



May 14, 2021

Submitted via Email

The Honorable Mark J. Mazur,
Deputy Assistant Secretary for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

The Honorable William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Dear Deputy Assistant Secretary Mazur, Commissioner Rettig, and Acting Chief Counsel Paul:

We understand the IRS and Department of the Treasury are evaluating whether and how to treat digital assets as “financial assets” under the Foreign Account Tax Compliance Act (sections 1471 – 1474 of the Internal Revenue Code (the “Code”)) (“FATCA”). The Chamber of Digital Commerce (the “Chamber”) is pleased to submit this letter providing comments and considerations regarding the current applicability of FATCA to digital assets and what would be required to be clarified to determine that they are subject to FATCA on a go forward basis. In any circumstance, the Chamber requests that taxpayers be provided sufficient time to incorporate any changes such as this to ensure the ability to meet IRS expectations.

The Chamber is the world’s largest blockchain trade association. Our mission is to promote the acceptance and use of digital assets¹ and blockchain technology, and we are supported by a diverse membership that represents the blockchain industry globally. Through education, advocacy, and close coordination with policymakers, regulatory agencies, and industry across various jurisdictions, our goal is to develop a pro-growth legal environment that fosters innovation, job creation, and investment. We represent the world’s leading innovators, operators, and investors in the blockchain ecosystem, including leading edge start-ups, software companies, global IT consultancies, financial institutions, insurance companies, law firms, and investment firms. Consequently, the Chamber and its members have a significant interest in blockchain and distributed ledger technology.

1. Introduction

FATCA was enacted in 2010 to improve compliance with the obligation of U.S. persons to report their worldwide income to determine their U.S. tax liability. It does this primarily by requiring foreign² financial institutions (“FFIs”) to report information regarding accounts held by U.S. persons or by non-financial foreign entities substantially owned or controlled by U.S. persons (“FATCA account reporting”).³ If a FFI does not comply with its obligations, it is subject to withholding at a rate of 30% on the gross amount of “withholdable payments,” which generally consist of items of U.S.-source fixed or determinable, annual, or periodical income paid to the FFI.⁴

Two sets of rules apply to FATCA account reporting obligations: (1) the regulations under sections 1471 – 1474, and (2) inter-governmental agreements (“IGAs”) between

¹ The Internal Revenue Service (“IRS”) guidance in this area has thus far has addressed “convertible virtual currencies.” See, e.g., IRS Notice 2014-21. In our prior letter, dated April 3, 2020, we noted that there are differences between types of digital assets. We use the term “digital assets,” rather than “virtual currencies” (the term used in IRS guidance) to emphasize that different assets having a digital representation of value have different characteristics which we believe should be taken into account in future guidance. See, CHAMBER OF DIG. COMMERCE, *IRS Comment Letter on Information Reporting for Virtual Currency Transactions* (Apr. 3, 2020), <https://digitalchamber.org/wp-content/uploads/2020/04/Chamber-of-Digital-Commerce-IRS-Comment-Letter-on-Information-Reporting-for-Digital-Asset-Transactions.pdf> (“Prior Letter”).

² A financial institution is, generally, “foreign,” as defined in the Internal Revenue Code if it is not formed under the laws of the United States or any State thereof (including the District of Columbia). Treas. Reg. §§1.1471-1(b)(53); 1,1473-1(e). The Model 1 inter-governmental agreements (“IGAs”) treat foreign branches of U.S. entities as if they were foreign entities. The Model 2 IGAs permit a foreign branch of a U.S. entity to satisfy its account documentation requirements under Annex 1 of the IGA but, for information reporting purposes, the rules applicable to U.S. financial institutions apply, not the reporting rules under the IGA.

³ The regulations also require reporting of withholdable payments. Treas. Reg. § 1.1474-1(d).

