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The Crypto Industry and Lawmakers Continue Efforts to Change Digital Asset Reporting Requirements Passed Under the Infrastructure Act

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On November 15, President Biden signed the more than $1 trillion Infrastructure Investment and Jobs Act (the ''Infrastructure Act'')[1] into law. Despite substantial criticism and various attempts to amend the bill while it was under debate in Congress, the Infrastructure Act includes two changes to provisions of the Internal Revenue Code (Code) that deal with reporting obligations for certain digital assets transactions. Although one of these changes received much more attention than the other.

REPORTING OBLIGATIONS FOR ''BROKERS''

The Infrastructure Act includes amendments to §6045[2] that requires ''brokers'' to furnish written statements to their customers concerning transfers of ''covered securities'' made on behalf of the customers.[3] The Infrastructure Act amends the definition of ''broker'' in this section to include ''any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person.''[4] Further, the definition of ''covered securities'' is amended to include ''digital assets.'' Digital assets for the purposes of these amendments is meant to include cryptocurrencies. The Infrastructure Act also includes amendments to reporting requirements for transfers between two brokers.[5] When one broker transfers a covered security, which would include digital assets, to another broker, the transferring broker would have to furnish to the receiving broker a written statement that would enable the receiving broker to meet their basis and holding period reporting requirements of §6045(g). These amendments for brokers and digital assets apply to returns required to be filed, and statements required to be furnished, after December 31, 2023. Penalties may be imposed when a broker fails to fulfill their reporting obligations under §6045A.[6]

These amendments sparked significant criticism when they were initially proposed. Critics contended that this expanded definition of a ''broker'' was overly broad because it captured not only parities that execute transactions (such as digital asset exchanges) but also other parties that validate digital asset digital asset transactions (such as miners or stakers) and entities that sell hardware or software that customer use to control their private keys — which are used to access digital assets.

Coinbase CEO Brian Armstrong, Square and Twitter CEO Jack Dorsey, and SpaceX and Tesla CEO Elon Musk were among the prominent critics of these amendments.

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[1] Pub. L. No. 117-58.

[2] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[3] *See* Infrastructure Act, §80603(b)(1).

[4] *See* §6045(c)(1)(D), as amended by Infrastructure Act, §80603(a).

[5] *See* §6045A(d), as amended by Infrastructure Act, §80603(b)(2)(A).

[6] *See* §6724(d)(1)(B)(xxvii), as added by Infrastructure Act, §80603(b)(2)(B).

REPORTING OBLIGATIONS SALES IN EXCESS OF $10,000

Amendments to §6050I received comparably less attention, although the effects may also be broad sweeping and a trap for the unwary. Section 6050I, originally passed in 1984 to address concerns about money laundering, requires any person who receives cash in excess of $10,000 as part of a ''trade or business'' to obtain and report personal information about the sender to the IRS on a Form 8300, *Report of Cash Payments Over $10,000 Received in a Trade or Business*. Failures to fulfill §6050I reporting obligations can be charged as a felony but the recipient of the cash is not required to file the report if the transfer involves a financial institution which would also be obligated to report the transfer under the Bank Secrecy Act. In other words, §6050I encourages businesses to involve regulated financial institutions for these large transactions — to limit the obligations and potential criminal exposure to which business could be subject.

The Infrastructure Act amends §6050I to treat digital assets the same as cash for purposes of the reporting obligations.[7] Given the rapid expansion of the non-fungible tokens (NFTs) representing high-value art, for example, and decentralized finance (referred to as DeFi) and the fact that digital asset transfers occur substantially without involvement of regulated financial institutions, serious concerns are now being raised about the implications of these changes to §6050I. These concerns center around the uncertain meaning of ''trade or business,'' ''digital assets'' and the method of valuation. Others have also raised questions about whether these changes violate Fourth Amendment protections against unreasonable searches and seizures.

MORE CHANGES TO COME?

Despite the passage of the Infrastructure Act, several members of Congress continue efforts to change the digital asset provisions — often with input and encouragement from members of the crypto industry.

On November 15, Senate Finance Committee Chairman Ron Wyden (D-OR), and Senator Cynthia Lummis (R-WY) introduced a bill[8] aimed to narrow the scope of the Infrastructure Act's amendments to §6045. This bill would add rules of construction for the meaning of broker, providing that persons engaged solely in the business of validating transactions, selling hardware or software for the sole function of permitting a person to control private keys, and developing digital assets or their corresponding protocols should not be considered brokers with the reporting obligations under §6045.

Senator Ted Cruz (R-TX), introduced a bill[9] on November 16 to repeal the portion of the Infrastructure Act that deals with reporting obligations of brokers under §6045.

On November 18, a bi-partisan group in Congress, led by Patrick McHenry (R-NC) and Tim Ryan (D-OH), introduced a bill[10] that addresses both the amendments to §6045 and §6050I. This bill would reset the definition of a broker of digital assets to ''any person who stands ready in the ordinary course of a trade or business to effect sales of digital assets at the direction of their customers'' — which received approval from the digital assets industry as being more precisely tailored than the definition included in the Infrastructure Act. The bill also completely removes the updates to §6050I and provides instead that the Department of Treasury should conduct a study on the effect of expanding the existing reporting requirement to transactions involving digital assets.

Additionally, the Department of Treasury will also conduct its usual proposed rulemaking with notice and comment period to further refine the scope of the new reporting requirements to extent that the requirements are not repealed by any bills proposed by members of Congress.

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[7] *See* §6050I(d)(3), as amended by Infrastructure Act, §80603(b)(3).

[8] S.3249, 117th Cong., 1st Sess. (2021). *See Wyden & Lummis Introduce Bill to Fix Broker Definition for Digital Assets* (Nov. 15, 2021), https://www.lummis.senate.gov/press-releases/wyden-lummis-introduce-bill-to-fix-broker-definition-for-digital-assets/.

[9] S.3206, 117th Cong., 1st Sess. (2021). *See Sen. Cruz Introduces Legislation to Repeal Infrastructure Bill's "Devastating Attack" On Emerging Cryptocurrency Industry* (Nov. 16, 2021),https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-introduces-legislation-to-repeal-infrastructure-bills-devastating-attack-on-emerging-cryptocurrency-industry.

[10] H.R. 6006, 117th Cong., 1st Sess. (2021). *See* McHenry Leads Bipartisan Legislative Fix to New Digital Asset Reporting Requirements (Nov. 18, 2021), https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=408199.

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