THE TAXATION OF BITCOIN: HOW THE IRS VIEWS CRYPTOCURRENCIES

Deidre A. Liedel*

ABSTRACT

Cryptocurrencies such as Bitcoin have gained prominence since they were first introduced in 2008. While cryptocurrencies have grown in use by consumers and business, government regulators such as the Internal Revenue Service have been slower to respond to this technological creation. It is important to understand how the IRS views cryptocurrencies, so individuals and businesses can properly report their use of cryptocurrencies in transactions. The IRS has determined that cryptocurrencies will be treated as property, with all that entails including tracking basis, determining market value of transactions, and reporting gains or losses.

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* Deidre Liedel is an attorney and CPA and currently teaches at the University of Toledo College of Business and Innovation. She received her J.D. at the University of Toledo College of Law in 1998. The author thanks Dustin Miller for his contribution as a research assistant and Peggy Ery for her technical assistance.
I. INTRODUCTION

The U.S. financial system has seen many changes since the economy developed beyond a barter economy several centuries ago. While we have not moved completely beyond a barter economy, currency is used and exchanged in the vast majority of transactions for goods and services. Beyond the use of currency, the banking industry has taken steps to make spending money easier. The use of checks in the United States dates back to 1681, and money transfers were introduced by Western Union in 1871.


These tools helped the economy grow and flourish because they made it easier for consumers to spend money.

In the current economy, the use of checks and money transfers has given way to credit cards, debit cards, PayPal, and other payment methods such as Apple Pay, Google Pay, and proprietary store options. These alternative payment methods are based on U.S. currency and provide a new level of convenience.\(^3\) However, technology moved beyond currency-based payment methods with the development of cryptocurrency. Cryptocurrency is “a digital currency or decentralized system of exchange that uses advanced cryptography for security.”\(^4\) In layman’s terms, cryptocurrency is a pseudonymous digital payment system.

While Bitcoin is the most well-known cryptocurrency, there are over 850 active digital currencies.\(^5\) Although it does fluctuate, sometimes significantly, Bitcoin alone has a daily transaction volume of $50 million, with peaks of $500 million\(^6\) and market capitalization of almost $50 billion.\(^7\) Cryptocurrencies as a whole have a market capitalization of more than $100 billion,\(^8\) indicating Bitcoin is by far the largest. The development and success of Bitcoin has prompted questions as to how Bitcoin and other cryptocurrencies should be treated by the Internal Revenue Service.\(^9\)

This Article first reviews the history of cryptocurrencies, before detailing the IRS position as stated in Notice 2014-21, in order to understand the approach the IRS has taken with cryptocurrencies.\(^10\) This Article also discusses the perspective of several federal agencies that have addressed

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8. Id.


10. See infra Part II.
cryptocurrencies, as well as how federal courts have classified cryptocurrencies in a variety of legal cases.\textsuperscript{11} Next, a review of state and international treatment of Bitcoin, including a look at how the accounting industry has begun to look at cryptocurrencies.\textsuperscript{12} Finally, this Article conducts a review of the conflicting judicial and regulatory treatment of cryptocurrencies.\textsuperscript{13}

II. BRIEF OVERVIEW OF CRYPTOCURRENCIES\textsuperscript{14}

Bitcoin was the first cryptocurrency, the protocol for which was developed and published in 2008 under the pseudonym of Satoshi Nakamoto.\textsuperscript{15} Prior to Nakamoto’s invention, transferring money online required a trusted third-party intermediary, such as a credit card processor or PayPal.\textsuperscript{16} Any system without this third-party intermediary to maintain a ledger of transactions (i.e., subtract the balance from the sender’s account and add it to the receiver’s account) meant digital currency could be spent twice or transactions could be altered,\textsuperscript{17} making such digital currency unreliable and worthless. Bitcoin addressed this issue with what is called a blockchain and created a decentralized peer-to-peer payment network.\textsuperscript{18} “The blockchain is . . . an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually everything of value . . . .”\textsuperscript{19} It ensures that digital money used in a transaction cannot be spent twice\textsuperscript{20} nor balances retroactively edited.\textsuperscript{21}

\textsuperscript{11} See infra Parts III, IV.
\textsuperscript{12} See infra Part V.
\textsuperscript{13} See infra Part VI.
\textsuperscript{14} “Bitcoin” is often used interchangeably with “cryptocurrency.” However, Bitcoin is actually a form of a cryptocurrency and will be distinguished as such in this Article.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 3–4.
\textsuperscript{18} Id. at 4.
\textsuperscript{20} BRITO & CASTILLO, supra note 15, at 4.
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A. Technical Aspects

Ledgers have been the foundation of accounting for centuries. Cryptocurrencies have expanded the definition and use of the accounting ledger by using a distributed ledger. A commentator notes, “[A] distributed ledger is a database held and updated independently by each participant (or node) in a large network.” Within the ledger system, each user has an account where transactions are posted via an entry in the ledger—a collection of these entries is a “block” in the “blockchain.”

To achieve a secure transaction ecosystem, cryptocurrencies use public-key cryptography, which requires every user to have both a public key and a private (or secret) key. When cryptocurrencies are used in a transaction, the sender identifies the receiver by the receiver’s public key, while signing the transaction with the sender’s private key and a unique transaction number. The proposed transaction is submitted to the decentralized network, and upon consensus, it is then added to the blockchain of the cryptocurrency with these keys. Thus confirming the transfer of cryptocurrency from sender to receiver and ensuring that the same units cannot be transferred again.

