

Congress of the United States
Washington, DC 20515

November 10, 2023

The Honorable Lily Batchelder
Assistant Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: *IRS Proposed Rulemaking REG-122793-19; Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions*

Dear Ms. Batchelder:

We write to you today to express our continued concern with the Department of the Treasury’s (“Treasury”) treatment of digital assets for tax reporting purposes. While we appreciate Treasury’s efforts, the August 25, 2023, proposed regulations (proposed regulations) would inhibit innovation and harm the digital asset ecosystem, if finalized in its current form.¹

As we have communicated previously,² the tax reporting requirements on digital asset market participants in the Infrastructure Investment and Jobs Act (the “IIJA”) are unworkable as written and fail to consider factors that are inherent to the digital asset ecosystem.³ The proposed regulations do not remedy our previously stated concerns. The breadth of the proposed regulations and the unworkable definitions raise serious concerns for the digital asset ecosystem. Treasury must address the following concerns to ensure the United States has a workable tax reporting framework for digital assets.

The definition of “Broker” remains too broad and would capture entities that do not possess traditional characteristics of a broker.

In the proposed regulations, Treasury defines “broker” to include persons who provide “facilitative services that [directly or indirectly] effectuate the sales of digital assets by customers.”⁴ This definition captures a significant portion of the entities within the digital asset ecosystem, including decentralized finance (“DeFi”) exchanges.

¹ Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, 88 Fed. Reg. 59576 (proposed Aug. 25, 2023) (to be codified at 26 C.F.R. pts. 1, 31, and 301). ² January 26, 2022, Letter from Chair Patrick McHenry to Treasury Secretary Janet Yellen, available at https://financialservices.house.gov/uploadedfiles/2022-01-26_crypto_letter_to_sec_yellen.pdf.

³ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021).

⁴ *Supra.* note 1 at 59585.

Many DeFi entities provide information a consumer might use to make digital asset transfers on their own behalf or provide an interface by which other digital asset users can conduct transactions. The proposal acknowledges that “a person...that merely provides facilities in which others effect sales” is not a broker.⁵ However, many entities within DeFi, which effectively are “facilities in which others effect sales,” are explicitly identified in the proposed regulation’s list of what is considered a facilitative service.⁶

Moreover, additional DeFi protocols will be caught up in Treasury’s expanded definition of “broker.” Instead of evaluating if persons “ordinarily would know” the identity of their customers to determine who is a broker for tax reporting purposes, Treasury defines “broker” as persons that are “in the position to know the identity of the party.” Treasury further clarifies that “a person with the ability to change the fees charged for facilitative services” is in “a position to know” for purposes of tax reporting.⁷ This new interpretation will sweep up DeFi protocols in the definition of broker because the “position to know standard” encompasses more entities compared to the “ordinarily would know” standard. There is no evidence indicating DeFi protocols “ordinarily would know” the identity of the party because many of them do not receive information from users as an ordinary course of business.

Additionally, Treasury’s expanded definition of “broker” will cause many entities and systems in the digital asset ecosystem to file duplicative reports to both the Internal Revenue Service (“IRS”) and American taxpayers. Consumers will receive multiple 1099-DA forms for every transaction they conduct, potentially from both sides of the transaction. It also means that the IRS will be receiving the same information on a single transaction from multiple parties. It is not clear why the IRS would seek to promulgate a regulation that will raise the cost of doing business as well as inundate the IRS and American consumers with unnecessary information.

The definition of “Digital Asset” fails to consider or differentiate the uses or attributes of different types of digital assets.

In addition to expanded definition of “broker,” the proposed regulation includes a definition for “digital asset” that will limit the use of certain digital assets. Specifically, Treasury’s proposed regulations define “digital asset” as “a digital representation of value that is recorded on a cryptographically secured distributed ledger (or similar technology)”⁸ and explicitly includes “those referred to as stablecoins or [nonfungible tokens] (“NFTs”).”⁹

While some NFTs in the digital asset ecosystem represent financial instruments, the vast majority do not.¹⁰ Treasury’s approach in the proposed regulations fails to differentiate between

⁵ *Id.* at 59635

⁶ *Id.* at 59585. (stating “The Treasury Department and the IRS expect that this clarified proposed definition will ultimately require operators of some platforms generally referred to as decentralized exchanges to collect customer information and report sales information about their customers...”)

⁷ *Id.*

⁸ *Id.* at 59577.

⁹ *Id.* at 59582.

¹⁰ See I.R.S. Notice 2023-27 (March 21, 2023) (giving guidance on the treatment of certain nonfungible tokens as collectibles, stating “a nonfungible token (NFT) is a unique digital identifier that is recorded using distributed ledger technology and may be used to certify authenticity and ownership of an associated right or asset. Distributed

the various kinds NFTs. Instead, it proposes to include all NFTs under an expanded interpretation of “digital asset.” Separately, by including payment stablecoins under the definition of digital asset, Treasury will only hinder their adoption in the marketplace. Treating payment stablecoins as an investment instrument for tax reporting purposes will deter their integration into our payment systems and push them into shadow systems. More disappointing, the proposed regulations focusing on payment stablecoins only undermines Congress’ efforts to establish a regulatory framework for payment stablecoins.

Treasury should not seek to establish a regulatory framework without clear direction from Congress and should exclude both stablecoins and NFTs from the definition of “digital asset.”

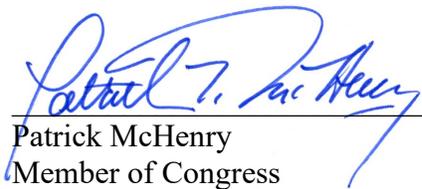
The comment period and implementation time frame for the proposal is unreasonably short.

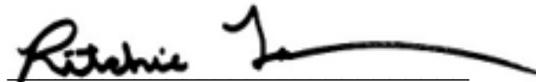
We are concerned with the expedited time frame for both the comment period and implementation phase. The shortened time frame limits the amount of feedback and the ability to make changes to the final rule. It further strains market participants who will need additional time to come into compliance.

To that end, we encourage Treasury to further extend the comment period and set a new deadline for December 31, 2023. This additional time will give market participants the opportunity to provide comprehensive feedback that will allow Treasury to adequately address the aforementioned concerns, among others. Furthermore, if Treasury maintains the current deadline, many of the open questions included in the proposed regulations will go unanswered and cause the final rule to have serious deficiencies. Finally, the implementation period for this proposal is insufficient. This proposal is very complex and will have profound and far-reaching implications for the digital asset ecosystem. The implementation period must also be extended.

We appreciate your attention to our concerns. This proposal, as currently written, will prevent a large swath of the digital asset ecosystem from continuing to exist in the United States. We urge you to reevaluate the proposed regulations and adjust them accordingly to ensure there is a workable tax reporting framework in place for the digital asset ecosystem.

Sincerely,


Patrick McHenry
Member of Congress


Ritchie Torres
Member of Congress

ledger technology, such as blockchain technology, uses independent digital systems to record, share and synchronize transactions, the details of which are recorded simultaneously on multiple nodes in a network.”).



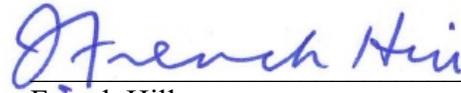
Warren Davidson
Member of Congress



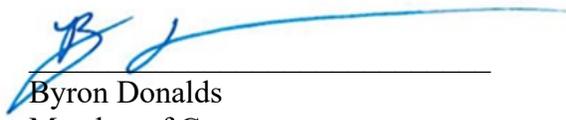
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