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November 13, 2023

*Via Electronic Submission*

Mr. Douglas W. O'Donnell  
Deputy Commissioner for Services and Enforcement  
1111 Constitution Ave., N.W.  
Washington, D.C. 20224

**RE: Public Comment on Proposed Rule for Gross Proceeds and Basis Reporting by Brokers  
and Determination of Amount Realized and Basis for Digital Asset Transactions  
(REG-122793-19)**

Dear Deputy Commissioner O'Donnell:

The Independent Community Bankers of America (“ICBA”)<sup>1</sup> welcomes the opportunity to provide comments on the Internal Revenue Service (“IRS”) and Treasury Department’s proposal regarding information reporting rules for digital assets brokers. ICBA and community bankers support the proposal and believe the proposed rules will help to provide taxpayers with relevant information to accurately meet their filing obligations, clarify reporting requirements for digital assets brokers, and dispel questions about the overall tax treatment of digital assets. Importantly, the proposal would create a level playing field by applying comparable information reporting requirements on brokers of digital assets as well as traditional assets. As digital assets technology and applications continue to evolve, we look forward to additional engagement with the IRS and Treasury Department to ensure that U.S. tax policies remain current and fair and promote innovation by community banks and other responsible actors.

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<sup>1</sup> *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

*With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding \$5.8 trillion in assets, \$4.8 trillion in deposits, and \$3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).*

## **Background**

The digital asset ecosystem started in 2009 with the first Bitcoin transaction, and in the years since, has grown into a complex environment featuring thousands of tokens and applications that claim to support a variety of use cases. Every day, American consumers trade crypto assets using centralized and decentralized crypto asset service providers.

In 2014, the IRS clarified in Notice 2014-21 that transactions in “virtual currency” are subject to the same tax principles as transactions in “real currency.” Gains and losses associated with crypto trading are subject to the same tax treatment applied to traditional securities. However, in the absence of clearly defined information reporting requirements, noncompliance is believed to be widespread. The IRS lacks information to enforce crypto tax liabilities and crypto investors who wish to comply with the tax law often lack the information to do so.

In 2021, Congress passed, and the President signed into law the Infrastructure Investment and Jobs Act (“the Act”). The Act includes a provision that amends the definition of a “broker” subject to information reporting requirements under the tax code to include “any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person.” The provision is intended as a clarification of present law. Further, the Act amends the definition of “specified security” to include digital assets, in addition to other changes designed to facilitate information reporting. This proposed regulation would implement the statutory amendments created by the Act.

ICBA’s letter focuses on the areas of greatest interest to community bankers: the definition of digital assets, the definition and obligations of digital assets brokers, and the treatment of stablecoins.

## **The Definition of “Digital Assets”**

According to the proposed rule, a “digital asset” is defined as “a digital representation of value that is recorded on a cryptographically secured distributed ledger (or similar technology).”<sup>2</sup> The IRS and the Treasury Department specifically note that this definition is not intended to apply to fiat currency held in digital forms, such as money held in a community bank account or transacted through a payment processor. Additionally, this definition is designed to exclude other forms of virtual assets that exist within closed system, such as tokens or other assets that can be bought and sold within a video game.

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<sup>2</sup> Internal Revenue Service and United States Treasury Department, “Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Assets,” *Federal Register* 88, no. 166 (August 29, 2023): 59581, <https://www.govinfo.gov/content/pkg/FR-2023-08-29/pdf/2023-17565.pdf>.

On behalf of community bankers, ICBA agrees that use of cryptography to secure transactions is an essential characteristic of “digital assets,” and we believe that the final definition should retain this element. We also support the IRS and the Treasury Department’s decision to not limit the definition to “only those digital representations for which *each transaction* is actually recorded or secured on a cryptographically secured distributed ledger (emphasis added).” We share the IRS and Treasury Department’s concern that such a definition would fail to cover the significant amount of trading that occurs off-chain on the internal ledger of centralized crypto asset service providers.

ICBA and community bankers are also aware of various experiments by some financial institutions, central banks and technology providers to tokenize deposits and other traditional financial instruments. Community banks are not widely involved in such projects at this time; therefore, it is difficult to gauge how the proposed definition may or may not impact community banks if these tokenization experiments eventually evolve into regular activities throughout the financial system. If tokenization in traditional financial services becomes more prevalent, we ask the IRS and the Treasury Department to remain open to future changes to ensure that the definition does not inadvertently capture back-office operational systems and processes.

Additionally, while the IRS and the Treasury Department state that the definition is not intended to apply to commercial applications that do not create tradeable assets, we believe that definition could be clarified to explicitly incorporate this exclusion. For example, digital assets could be defined as “a digital representation of value that is recorded on cryptographically secured ledger (or similar technology) and has the capability to be purchased, sold or exchanged.”

### **Definition and Obligations of Digital Assets Brokers**

ICBA and our community bankers welcome the IRS and Treasury Department’s thoughtful consideration of which parties or entities should be obligated to fulfill the new reporting requirements outlined in the proposal.