Users or owners of a cryptocurrency can store their units two ways. Users can choose to store units on a computer, sometimes referred to as “cold storage.” This method does have risk, because if you lose access to your computer and its digital contents, there is not another way to access your cryptocurrency. The second option is to use an exchange, similar to a

22. Acknowledging that this is an Article focused on Bitcoin and the IRS, I will minimize the technical aspects of Bitcoin.
24. Id.
25. Id.
27. Id.
28. Id.
29. Id.
30. Id.
32. Id.
stock exchange, where units can be digitally stored in a “wallet” or account. Each different cryptocurrency may have numerous exchanges where users can exchange government-backed legal tender or fiat currency for cryptocurrency units or vice versa, or the units can be exchanged for goods and services. Cryptocurrency exchanges are not regulated like banks or publicly traded stocks, and the exchanges can be very volatile.

1. Benefits of Cryptocurrencies

Cryptocurrencies, derived from the innovation of the blockchain, can function as a reliable online payment system with several benefits. Cryptocurrencies have a level of pseudonymity that is not found in other online payment methods, an important feature both for those seeking privacy and organizations that require it. Through cryptocurrencies’ implementation of the blockchain, users are not identified by name, bank account, social security number, or other method. However, most cryptocurrencies do not have complete anonymity, as the history of blockchain transactions is public by nature, and the activity of any specific user, based on the user ID, is traceable.
Despite this pseudonymity, there have been efforts to identify cryptocurrency users through their accounts on third-party exchanges. The IRS has attempted to obtain the identities of all 1.5 million users of the largest U.S. Bitcoin exchange, Coinbase. After receiving critical inquiries from Congress and opposition from both Coinbase itself and a Coinbase user, the IRS limited its inquiry only to those "who have conducted 'at least the equivalent of $20,000 in any one transaction type (buy, sell, send, or receive) in any one year during the 2013-2015 period,'" using the reporting thresholds of Internal Revenue Code (IRC) § 6050W, which requires all payment-processing companies such as PayPal to report certain information to the IRS regarding payments that were processed in a calendar year. Coinbase has not yet responded to the limited inquiry.

Cryptocurrencies can function as a medium of exchange with lower transaction costs than a typical paper currency with digital aspects. For example, the average cost to print a U.S. currency note (regardless of denomination) is $0.10267 per note. Beyond the cost of the actual currency is the cost of the banking industry itself, so that paper currency can function. Additional costs of the system include environmental costs, socioeconomic costs, corruption, institutional fraud, and transactional fraud, among

47. To date, Coinbase has not responded. In November 2017, the District Court ordered Coinbase to produce “documents for accounts with at least the equivalent of $20,000 in any one transaction type.” Order Re Petition to Enforce IRS Summons at 14, United States v. Coinbase, Inc., No. 17-cv-01431-JSC, 2017 WL 5890052, at *8.
Commentators note, “Bitcoin transactions are substantially cheaper and quicker than traditional payment networks.”
In comparing Bitcoin to traditional wire services, Bitcoin’s transaction fee is approximately 1/9 the cost of traditional wire-service companies such as Western Union and MoneyGram.

2. Disadvantages of Cryptocurrencies

Despite the benefits of cryptocurrencies, there are several concerns with the current implementation of Bitcoin and how it may be used. Bitcoin has been used by criminals and those involved in the black market because of the pseudonymous structure of the blockchain. Cryptocurrencies could theoretically be used to launder money in addition to selling and purchasing black market products. Attempting to avoid association with money laundering, as well as the regulatory issues involved, “[S]everal bitcoin exchanges have taken steps to comply with anti-money laundering record-keeping and reporting requirements.”

There are also personal financial security issues with cryptocurrencies, although they may not be wholly different from traditional currency security issues. Just like dropping a $20 bill on the sidewalk without noticing, if a user’s digital “wallet,” which contains the private keys, is lost, the value associated with that wallet is also lost.

The infrastructure needed to facilitate use of cryptocurrencies can also be hacked, leading to stolen units. The exchange called Bitfloor suffered a loss of 24,000 Bitcoins (valued at $250,000) when hackers successfully

50. BRITO & CASTILLO, supra note 15, at 10.
51. Id. at 13.
52. Id. at 20.
53. Id. at 21.
55. BRITO & CASTILLO, supra note 15, at 22.
56. Id. at 19.
57. See id.
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hacked the system.\textsuperscript{59} The Bitcoin exchange known as MtGox, which claimed to handle 80 percent of the global Bitcoin trade, filed for bankruptcy after 850,000 coins valued at $480 million disappeared.\textsuperscript{60} The former CEO of MtGox, Mark Karpeles, is currently facing embezzlement and data-manipulation charges in Japan.\textsuperscript{61}

One unique aspect of cryptocurrency security breaches, as opposed to the theft of U.S. currency, is that when a bank is robbed or there is a digital theft of deposits, such activity does not impact the value of U.S. currency either held personally or in bank accounts.\textsuperscript{62} However, a security breach of Bitcoin does negatively affect the market value of Bitcoin, though such impact has not been permanent.\textsuperscript{63}

B. IRS Treatment of Cryptocurrencies

Given advances in technology over the last several decades, it is not unusual for various parts of the law to lag these advances. Amazon.com operated without collecting a sales tax in most states for over 20 years before states caught up with the status of e-commerce sales and began to enforce applicable sales taxes.\textsuperscript{64} Today, Amazon.com collects a sales tax in all 45 states that assess it on end-user purchases.\textsuperscript{65} Similar challenges face Bitcoin and other cryptocurrencies.

