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Invested in America

September 8, 2023

The Honorable Ron Wyden
221 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Mike Crapo
239 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: **Tax Treatment of Digital Assets**

Dear Chairman Wyden and Ranking Member Crapo:

The Securities and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to your letter seeking input regarding the US federal income tax treatment of digital asset transactions. We commend you and your staff for focusing on the US federal income tax treatment of digital asset transactions, and we agree that this is an area of tax law that is in need of greater clarity and consistency. Accordingly, we encourage Congress and the Treasury Department to issue guidance in this regard, particularly in light of the increased use of digital assets in the financial markets and the complexity and novel features of many digital asset transactions.

While our members have views on the specific questions that you posed for consideration, and we would be happy to meet with you or your staff to discuss our views or to provide any assistance, this letter presents several comments regarding the process that we believe should be adopted in considering and enacting rules regarding the tax treatment of digital assets, as well as one specific recommendation regarding broker reporting for wash sales of digital assets.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

1. The request for comments employs the term "digital assets," but does not define that term or request comments that define that term. We believe that that term should be defined in any legislation regarding the tax treatment of digital assets, and it is possible that a different definition may be required in different contexts.

In particular, we note that any special rules for digital assets should not apply to an "asset tokenization" in which interests in a traditional asset, or a traditional financial asset itself, are represented by digital tokens on a distributed ledger or blockchain. For example, interests in stocks, bonds, and real estate (as well as other asset classes) have been issued as tokens that trade on a blockchain, where transactions may be considered to be more secure and efficient. In some cases, such tokens represent ownership interests in a corporation or partnership, which are economically the same as shares of a corporation or interests in a partnership. Such tokens simply represent ownership of the reference assets, or constitute a financial asset itself, for which there are well established tax rules. We therefore recommend that the term "digital asset" be defined for purposes of any new legislation so that it does not include such tokens or other digital interests.[2]

2. We recommend that any legislation regarding the tax treatment of digital assets only be enacted after a deliberative and collaborative process with tax and non-tax experts and industry stakeholders. This will allow for tax rules that take into account the realities of the digital asset marketplace, and that will be administrable and enforceable as a practical matter. We likewise recommend that the Treasury Department adopt a similar approach in issuing any regulations with respect to any such legislation.

3. We recommend that any legislation with respect to the taxation of digital assets, particularly with respect to reporting and compliance requirements beyond current Section 6045 of the Internal Revenue Code (the "Code"), take into account the burden and administrability of such rules and requirements. Any new rules that impose additional reporting and compliance requirements for digital assets will likely require the development of complex and expensive systems that will take significant time to develop and implement. We recommend that the government consider such costs, burdens and complexity in considering any reporting or compliance rules, and particularly whether the costs of reporting may in some cases (e.g., certain *de minimis* transactions) outweigh any potential tax avoidance. We further recommend that any new legislation regarding digital assets take into account, where possible, existing statutory and

[2] We note in this regard that the recently issued proposed regulations regarding broker reporting for digital assets considered this issue and took the position that these uses should not be in scope as it states that "it is intended that the regulations would not apply to uses of distributed ledger technology or similar technology for ordinary commercial purposes that do not create new transferable assets".

regulatory frameworks, so that financial instruments are not subject to dual and redundant legal regimes. We likewise recommend that the Treasury Department adopt a similar approach in issuing any regulations with respect to any such legislation.

4. We recommend that any new legislation related to the tax treatment of digital assets, especially concerning tax reporting and compliance obligations, be circulated in draft form for review and input from industry experts and stakeholders before enactment. This pre-enactment review process would help identify potential implementation challenges, unintended consequences, or areas in need of clarification, and would allow market participants an opportunity to comment on, and potentially improve, any such rules.

In addition, as discussed above, any new rules that impose additional reporting and compliance requirements for digital assets will likely require the development of complex and expensive systems that will take significant time to develop and implement. We therefore recommend that new legislation regarding the tax treatment of digital assets, particularly with respect to compliance and reporting requirements beyond those currently in Section 6045 of the Code, provide (or direct the Treasury Department to provide) for a deferred effective date so that market participants have the time to implement the systems to comply with such requirements. If a deferred effective date is not explicitly provided in any such legislation, then we recommend that, at a minimum, the legislative history direct Treasury to implement the rules in the legislation with deferred effective dates. In addition, we recommend that the statutory language, or at a minimum the legislative history, direct Treasury to first issue regulations that implement such legislation in proposed form.[3] We note in this regard that if the financial services industry is subject to reporting and compliance requirements which are overly burdensome or for which the industry does not have sufficient time to implement the requisite legal requirements, firms may be unwilling to custody digital assets or to participate in digital asset market transactions. This could in turn trigger a harmful economic disruption in a critical financial market, which could have unintended adverse economic consequences for financial markets more generally.

[3] We note in this regard that Treasury has adopted the proposed regulations and deferred effective date approach described above with respect to the implementation of the new broker tax reporting rules for digital assets that were enacted in the Infrastructure Investment and Jobs Act. However, while this is not the subject of this letter, we believe that the January 1, 2025, effective date in the recently issued proposed regulations does not provide sufficient time to develop and implement the systems necessary to comply with the requirements in the proposed regulations. We note this in this letter so that you are aware that the deferred effective dates that are proposed by the Treasury Department may not be sufficient in some cases, and therefore a specific legislative directive may be helpful in this regard.

We believe that the process under which the FATCA and Section 871(m) legislation and regulations were issued provides a useful guidepost in this regard. Those rules represented novel reporting and withholding regimes which required the development and implementation of complex and expensive systems. The government acknowledged this by first issuing rules in proposed form to allow for industry comments to improve the rules and make them more efficient and practical, and then providing for deferred effective dates to allow market participants the time to develop the systems and operational capability to implement the new rules. We recommend that any new rules that are issued regarding reporting and compliance with respect to digital assets be similarly implemented with opportunity to comment and deferred effective dates that would allow for implementation in a balanced and fair manner that would not cause a harmful market disruption.

5. Your letter requested comments regarding the possible application of the Section 1091 wash sale rules to digital assets. While we do not express a view as to whether the wash sale rules should apply to digital assets, we note that IRC Section 6045 and the regulations thereunder specifically provide that a broker is only required to apply the wash sale rules for broker tax reporting purposes to identical securities that are held in the same account. This is the case notwithstanding that the wash sale rules apply to all equity or other securities of a taxpayer, irrespective of whether they are identical or held in the same account. The different broker tax reporting rule acknowledges that it would not be practical or feasible for brokers to track securities held in different customer accounts or different securities that are held in a single customer account in order to determine whether the wash sale rules apply to a transaction. We similarly recommend that if Congress chooses to apply the wash sale rules to digital asset transactions, it should then provide that brokers will only be required to apply the wash sale rules for tax reporting purposes to identical digital assets that are held in the same customer account. Any other position would not be practical or feasible, and there is no reason why the broker tax reporting rules for wash sales of digital assets should differ from the broker tax reporting rules for wash sales of stock or securities.

We appreciate your consideration of our views and concerns, and we would be happy to further discuss this letter with you and your colleagues. In addition, as noted above, we would be happy to meet with you or your staff to discuss the specific questions outlined in your letter.

Respectfully submitted,

Josh Wilsusen
Executive Vice President, Advocacy