⁴ I.R.C. § 1473(1)(A)(i). Although the statute includes within the definition of withholdable payment gross proceeds from the sale or other disposition of any property that can produce interest or dividends from sources within the United States, the Treasury Department and IRS have issued proposed regulations that would eliminate such gross proceeds from the definition of withholdable payment. See, e.g., Regulations Reducing Burden Under FATCA and Chapter 3, 83 Fed. Reg. 64757 (Dec. 18, 2018). Section 1473(1) provides the IRS authority to exclude gains from the definition of withholdable payment.

the United States and other countries. Our comments relate to both sets of rules unless specifically stated otherwise. Neither set of rules specifically address FATCA account reporting rules as they relate to digital assets. We believe that this lack of guidance hurts IRS enforcement efforts, contributes to the unequal treatment of similarly situated taxpayers, and creates uncertainty for financial institutions with respect to FATCA reporting obligations.

2. As Written, FATCA Does Not Apply to Digital Assets

As currently written, FATCA account reporting does not apply to digital assets. Given the extraordinary growth of this industry and the corresponding uncertainty in the application of traditional laws to this new technology, we understand that the Treasury and the IRS may seek to clarify the application of FATCA account reporting to digital assets. Should Treasury and the IRS determine that inclusion of digital assets within the scope of FATCA account reporting is appropriate, we urge Treasury and the IRS to issue proposed guidance to give the industry and taxpayers sufficient time to comment. The complexity of the tax issues surrounding digital assets requires industry input and the implementation of any rules will require the commitment of substantial resources.

This letter provides a brief description regarding the current scope of FATCA account reporting for different types of financial institutions and the modifications to the current rules that would be necessary for FATCA account reporting to apply to digital assets.

Specifically, in order for FATCA to apply to digital assets, Treasury and the IRS should provide proposed guidance to clarify the following:

- For banks and similar financial institutions, whether digital asset deposits are subject to FATCA account reporting, and
- For non-bank financial institutions such as custodians and investment entities, whether the term “financial assets” includes digital assets.

As a general comment, the FATCA and the OECD’s Common Reporting Standard (“CRS”) have generally been consistent regarding the scope of the financial institutions and accounts subject to reporting.⁵ This consistency is critical to fostering compliance that is administrable and effective globally.⁶

This letter should be read together with the Chamber’s prior letter dated April 3, 2020 (“Prior Letter”), which discusses information reporting issues more generally.⁷ The

⁵ The terms “foreign financial institution” and “financial account” are prescribed by statute for FATCA. I.R.C. §§ 1471(d)(2), (4), and (5).

⁶ We acknowledge that the OECD is considering extending CRS to “Virtual Asset Services Providers,” as defined in the General Glossary to the FATF Recommendations. If the OECD were to adopt this approach, the scope of entities covered by CRS and FATCA would differ, as the definition of “financial institution” for FATCA is defined by statute.

⁷ Prior Letter, *supra* note 1.

terminology used in this letter follows the definitions contained in the Prior Letter.

3. Scope of FATCA Account Reporting — In General

Generally, FATCA account reporting applies to a “foreign financial institution.” A financial institution generally includes an entity that is a “depository institution,” a “custodial institution,” or an “investment entity.”⁸ The type of accounts subject to reporting depend on the financial institution required to report. The definition of each type of financial institution and the types of accounts for which reporting is required raise different issues if FATCA reporting is extended to cover digital assets. These issues are discussed in the following sections.⁹

3.1. What Constitutes a “Foreign” Account.

A threshold consideration is what constitutes a “foreign” account in the context of digital assets. Currently, the definition focuses on the jurisdictional nature of the entity. In the digital asset context, however, it may not be clear where the financial institution is “located” given entities often have no physical locations and users open accounts online. Instead, we recommend the determination center on the entity that contractually holds the private key to the wallet. We believe that focusing on the location of the financial institution storing the digital assets’ private keys with rights to control the assets in question is a simpler approach.