In early 2014, the National Taxpayer Advocate urged the IRS to issue guidelines on how Bitcoin should be treated for purposes of taxation.\textsuperscript{66} At

\begin{thebibliography}{99}
\bibitem{59} Brito \& Castillo, \textit{supra} note 15, at 19.
\bibitem{62} See Brito \& Castillo, \textit{supra} note 15, at 4 (explaining that the value of bitcoin is not derived from other world currencies).
\bibitem{66} Ryan Tracy, \textit{Clarity Sought for Bitcoin Treatment}, WALL ST. J. (Jan. 9, 2014),
\end{thebibliography}
that point, Bitcoin had been in existence for five years, and the IRS had no
guidance on how to treat transactions involving Bitcoin or other
cryptocurrencies.  
Again, this lag between technology and regulation is not
uncommon. Like Amazon.com and sales tax, PayPal.com existed for 20
years before the IRS developed guidelines on how to report revenue
received via PayPal.com and similar online payment processing services.

1. IRS Notice 2014-21

In April 2014, the IRS released Notice 2014-21, which described “how
existing general tax principles apply to transactions using virtual currency.”
While some technology advances such as e-commerce and online payment
processing services like PayPal required new legislation to deal with the tax
implications, the IRS and Congress felt no need to develop new rules or laws
for cryptocurrencies. In 2011, when the IRS began to regulate PayPal and
similar services, PayPal was conducting almost $120 billion in net total
payment volume. While a direct comparison is difficult because of the
numerous cryptocurrencies functioning, Bitcoin did not process such
volume in 2014 when the IRS published its notice on the treatment of
cryptocurrencies. Today, cryptocurrencies will exceed that volume, with


68. Christina Mercer, History of PayPal: The History of the Biggest Online Payment
System in the World, TECHWORLD (Nov. 25, 2015), http://www.techworld.com/picture-
gallery/business/history-of-paypal-1998-now-3630386/ (stating that PayPal has existed
since 1998); see Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §
PLAW-110publ289.pdf.

16_IRB/ar12.html.

70. See infra notes 72–77.

71. While there were other services providers in the online payment processing
industry, PayPal was by far the largest and most used system. See 10 Excellent Online
Payment Systems, WEBPAGEFX (May 15, 2012), https://www.webpagefx.com/blog/web-
design/online-payment-systems/.

72. eBay Inc. Reports Strong Fourth Quarter and Full Year 2011 Results, eBAY (Jan.
18, 2012), http://files.shareholder.com/downloads/ebay/5097698907x0x534815/B8840
A22-DDFA-43C0-9D29-9CF11EA0BEC0/EBAY_News_2012_1_18_
Earnings.pdf.

73. Bitcoin Stats, BLOCKCHAIN, https://blockchain.info/stats (last visited Nov. 8,
2017) (providing a Bitcoin statistic summary every 24 hours).

74. See Confirmed Transactions Per Day, BLOCKCHAIN, https://blockchain.info/
transactions in excess of $3 billion each day.\textsuperscript{75}

The IRS stated in Notice 2014-21 that virtual currencies such as Bitcoin will be treated as property for federal tax purposes.\textsuperscript{76} While the IRS acknowledges that cryptocurrencies can operate “like ‘real’ currency” in some circumstances and can be used to sell or purchase goods and services, it noted that Bitcoin (at that time) did not have legal tender status in any U.S. jurisdiction.\textsuperscript{77}

2. Using Cryptocurrencies in Transactions

With the classification of cryptocurrencies as property, numerous resources must be reviewed to determine how to properly report transactions involving cryptocurrencies on tax returns and other income or transaction reporting forms. Those resources include IRS Notice 2014-21 and Publications 525, 544, and 551.\textsuperscript{78}

The purchase of a unit or partial unit of a cryptocurrency does not in itself lead to a reportable transaction. At the point of initial purchase, the transaction does not yet fall under the scope of “gross income” as defined under § 61 of the Internal Revenue Code.\textsuperscript{79} However, receiving

\textsuperscript{77} Id. § 2.
\textsuperscript{79} Gross income is defined in the IRC as:

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
cryptocurrency in exchange for products or services, or exchanging cryptocurrency in a transaction involving the receipt of products or services, does fall under the definition of gross income.\textsuperscript{80}

Publication 525, Taxable and Non-Taxable Income, clarifies when a transaction that does not involve currency may still result in taxable income for at least one of the parties involved.\textsuperscript{81} “Bartering is an exchange of property or services.”\textsuperscript{82} Since cryptocurrency has been classified as property, transactions involving cryptocurrency would be considered a bartering arrangement.\textsuperscript{83} When analyzing the impact of this cryptocurrency barter transaction, the perspectives of both the buyer and seller must be considered.

a. \textit{Goods and services}. Ordinarily, when a consumer purchases a product or service, there is no need to look beyond exchanging money for the product or service received in the transaction. However, when cryptocurrency is involved, the transaction has an added stage for the consumer. As stated in Notice 2014-21, if the fair market value of the property received in a transaction exceeds the taxpayer’s adjusted basis of the cryptocurrency used in the exchange, there is a taxable gain that must be reported.\textsuperscript{84} This would apply for every transaction in which a consumer engages where they are exchanging cryptocurrency for a product or service, unless there is an exception allowed under the Internal Revenue Code, such as a like-kind exchange or involuntary conversion.\textsuperscript{85} The reporting of a gain or loss in an exchange will be discussed in subpart three below.\textsuperscript{86}

\begin{itemize}
\item[(9)] Annuities;
\item[(10)] Income from life insurance and endowment contracts;
\item[(11)] Pensions;
\item[(12)] Income from discharge of indebtedness;
\item[(13)] Distributive share of partnership gross income;
\item[(14)] Income in respect of a decedent; and
\item[(15)] Income from an interest in an estate or trust.
\end{itemize}


