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Back to the Future ... Cryptocurrency Tax Reporting

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The cryptocurrency industry may be breathing a sigh of relief following the release of recent IRS guidance on cryptocurrency tax reporting, which effectively postpones the January 1, 2023 effective date of the digital asset broker rules and reporting obligations enacted by the 2021 Infrastructure Investment and Jobs Act (the "Act") under Sections 6045 and 6045A. *See Announcement 2023-2* (the "Announcement") [linked here](#). While this effective delay may be good news for cryptocurrency market participants potentially subject to these reporting rules, retail cryptocurrency investors may not receive IRS Form 1099-Bs covering their cryptocurrency investments this tax season and so may need to continue to make do with the improvised system that the cryptocurrency industry has implemented in past years.

Prior to the Act, cryptocurrency market participants struggled with how the tax reporting rules of Sections 6045 and 6045A applied to cryptocurrency, as these rules were not drafted with cryptocurrency in mind. Thus, the cryptocurrency industry has been left to its own devices to answer such basic questions as (1) who must report (e.g., exchanges, miners, stakers, and others), (2) what must be reported (e.g., gross proceeds, tax basis, and other information), and (3) to whom must the reports be provided (e.g., IRS, customers, and others). With the delay of reporting rules, cryptocurrency tax reporting remains muddled, and the reporting itself will be a crazy quilt of *ad hoc* interpretations of existing law.

As amended by the Act, Sections 6045 and 6045A impose mandatory tax reporting requirements for brokers of certain digital asset transactions entered into after December 31, 2022. Section 6045 requires brokers to report on IRS Form 1099-B certain information about taxpayers, including names and addresses, as well as certain information about the property underlying the transaction, including the sale date and gross proceeds of a sale (and for so-called covered securities, the adjusted basis of the property sold and the character of any gain or loss) as well as furnish payee statements to customers. For transactions between brokers, Section 6045A further requires transferors of covered securities to furnish transfer

statements to transferees. The Act expanded Section 6045's 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." Additionally, the Act provides that digital assets, defined as "any digital representation of value which is recorded cryptographically," could be treated as covered securities.

Concern has been expressed that the Act's broad definition of "broker" could subject many cryptocurrency market participants not traditionally viewed as brokers (e.g., miners, stakers, etc.) to reporting requirements as discussed [here](#) and in the legislative history to the Act linked [here](#). As included in the Announcement, Treasury plans to provide further guidance on what constitutes a broker for purposes of Sections 6045 and 6045A, address the application of Sections 6045 and 6045A to digital assets, and provide forms for broker reporting. The Announcement provides interim relief in advance of the January 1, 2023 effective date and provides that until final regulations are published, digital asset brokers may rely on the law in effect as of the date of the Announcement, December 23, 2022 (i.e., prior law).

Pursuant to the Announcement, digital asset brokers may report the gross proceeds of certain sales and adjusted basis of property and may furnish statements on transfers of covered securities but will not be required to provide additional information with respect to dispositions of digital assets, issue additional statements, or file returns with the IRS on digital asset transfers. The Announcement does not, however, address the extent to which certain digital asset transactions may otherwise be subject to Sections 6045 and 6045A absent additional guidance. Thus, cryptocurrency market participants are left to decipher their reporting obligations under prior law. The IRS has provided no guidance to date on the applicability of existing regulations under Sections 6045 and 6045A to cryptocurrency specifically. As a result, the cryptocurrency industry and specifically cryptocurrency exchanges have been left to review the existing guidance under Sections 6045 and 6045A, which was not specifically designed to address cryptocurrency transactions, in order to ascertain their reporting obligations, if any. Accordingly, the reporting provided by cryptocurrency exchanges is not uniform in the marketplace, and many exchanges do not provide IRS Form 1099-Bs to their customers.

Clarity may be coming soon as a draft of proposed regulations is currently under review by the Office of Management and Budget. While the content of these regulations remains uncertain, it seems plausible that the regulations may narrow the definition of "broker" as Treasury indicated in a letter to various U.S. senators in February 2022 that ancillary parties such as stakers or miners, persons selling storage devices, and persons writing code should not be subject to reporting requirements. The regulations will also likely address issues inherent in cryptocurrency reporting – namely, the decentralized nature of cryptocurrency, that may make compliance with the broker reporting rules onerous. That is, in many cryptocurrency transactions, it is unlikely that either party may have the requisite information (e.g., names or addresses) or access thereto as the ledger does not provide this information. If Treasury's earlier statements are any indicator, it is likely that future guidance will provide some comfort for the cryptocurrency industry.

Until these regulations are finalized, some cryptocurrency customers currently receiving IRS Form W-2s for wages and IRS Form 1099-INTs for interest may not be receiving IRS Form 1099-Bs for their cryptocurrency investments. For now, it is *status quo ante* for cryptocurrency tax reporting.