3.2. Depository Institutions

FATCA requires a “depository institution” to provide information for “depository accounts.” The FATCA statute, regulations, and the IGAs generally define a depository institution as any entity that accepts deposits in the ordinary course of a banking or similar business.¹⁰ The regulations state that an entity is engaged in a banking or similar business if, in the ordinary course of its business with customers, the entity accepts deposits or other similar investments of funds and regularly engages in one or more of the following activities—

(A) Makes personal, mortgage, industrial, or other loans or provides other

⁸ I.R.C. §§ 1471(d)(4) and (5). The FATCA regulations and the IGAs include within the definition of a financial institution an insurance company or a holding company of an insurance company that issues, or is obligated to make payments with respect to, a cash value insurance or annuity contract, certain other holding companies, and treasury centers. The FATCA regulations also include an entity that is a holding company or treasury center.

⁹ We do not address the holding of digital assets by certain insurance companies, holding companies, and treasury centers as the impact is currently limited.

¹⁰ I.R.C. §§1471(d)(2)(A) and (5)(A); Treas. Reg. §§ 1.1471-5(e)(1)(i) and -5(e)(2)(i); Reciprocal Model 1A IGA, Appendix 1 i); Reciprocal Mode1 2 IGA Appendix 1 j).

extensions of credit;

(B) Purchases, sells, discounts, or negotiates accounts receivable, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;

(C) Issues letters of credit and negotiates drafts drawn thereunder;

(D) Provides trust or fiduciary services;

(E) Finances foreign exchange transactions; or

(F) Enters into, purchases, or disposes of finance leases or leased assets.¹¹

A depository institution must report information related to “depository accounts.” A “depository account” generally includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained in the ordinary course of a banking or similar business.¹²

Digital assets are not a type of asset generally held within a depository account. If FATCA were to apply, Treasury and the IRS would have to determine whether digital assets held in an account at a bank or similar business should be included within the definition of “depository account.” In addition, Treasury and the IRS should state whether deposits of digital assets are included in the calculation of the \$50,000 threshold exclusion applicable to deposit accounts held by individuals. Further, if digital assets should be treated as “financial assets” for the FATCA obligations of custodial institutions and investment entities, discussed below, FATCA reporting should apply to digital assets held in an account at a bank or similar business.

3.3. Custodial Institutions and Investment Entities

A custodial institution is an entity that, as a substantial portion of its business, holds “financial assets” for the benefit of one or more other persons.¹³ The term “financial assets” is not defined for a custodial institution but is for an investment entity. We assume that the investment entity definition applies to determine whether an entity is a custodial institution. Thus, “financial asset” means —

¹¹ Treas. Reg. § 1.1471-5(e)(2)(i).

¹² The IGAs and the Treasury regulations include within the definition of deposit account “an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon.” The definition of deposit accounts is also slightly different than the definition in the IGAs. Those differences and the inclusion of amounts on deposit with an insurance company are not relevant for the present discussion.

¹³ I.R.C. § 1471(d)(5)(B); Treas. Reg. § 1.1471-5(e)(1)(ii); Model IGA 1A Article 1 h); Model 2 IGA Article 1 i).

[A] security (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interest, commodity (as defined in section 475(e)(2)), notional principal contract (as defined in §1.446-3(c)), insurance contract or annuity contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, notional principal contract, insurance contract, or annuity contract.¹⁴

A custodial institution must report a “custodial account,” which is defined as —

[A]n arrangement for holding a financial instrument, contract, or investment (including, but not limited to, a share of stock in a corporation, a note, bond, debenture, or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a nonfinancial index, a notional principal contract as defined in §1.446-3(c), an insurance or annuity contract, and any option or other derivative instrument) for the benefit of another person.¹⁵

A similar definition is incorporated into the Reciprocal Model 1A IGA.¹⁶

An investment entity is defined in the Treasury Regulations as —

(A) An entity that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer —

- (1)** Trading in money market instruments (checks, bills, certificates of deposit, derivatives, etc.); foreign currency; foreign exchange, interest rate, and index instruments; transferable securities; or commodity futures;
- (2)** Individual or collective portfolio management; or
- (3)** Otherwise investing, administering, or managing funds, money, or financial assets on behalf of other persons.