80. Id.
82. Id.
83. See id.
85. Id. § 4.
86. See discussion infra Part II.B.3.
From the perspective of the seller, a barter transaction where the seller is receiving cryptocurrency in exchange for selling goods or services has minor differences from a traditional goods-or-services-for-money transaction. The seller still must recognize the sale of the good or service as revenue. Unlike a sale for cash, however, the seller must determine the fair market value of the cryptocurrency received in the transaction. If the value of the goods or services was determined in advance of the barter transaction, that value can be used as the fair market value of the item sold. IRS Notice 2014-21 further clarifies that the basis of the cryptocurrency received in a cryptocurrency barter transaction is the fair market value of the cryptocurrency as of the date of the receipt. Logic would suggest that the two distinct values that Publication 525 and Notice 2014-21 refer to would be the same. However, it is possible that since cryptocurrency value fluctuates like publicly traded stocks, there may be minor deviations which, for the purposes of this Article, will not be clarified.

The seller who is receiving cryptocurrency in a barter transaction may choose to liquidate that cryptocurrency to U.S. currency immediately. This would eliminate or minimize the potential to report gain or loss on the exchange of the cryptocurrency in a future transaction. If, however, the seller holds the cryptocurrency received, there would be gain or loss implications on future barter transactions as previously discussed or on the eventual conversion to cash.

As a final note regarding the exchange of cryptocurrency for goods or services, if the purchaser in a cryptocurrency barter transaction is purchasing a capital asset, the buyer would need to calculate the basis of the property received in the transaction.

b. Cryptocurrency as compensation. The legal structure of the business does not change how and when revenue from a barter transaction is recognized. Throughout the text of IRS Notice 2014-21, the agency refers to “taxpayer” consistently, without indicating a distinction between an

88. See I.R.S. Pub. 525, at 19.
92. Id. § 4.
individual or an entity, including references to IRS documents that apply to individuals and businesses.94

Cryptocurrency can be used as compensation for both employees and independent contractors, with minor differences from making payments in cash.95 “[T]he fair market value of virtual currency received for services performed as an independent contractor, measured in U.S. dollars as of the date of receipt, constitutes self-employment income and is subject to the self-employment tax.”96

While an employee can be paid in cryptocurrency instead of U.S. currency, such a payment arrangement does not change the obligations of the employer to follow appropriate withholding requirements and information reporting.97 Remuneration in the form of cryptocurrency is still considered wages for employment tax purposes.98 Cryptocurrency compensation is subject to federal income tax and Federal Insurance Contributions Act (FICA) tax withholdings on behalf of the employee.99 The employer is also still liable for FICA and Federal Unemployment Tax Act taxes.100

Payments made to both employees and independent contractors are subject to information reporting.101 Compensation paid to an employee in the form of cryptocurrency would be included in the employee’s Form W-2, Wage and Tax Statement, which is issued to the employee and reported to the IRS.102 Likewise, an independent contractor would use Form 1099-MISC to report cryptocurrency-based payments.103

3. Gain or Loss upon Exchange and Character of Gain or Loss

While cryptocurrency can be used to purchase products and services, as well as being a form of compensation, others see cryptocurrency as an investment or capital asset.

95. Id. at A-9, A-10.
96. Id. at A-10.
97. Id. at A-10, A-11.
98. Id. at A-11.
99. Id.
100. Id.
101. Id. at A-12.
102. Id. at A-11.
103. Id. at A-13.
The calculation of gain or loss upon the disposition of a unit of a cryptocurrency is no different from any other property or asset.\textsuperscript{104}

If the fair market value of property received in exchange for virtual currency exceeds the taxpayer’s adjusted basis of the virtual currency, the taxpayer has taxable gain. The taxpayer has a loss if the fair market value of the property received is less than the adjusted basis of the virtual currency.\textsuperscript{105}

The character of the gain or loss that must be reported by the taxpayer will depend on the purpose of the asset for that individual taxpayer.\textsuperscript{106} If Bitcoin is being held as a capital asset, the gain or loss upon disposition would be treated accordingly.\textsuperscript{107} If Bitcoin is not being held as a capital asset, the taxpayer would recognize ordinary gain or loss on the disposition.\textsuperscript{108} When a taxpayer has a transaction where cryptocurrency is exchanged for something—whether it is goods, services, or back into U.S. currency—that is a reportable transaction to the IRS for income tax purposes.\textsuperscript{109}

4. Valuing Cryptocurrencies

Regardless of how Bitcoin is used, if a transaction must be reported for tax purposes, it must be reported in U.S. dollars.\textsuperscript{110} Since our economy has moved beyond a barter economy, most transactions are easy to value. Even transactions involving publicly traded stock can easily be valued because the stock exchanges provide a way to readily calculate the value of the stock. Cryptocurrency transactions may not be so easy.\textsuperscript{111}

According to IRS Notice 2014-21, the value of cryptocurrency can be determined based on the value listed on a cryptocurrency exchange.\textsuperscript{112} Using this method would establish the valuation of a cryptocurrency based on a market-supply-and-demand method.\textsuperscript{113} However, unlike the stock market where the stock of a publicly traded company is traded on only one

\textsuperscript{104} Id. at A-7.
\textsuperscript{105} Id. at A-6.
\textsuperscript{106} Id. at A-7.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{110} I.R.S. Notice 2014-21, § 4, at A-3.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at A-5.
\textsuperscript{113} Id.
exchange, some cryptocurrencies can be traded on several exchanges, sometimes dozens of exchanges. Each Bitcoin exchange runs independent of other exchanges and values Bitcoin independent of the other exchanges. Valuation variances can be as much as 10 percent. Because of this variance, it is important to note that the IRS makes it clear that any such valuation conversions should be done in a reasonable and consistent manner.

