdictions welcome entrepreneurs in the digital asset space. Ripple CEO Brad Garlinghouse noted, “Europe really has provided leadership and countries like UAE ... the growth you’re seeing ... even the U.K. and Singapore, they’re providing the clarity about how they will regulate these digital assets.”⁸

While the SEC is clamping down, regulators elsewhere are opening up.⁹ Hong Kong authorities are promoting the city as a digital-assets hub. Singapore has started issuing licenses to crypto companies again and it recently issued proposed guidelines on regulating stablecoins.¹⁰ Dubai created a crypto-focused regulator last year and several crypto companies have already set up operations there.¹¹

Moving operations also could also mean a brain drain of the best and brightest in the technology sector.¹²

All of this is relevant for ICAN because it means fewer digital asset investment options as the SEC continues an unprecedented crackdown on digital asset brokers, developers, and sales persons.¹³

C. Conclusion

We recommend that the final regulations unequivocally state that they do not apply to federal or state securities laws. Further, the fact that brokers are now required to report on transactions involving digital assets in the same way that traditional brokers have reported on transactions involving securities in no way transmutes digital assets into “securities” under securities laws. Finally, the Treasury Department should recognize the proposed rulemaking could go beyond the authority that Congress is able to grant under the Constitution.

⁷ David Yaffe-Bellany, *Crypto Firms Start Looking Abroad as U.S. Cracks Down*, New York Times, (June 7, 2023).

⁸ *Ripple CEO says more crypto firms may leave U.S. due to U.S. Rules*, CNBC, (May 18, 2023).

⁹ Weilun Soon, *Crypto Companies Are Looking Outside the U.S. for Growth*, Wall Street Journal, (Sept. 21, 2023).

¹⁰ *Id.*

¹¹ *Id.*

¹² Isabelle Castro Margaroli, *Crypto Firms Moving Overseas Taking Talent with Them*, Fintech Nexus, (Aug. 1, 2023).

¹³ Allison Morrow, *US Crypto Investors Are Left with Few Options*, CNN, (June 6, 2023).



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Should the Treasury Department have any questions or would like to receive additional information, please do not hesitate to contact me at nicolas.morgan@icanlaw.org

Sincerely,

Nicolas Morgan
Chair and President
Investor Choice Advocates Network