¹⁴ Treas. Reg. § 1.1471-5(e)(4)(ii); I.R.C. § 1471(d)(5)(C). The term is not defined in the IGAs.

¹⁵ Treas. Reg. § 1.1471-5(b)(1)(ii).

¹⁶ Reciprocal Model 1A IGA Appendix I 1 u. “The term ‘Custodial Account’ means an account (other than an Insurance Contract or Annuity Contract) for the benefit of another person that holds any financial instrument or contract held for investment (including, but not limited to, a share or stock in a corporation, a note, bond, debenture, or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a nonfinancial index, a notional principal contract, an Insurance Contract or Annuity Contract, and any option or other derivative instrument).” The Reciprocal Model 2 IGA does not define the term.

(B) The entity's gross income is primarily attributable to investing, reinvesting, or trading in *financial assets* and the entity is managed by another financial institution;

(C) The entity functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in *financial assets*. [Emphasis added.]

Under Article 1 j) of the Model 1 IGA and Article 1 k) of the Model 2 IGA, the definition of an investment entity is —

Any entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:

- (1) trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- (2) individual and collective portfolio management; or
- (3) otherwise investing, administering, or managing funds or money on behalf of other persons.

Unlike the definition under the regulations, the Model IGAs do not refer to financial assets. This appears to be an oversight and we assume that an entity that is “otherwise investing, administering, or managing funds or money on behalf of other persons” (an investment entity) includes an entity that performs those functions with regard to financial assets.

The term “financial assets” for purposes of investment entities is the same as quoted above in connection with the definition of custodial institution. Thus, the same considerations around the term financial assets come into play. Specifically, the definitions of “financial assets” and “custodial account” do not specifically refer to digital assets. Our prior letter discussed the possibility of treating digital assets as commodities for purposes of information reporting under Section 6045.

Section 6045 and FATCA have different definitions of a commodity, as the current Section 6045 regulations refer to property (or interests therein) for which regulated futures contracts have been approved by the Commodity Futures Trading Commission (“CFTC”),¹⁷ while FATCA refers to Section 475(e)(2) (which focuses on active trading (only) and not contracts approved by the CFTC).¹⁸

¹⁷ Treas. Reg. § 1.6045-1(a)(5).

¹⁸ Treas. Reg. § 1.1471-5(e)(4)(ii).

If, and to the extent, Treasury and the IRS determine that digital assets should be treated as commodities for section 6045 and FATCA purposes, the guidance should limit the characterization of digital assets as commodities solely for the purposes of section 6045 and FATCA. Without this limitation, other Code sections containing the term “commodity” would be impacted perhaps leading to unintended consequences. In this connection, we note that the term does not have a uniform definition throughout the Code.

3.4. Non-Custodial Accounts

If the Service were to apply FATCA to digital assets, we would also recommend that the guidance make clear that a non-custodial wallet is not a custodial account for FATCA purposes and, therefore, FATCA would not apply. Non-custodial wallets, where a financial institution does not hold the private keys, for example, would not be reportable accounts. Private wallets, mobile wallets, hardware wallets and other services or software that allows users to hold and control their own digital assets without the intervention of a financial institution or agency should be excluded from the scope of FATCA as they are generally considered to be private taxpayer transactions without an intermediary, thus not implicating reporting obligations.

4. Conclusion

In summary, if the Treasury and the IRS seek to apply FATCA reporting requirements to digital assets, they must propose this treatment in an advanced notice of proposed rulemaking to address whether digital assets in custodial accounts are reportable for banking and similar institutions. With regard to custodial institutions and investment entities, the definition of “financial asset” will need to be reconsidered. As always, the Chamber will provide any further information it can to address questions you may have.

* * *

Thank you for your time and consideration.

Very Truly Yours,



Amy Davine Kim
Chief Policy Officer