5. Are Cryptocurrencies Fungible?

Fungibility is the concept that one unit of a good or commodity can be exchanged for another unit of the good or commodity with little to no variance in the value of the units being exchanged. Goods and commodities such as oil, precious metals, and shares of stock are fungible. Currency is also fungible, and that fungibility makes the operation of economies based on currency function in a quick and seamless fashion. Cryptocurrencies, however, are not as clear-cut, for there are two aspects of fungibility that may create issues.

First, as was discussed above, there are numerous cryptocurrencies, and each cryptocurrency may trade on several exchanges. Looking at Bitcoin, the value on each exchange varies slightly, though with the more popular exchanges, the value is quite comparable. As such, the value of one Bitcoin on one exchange is not necessarily the same as one Bitcoin on another exchange. Does this mean a Bitcoin on one exchange cannot be exchanged for a Bitcoin on another exchange? Not really. Transactions and exchanges can and do still take place, as is evidenced by the activity on the

116. See id.
120. See id.
121. Currencies, supra note 115; USD Exchange Trade Volume, supra note 6.
122. Currencies, supra note 115.
One Bitcoin is typically seen as exchangeable for another Bitcoin. The second potential issue of fungibility is directly related to Bitcoin's traceability. Unlike currency, each transaction of a cryptocurrency has a traceable path of where it has been digitally. That traceability creates a distinction between transactions of the cryptocurrency with a clean history and those with a “dirty” (i.e., illegal or questionable) history. Since cryptocurrencies are tracked by ledger accounts, one questionable transaction could have the potential of tarnishing all units held by that account at any point after the questionable transaction, and as a result the entire ledger balance would be “dirty,” not just a specific unit.

Normal currency is traceable as well, but in a different sense. Serial numbers on currency can be used for law enforcement purposes, as well as for hobbyist tracking of where an individual bill has traveled in the country or world. But the traceability of currency is limited in scope and often voluntary by the users. Cryptocurrency, however, can be traced through every transaction it has been involved with. Merchants who accept cryptocurrency can evaluate proposed Bitcoin transfers and either reject ledger balance transfers of cryptocurrency that has a connection to questionable activity or certain vices, or be valued less because the “dirty” cryptocurrency they accepted may not be acceptable to other merchants.

III. REGULATORY TREATMENT OF CRYPTOCURRENCY

In considering whether the IRS has properly classified cryptocurrency as property, a review of how other government agencies have classified or approached cryptocurrency is relevant. Different federal regulatory bodies have taken different stances based on the scope of their individual authority and the mission of their organization.

123. See USD Exchange Trade Volume, supra note 6.
124. Vorick, supra note 63.
126. Vorick, supra note 63.
127. See id.
129. BRITO & CASTILLO, supra note 15, at 5.
130. See Vorick, supra note 63.
A. Federal Reserve Regulation

The Federal Reserve System, or “the Fed” as most refer to it, is the U.S. central bank, and among other things, it issues and distributes U.S. currency. Shortly after the largest Bitcoin exchange collapsed in 2014, the Chair of the Board of Governors of the Federal Reserve System, Janet Yellen, told the Senate Banking Committee:

Bitcoin is a payment innovation that’s taking place outside of the banking industry . . . . [t]here’s no intersection at all, in any way, between Bitcoin and banks that the Federal Reserve has the ability to supervise and regulate. So the fed doesn’t have authority to supervise or regulate Bitcoin in any way.133

When pushed about the possibility of regulating or banning Bitcoin as several other countries had at that point, Yellen continued: “It’s not so easy to regulate Bitcoin because there’s no central issuer or network operator. This is a decentralized, global [entity].” Yellen also stated, “But certainly it would be appropriate for Congress to ask questions about what the right legal structure would be for digital currencies . . . .” While Yellen’s comments directly referenced Bitcoin, her views should be applicable to all types of cryptocurrency.136

B. FEC Regulation

The Federal Election Commission (FEC) is the federal agency tasked with enforcing federal campaign finance laws. The FEC provides regulations and guidance to political campaigns on what may be accepted in the form of campaign contributions—both monetary and in-kind donations—as well as how those contributions should be reported and how

134. Id. (alteration in original).
135. Id.
136. See id.
In 2014, the FEC was asked to consider whether a political action committee could accept Bitcoin, and, if so, how. In contrast to the Fed’s position, the FEC stated in the background summary of the advisory opinion that Bitcoin is a purely digital, “privately issued currency that was created in 2009.” In labeling Bitcoin a currency, the FEC acknowledged that Bitcoin recipients cannot immediately deposit such funds into a bank account within the required timeframe. However, the FEC went on to explain that the Federal Election Campaign Act defines a contribution as “[a] gift, subscription, loan . . . , advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office[]” and concluded that Bitcoin falls within the scope of what is considered a contribution.

So even though the FEC called Bitcoin “currency,” it in fact does not treat Bitcoin as currency; it specifically related Bitcoin to an in-kind contribution in the form of stocks, bonds, and other items that will be liquidated by the campaign later.