Specifically, the proposal revises the definition of “effect” to clarify that the term “broker” will now include “any person that provides facilitative services that effectuate sales of digital assets by customers...provided the nature of the person's service arrangement with customers is such that **the person ordinarily would know or be in a position to know the identity of the party that makes the sale and the nature of the transaction potentially giving rise to gross proceeds** (emphasis added).”<sup>3</sup> The IRS and the Treasury Department argue that this phrasing “takes into account whether a person is in a position to know information about the identity of a customer, rather than whether a person ordinarily would know such information” because crypto trading platforms, especially DeFi protocols, rarely obtain customer names and other identifying information. Crucially, the agencies assert that any person

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<sup>3</sup> Ibid, 59585.

with the capability to “modify the operation of a platform to obtain customer information is **treated as being in a position to know that information** (emphasis added).”<sup>4</sup>

We believe this proposed definition accurately recognizes how digital assets trading platforms operate. As we recently discussed in a comment letter to the International Organization of Securities Commissions, all activity within the crypto ecosystem is grounded in human activity and that human activity cannot exist outside the regulatory sphere.<sup>5</sup> DeFi trading platforms are the direct result of people or organizations performing critical duties, including, but not limited to, the writing of the underlying code that supports the trading functions, the execution of that code, the ongoing maintenance of the protocol, and the promotion of trading protocol among prospective users.

In other words, there are people throughout the workflow who take a lead role in the design and operation of the trading protocol—*including the ability to modify its operation*—and they should be held responsible to obtain the appropriate customer data to fulfill any tax reporting requirements. The proposal is correct in highlighting the fact that if a DeFi exchange operator has altered a smart contract or deployed a new one, then such activity “strongly suggests that the operator has sufficient control or influence over the facilitative services provided to obtain the information about either the identity of the party that makes the sale or whether and the extent to which the transfer of digital assets involved in a transaction gives rise to gross proceeds.”<sup>6</sup>

ICBA and its members also agree that decentralized autonomous organizations (“DAOs”) may also fulfill the definition of “broker.” As examined in the recent IOSCO report on DeFi, DAOs are not nearly as “decentralized” as they claim to be.<sup>7</sup> Oftentimes, ownership of governance tokens is concentrated among a small group of investors—perhaps even a majority held by a single user—that can exercise complete control over the development of the protocol. Plus, a DAO—like any other entity in the crypto industry—is an invention of individuals and/or other organizations making critical decisions including, but not limited to, how to establish a project, how to delegate power, and how to support the maintenance of the project. These individuals must be held responsible for the roles they fulfill.

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<sup>4</sup> Ibid.

<sup>5</sup> Independent Community Bankers of America, “RE: Public Comment on IOSCO’s Consultation Report on Policy Recommendations for Decentralized Finance (DeFi)” (October 18, 2023), <https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/response-to-iosco-defi-policy-recommendations>.

<sup>6</sup> “Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Assets,” 59587.

<sup>7</sup> The Board of the International Organization of Securities Commissions, IOSCO, “Policy Recommendations for Decentralized Finance (DeFi) Consultation Report,” (September 2023), 66-67, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD744.pdf>.

Therefore, we strongly support the agencies' decisions to include the operators of DeFi exchanges within the scope of the definition of the term "broker." By instituting the rule as proposed, taxpayers who engage in DeFi trading will have the information they need to accurately prepare their tax returns, and the government will have more information to ensure that DeFi entities are compliant with all relevant laws and regulations. Requiring DeFi exchanges to collect such information could also provide law enforcement with essential data to help track criminal activity throughout the crypto ecosystem, particularly the increasingly frequent large-scale hacks and money laundering conducted by state-sponsored groups and foreign criminal enterprises.

Lastly, we also support the notion that digital asset hosted wallet providers and anyone who sells or licenses unhosted wallet software should be classified as a broker, and have all the attendant responsibilities, if they offer services or functionality that enables taxpayers to purchase or sell digital assets.

### **Treatment of Stablecoins**

In contrast with digital assets like bitcoin or non-fungible tokens, stablecoins are a type of digital asset that aim to maintain a stable value and generally peg to the US dollar. Stablecoins try to achieve this stability through a variety of mechanisms, such as holding reserves as US Treasuries or deposits in bank accounts.

Over the past two years, every significant stablecoin, along with many minor ones, have lost their peg to the dollar. To that end, the proposed rule astutely acknowledges that stablecoins can experience the same value fluctuations as other digital assets. Therefore, it is logical for the agencies to include stablecoins within the definition of "digital assets" and seek to apply the same reporting obligation to these assets and their issuers. We also support the IRS' and Treasury Department's decision to exclude stablecoins from the definition of "cash" and to treat them like other digital assets.

### **Conclusion**

Thank you for the opportunity to comment on this important proposal, which will significantly assist investors in digital assets with meeting their tax obligations. As noted above, ICBA looks forward to additional engagement with the IRS and Treasury Department as the digital asset environment continues to evolve.

Please feel free to contact me at [Brian.Laverdure@icba.org](mailto:Brian.Laverdure@icba.org) if you have any questions about the positions stated in this letter.

Sincerely,

/s/

Brian Laverdure, AAP  
Senior Vice President, Digital Assets and Innovation Policy