Biden Administration’s Greenbook signals continued focus on taxation of cryptocurrency and digital assets

Blockchain and Digital Assets News and Trends

23 May 2022
By: Tom Geraghty | Kali McGuire

On March 28, 2022, the Treasury Department issued its General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (the Greenbook - so-called because of its traditional green cover), which describes the revenue proposals that form part of the Biden Administration’s FY2023 Budget Proposal.

Among other topics, the Greenbook outlines a number of tax proposals addressing trading and lending of cryptocurrency and digital assets, and further expanded information reporting for such assets.

- **Nonrecognition treatment for lending "actively traded" digital assets**. Under Section 1058 of the Code, loans of securities are not treated as taxable transactions, either on initial transfer of the securities or their subsequent return, if made pursuant to arrangements that meet certain requirements. The market for loans of cryptocurrency and digital assets has expanded rapidly, but remains hampered by a concern that such loans trigger gain or loss on the loaned asset. The Greenbook proposes to expand the scope of Section 1058 nonrecognition treatment to cover loans of “actively traded" digital assets where those loans have terms similar to those of qualifying securities loans and are recorded on cryptographically secured distributed ledgers. Under the proposal, a lender of digital assets would be required to include in income any amounts earned on the loaned digital asset during the term of the loan (for example, additional cryptocurrency earned as a result of a hard fork). Codification of this proposal would provide assurance to taxpayers that loan of digital assets meeting these requirements would not create a taxable disposition of the loaned digital assets.

- **Mark-to-market accounting available for "actively traded" digital assets**. Under Section 475 of the Code, commodity dealers and traders of securities and commodities may elect to use the "mark-to-market" method of accounting, under which they recognize **ordinary** gain or loss on an annual basis based on the change in value of such securities or commodities, rather than capital gain or loss. A significant benefit of this treatment is that current-year trading losses are treated as ordinary business losses rather than a capital loss subject to the annual $3,000 capital loss limitation. Currently, it is unclear whether digital assets qualify as commodities under Section 475. The Greenbook proposes to permit dealers and traders of "actively traded" cryptocurrency and digital assets, and derivatives on or hedges of such assets, to elect to use the mark-to-market method. What counts as “actively traded" for this purpose would be the subject of future Treasury Department regulations. It is important to note that this proposal would treat cryptocurrency and digital assets as a new class of assets eligible for mark-to-market treatment rather than treating such assets as securities or commodities, a significant benefit for dealers and traders of qualifying digital assets.
- **Digital assets subject to FATCA and foreign financial asset reporting.** As discussed in our November 2021 issue, the Infrastructure Investment and Jobs Act (HR 3684) increased the reporting obligations of facilitators of digital asset transactions by greatly expanding the definition of a broker to include "any person who (for consideration) is responsible for providing any service effectuating transfers of digital assets on behalf of another person." Following on this, the Greenbook proposes to require brokers (including US digital asset exchanges) to report information relating to the substantial foreign owners of passive entities. This information gathering proposal is intended to facilitate Treasury’s automatic information sharing with partner jurisdictions and the receipt of similar information with respect to US taxpayers from such partner jurisdictions. In addition, the Greenbook proposes to require foreign asset reporting with respect to accounts that hold digital assets maintained by a foreign digital asset exchange or other foreign digital asset service provider. The $50,000 threshold for foreign asset reporting would be determined based on the aggregate value of such digital assets and any foreign assets within the existing reporting regime.

It is important to note that the proposals outlined in the Greenbook are merely proposals and not legislation ready to be introduced. Whether or when Congress takes up or actually enacts any or all of these proposals is pure speculation at this time. Still, the inclusion of these proposals in the Greenbook is a signal that the Biden Administration has prioritized providing additional guidance for the taxation of cryptocurrency and digital assets.

AUTHORS

Tom Geraghty
Partner
Chicago | T: +1 312 368 4000
thomas.geraghty@dlapiper.com

Kali McGuire
Associate
San Francisco | T: +1 415 836 2500
kali.mcguire@dlapiper.com