C. Financial Crimes Enforcement Network Regulation

The U.S. Department of the Treasury has a division that handles financial crimes, the Financial Crimes Enforcement Network, or FinCEN. “The mission of the Financial Crimes Enforcement Network is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”

FinCEN issued its “Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies” in March 2013.
FinCEN stated that “virtual currency’ is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency,” specifically noting that virtual currencies like Bitcoin are not accepted as legal tender in any jurisdiction. FinCEN concluded that virtual currency has an equivalent value in real currency or can act as a substitute for real money. FinCEN determined that “virtual currencies are subject to regulation if that virtual currency has a substitutive purpose for facilitating exchanging goods and services.”

Later in 2013, FinCEN interpreted its statutory authority to extend to exchangers and administrators of virtual currencies so that they fall under its regulatory scope while excluding users of Bitcoin and other virtual currencies. In 2014, FinCEN issued further guidance, in the form of two administrative rulings, on applying its regulations to exchangers and administrators of virtual currencies. FinCEN was asked two questions regarding virtual currencies in general, not Bitcoin specifically, but the answers are relevant to Bitcoin as well as other cryptocurrencies. FinCEN’s 2014 administrative rulings focused on whether a company dealing in virtual currencies would be considered a money-services


146. Id. at 1. At the time that FinCEN issued its guidance, cryptocurrencies were not recognized as legal tender in any U.S. jurisdiction; this has not changed as of Sept. 2, 2017.

147. Id.


149. FIN-2013-G001, supra note 145, at 3–5.


151. See FIN-2014-R011, supra note 150, at 5; see also FIN-2014-R012, supra note 150, at 5.
business.152

Under the Bank Secrecy Act (BSA), FinCEN has the authority to regulate money-services businesses.153

The term “money services business” includes any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the following capacities: (1) Currency dealer or exchanger; (2) Check cashier; (3) Issuer of traveler’s checks, money orders or stored value; (4) Seller or redeemer of traveler’s checks, money orders or stored value; (5) Money transmitter; or (6) U.S. Postal Service.154

In the first administrative ruling, FIN-2014-R011, FinCEN was asked if setting up a “virtual currency trading and booking platform . . . would make the [c]ompany a money transmitter under the BSA.”155 The proposed virtual trading-and-booking platform would be exchanging virtual currency for U.S. currency, or a “convertible virtual currency for currency of legal tender (‘real currency’)” and vice versa.156 Specifically, FinCEN was asked if a convertible virtual currency trading platform would require the company to be considered a money-services business.157 In other words, the question is whether a company that is facilitating cryptocurrency transactions between users would be considered a “money transmitter” when the trade does not actually involve money.158

FinCEN defines money transmitter to “include a person that provides money transmission services.”159 Money-transmission services include the “acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.”160 In this administrative ruling, FinCEN determined that under the proposed

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152. See FIN-2014-R011, supra note 150, at 1; FIN-2014-R012, supra note 150, at 1.
153. 31 C.F.R. § 1022.380(a)–(f) (2016).
156. Id.
157. Id.; FIN-2014-R012, supra note 150, at 5.
159. Id.
160. Id.
structure, the company would be a money-services business, disagreeing with the characterization that the money transmission would occur directly between the two users (or customers, as referenced by the company).161 “The [c]ompany is facilitating the transfer of value, both real and virtual, between third parties” and does not qualify for an exemption.162

The second administrative ruling, FIN-2014-R-012, had a similar but slightly nuanced query.163 Instead of a virtual currency trading-and-booking platform,164 the company was planning to set up a convertible virtual currency payment system.165 The proposed payment system would allow consumers using currency to purchase products or services from vendors who wished to be paid in Bitcoin.166 The ruling focused on whether such a virtual currency payment system would prompt FinCEN to consider the company to be a money transmitter and subject to the rules of a money services business.167

FinCEN determined that this slightly nuanced structure still fell within the definition of money transmitter and thus a money-services business, stating:

An exchanger will be subject to the same obligations under FinCEN regulations regardless of whether the exchanger acts as a broker (attempting to match two (mostly) simultaneous and offsetting transactions involving the acceptance of one type of currency and the transmission of another) or as a dealer (transacting from its own reserve in either convertible virtual currency or real currency).168

FinCEN did clarify that while the payment system proposed was intended to accommodate Bitcoin transactions, the ruling would also apply
IV. COURT TREATMENT OF CRYPTOCURRENCY

With limited and mixed guidance from the regulatory state, courts have been left to their own devices to consider issues involving cryptocurrency. Federal court cases that mention cryptocurrency are at the district court level. None of these cases deal with the legal nature of cryptocurrency as the subject of the case. Instead, cryptocurrency has been brought in as a tangential matter with the character of cryptocurrency sometimes having little impact on the outcome of the case.

There are challenges in reviewing the judicial treatment of cryptocurrency, including no appellate review of substantive cases and few cases that specifically deal with the definition and structure of cryptocurrency. A discussion of these cases follows.

A. SEC v. Shavers

The first apparent judicial foray concerning Bitcoin was seen in 2013 when the Securities and Exchange Commission (SEC) pursued a Texas-based Ponzi scheme in SEC v. Shavers. The SEC asserted “that Shavers made a number of misrepresentations to investors regarding the nature of the investments and that he defrauded investors” when he promised a return of 1 percent per day on investments in a company called Bitcoin Savings and Trust (BTCST). Shavers did not accept cash in exchange for investments in BTCST; investments were only accepted in the form of Bitcoin. Because of this, Shavers argued that the court did not have subject matter jurisdiction because the investments in BTCST were not securities as

169. *Id.* at 5.
172. *Id.* at *1.
173. *Id.*
174. *Id.* at *2.
In a memorandum opinion, the court determined that the investments in BTCST are investments under the definition of an investment contract and, therefore, are securities. But beyond the subject matter before the court, the ruling is important for what it declares about Bitcoin:

... Bitcoin can be used as money. It can be used to purchase goods or services, and as Shavers stated, used to pay for individual living expenses. The only limitation of Bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for conventional currencies, such as the U.S. dollar, Euro, Yen, and Yuan. Therefore, Bitcoin is a currency or form of money, and investors wishing to invest in BTCST provided an investment of money.

Even though the issue of the case was based in securities laws, Bitcoin was a central component of the case as it was the foundation of the investment. The court’s determination that Bitcoin was a currency is a groundbreaking ruling for cryptocurrencies. Although the ultimate resolution of Shavers did not happen until September 2014, the memorandum opinion issued by the U.S. District Court for the Eastern District of Texas declaring Bitcoin a currency was issued in August 2013, prior to the IRS’s issuance of Notice 2014-21.

B. United States v. Petix

To show that the treatment of Bitcoin is a very unsettled area of the law, a magistrate judge in the U.S. District Court for the Western Division of New York came to the opposite conclusion of Shavers in a Report and Recommendation in December 2016. In United States v. Petix, the

175. Id. at *1.
176. Id.
177. Id. at *2 (emphasis added).
178. Id.
179. Id.
180. See id.
182. United States v. Petix, No. 15-CR-227A, 2016 WL 7017919, at *7 (W.D.N.Y. Dec. 1, 2016). It is important to note that this ruling is a Report and Recommendation from a magistrate judge to the Honorable Richard J. Arcara of the U.S. District Court for the Western District of New York. To date, a published ruling has not been issued indicating the follow-up of this case.
The defendant was charged with running an unlicensed money-transmitting business in violation of 18 U.S.C. § 1960 when the defendant was engaged in Bitcoin transactions. This is the same section of the U.S. Code at issue in Shavers.

In Petix, the court urged caution in applying ordinary dictionary terms that may be used in a different way by people in everyday life. Although used in § 1960, the terms “money” and “funds” are not actually defined in the section, and thus the court went on an extensive journey to define what they mean in reference to its application.

“‘Money,’ in its common use, is some kind of financial instrument or medium of exchange that is assessed value, made uniform, regulated, and protected by sovereign power. . . . Ordinary people in everyday life know this intuitively; the average person who hears the term ‘money’ will think of government-issued ‘dollars’ or instruments . . . .” The court continued to note that individual states cannot coin money or influence the value of money.

The court concluded, “Bitcoin is not ‘money’ as people ordinarily understand that term. Bitcoin operates as a medium of exchange like cash but does not issue from or enjoy the protection of any sovereign . . . .” The court continued by stating that “the whole point of Bitcoin is to escape any entanglement with sovereign governments. Bitcoins themselves are simply computer files generated through a ledger system that operates on block chain [sic] technology.”

Despite the disparate rulings in Shavers and Petix, the cases do have parallels, including similar underlying criminal acts—both defendants were accused of defrauding investors, although they were charged under different sections of the U.S. Code. But beyond that, the Shavers court was determining if the defendant was engaged in securities fraud, where subsequently the court ruled that not only was Bitcoin a form of currency as the court considered Bitcoin contracts as a security, it was sufficiently used

183. Id. at *1.
184. Id. at *3.
185. Id. at *4.
186. Id.
187. Id. at *5 (citing Laycock v. Kenney, 270 F.2d 580, 590 (9th Cir. 1959)).
188. Id.
189. Id.
190. SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at *8 (E.D. Tex. Aug. 6,
in a Ponzi scheme by the defendant.\textsuperscript{191} On the other hand, the Petix court found that Bitcoin is not included in the definition of “money” and “funds” under 18 U.S.C. § 1960, agreeing with the defendant in his effort to have a charge dismissed against him, and thus this court stepped closer to the heart of the issue of whether Bitcoin is currency.\textsuperscript{192}

\textbf{C. Bitcoin in Forfeiture Actions}

The U.S. Government has pursued the forfeiture of Bitcoin in civil forfeiture cases, including in United States v. 50.44 Bitcoins.\textsuperscript{193} The federal government acted to seize 50.44 Bitcoins that were believed to be connected to illegal activity on the Silk Road.\textsuperscript{194} The Bitcoins were titled as the defendants in the action, as no individual ever stepped forward to claim ownership or control over them, perhaps because of their purported connection to illegal behavior.\textsuperscript{195}

In analyzing the government’s motion for default judgment, the court walked through the legal steps related to forfeiture actions, including what property is subject to forfeiture.\textsuperscript{196} “Under 18 U.S.C. § 981, ‘any property, real or personal, involved in a transaction or attempted transaction in violation of [18 U.S.C. §1960], or any property traceable to such property’ is ‘subject to forfeiture to the United States.’”\textsuperscript{197} As such, the 50.44 Bitcoins court did not go beyond the required analysis, applying the standard language of 18 U.S.C. § 981 to conclude Bitcoin was property involved in a transaction that violated regulations regarding money transmission.\textsuperscript{198}

Likewise, in a criminal forfeiture action, the U.S. District Court for the

\textsuperscript{191} Id.
\textsuperscript{192} Petix, 2016 WL 7017919, at *5.
\textsuperscript{194} Id. at *2. The Silk Road was the black market of the cyber-underworld and was dismantled by the federal government in 2014. See Donna Leinwand Leger, How FBI Brought Down Cyber-Underworld Site Silk Road, USA TODAY (Oct. 21, 2013), https://www.usatoday.com/story/news/nation/2013/10/21/fbi-cracks-silk-road/2984921/.
\textsuperscript{195} Due to the anonymous nature of Bitcoin, law enforcement speculated on who the owner of the Bitcoins was, but the person was never personally named in the forfeiture action. 50.44 Bitcoins, 2016 WL 3049166, at *3.
\textsuperscript{196} Id. at *1.
\textsuperscript{197} Id. (alteration in original).
\textsuperscript{198} Id. at *2.
District of Nevada applied similar statutes to arrive at the same conclusion. In *United States v. Holden*, the defendant pleaded guilty to one count of “Accessing Protected Computer to Defraud” and agreed to forfeiture of property, including an unstated number of Bitcoin.\(^{199}\) In determining which property was subject to forfeiture, the court in *Holden* used a different subsection of 18 U.S.C. § 981, which states “any property, real or personal, constituting or derived from, any proceeds obtained, directly or indirectly, as a result of a violation of Title 18, United States Code, Section 1030(a)(4).”\(^{200}\) With no further analysis other than stating that “any and all funds contained in the Bitcoin and Dogecoin wallets or accounts . . . constitute[] property,” the court authorized the forfeiture of Bitcoin as property.\(^{201}\)

While *50.44 Bitcoins* and *Holden* may lead some to infer that federal courts may be moving toward classifying Bitcoin as property, further review of the treatment of property under 18 U.S.C. § 981 does not support that.\(^{202}\) It is not unusual for courts to reference accounts as property, even though the account is holding money.\(^{203}\) For example, in *United States v. $688,670.42 Seized from Regions Bank Account No. XXXXXX5028*, the property at issue was a bank account containing almost $700,000.\(^{204}\) The basis of the action was whether the bank account contained proceeds traceable to a violation of § 981 such that it was subject to civil forfeiture.\(^{205}\) There was no discussion of whether the money represented in the referenced bank account was considered property or currency.\(^{206}\) The currency represented by the account’s balance was considered property.

\[\text{V. INTERNATIONAL, STATE, AND INDUSTRY TREATMENT OF BITCOIN}\]

Under Article I of the U.S. Constitution, Congress has the sole power to coin money.\(^{207}\) Consequently, individual states and municipalities do not

\[\text{200. Id.}\]
\[\text{201. Id.}\]
\[\text{203. See United States v. $688,670.42 Seized from Regions Bank Account No. XXXXXX5028, No. 11-10886, slip op. at 1 (11th Cir. Dec. 23, 2011).}\]
\[\text{204. Id. at 2.}\]
\[\text{205. Id.}\]
\[\text{206. Id. at 3.}\]
\[\text{207. U.S. CONST. art. I, § 8.}\]
have the power to coin money or otherwise declare a currency. However, some states have taken steps to define cryptocurrencies for purposes of law enforcement and economic matters. It may also be helpful to consider how other countries have treated cryptocurrency. The Library of Congress has compiled data regarding the regulation of Bitcoin throughout the world.

A. Individual State Treatment

Only two states have implemented regulation of Bitcoin: Florida and New York. In response to a ruling where a judge threw out a money laundering charge because the judge determined Bitcoin should not be considered real money, the Florida State Legislature passed House Bill 1379, which designates virtual currency as a monetary instrument. Florida Governor Rick Scott signed the legislation June 23, 2017.

The New York State Department of Financial Services (NYDFS) has probably the most complete set of virtual currency regulation for a state within its Title 23, titled “Virtual Currencies,” a 44-page volume of how NYDFS categorizes Bitcoin and how it requires anyone engaging in a “Virtual Currency Business Activity” to obtain a license. The New York regulation is currently being challenged in court as being beyond the scope

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208. See U.S. CONST. amend. X.

209. Regulation of Bitcoin in Selected Jurisdictions, L. LIBR. CONGRESS (Jan. 2014), http://www.loc.gov/law/help/bitcoin-survey/index.php. The Library of Congress does not make a distinction between Bitcoin and other cryptocurrencies, using Bitcoin as both a noun and proper noun. For purposes of this Article, the assumption is that Bitcoin is being used as a substitute for cryptocurrency, and thus international regulation is based on all potential cryptocurrencies and not simply Bitcoin.


215. Id. § 200.3.
Several other states are considering legislation. Hawai‘i is considering legislation that would explore the use of blockchain technology to help boost its tourism and technology. The bill was passed by the Hawai‘i House of Representatives and was forwarded to the Hawai‘i Senate Committee on Ways and Means. Washington State is considering legislation that would provide protection for consumers. Working off a foundation of definitions, the bill would require surety bonds for online exchanges, as well as disclosure requirements to consumers. Looking to support financial innovation, Illinois has published proposed guidance on cryptocurrencies and on how the Illinois Transmitters of Money Act would apply.

B. International Views of Cryptocurrencies

Almost a dozen countries have stated that Bitcoin and other cryptocurrencies are not considered to be money or currency and are not acceptable as legal tender. This includes Australia, China, Germany, and Ireland. Additionally, Taiwan went so far as to state that “bitcoin is not a real currency, but a ‘highly speculative virtual commodity.’” Despite these declarations that it is not recognized as money, Bitcoin is still a prevalent device in transactions for goods and services or for investment purposes in countries such as Turkey.

219. Id.
220. Scott, supra note 217.
221. Id.
222. Id.
224. Id.
225. Id.
226. Id.
In comparison, Canada regulates Bitcoin similarly to the United States.\textsuperscript{227} The Governor General of Canada approved bill C-31, which regulates Bitcoin as a money-services business, as FinCEN has labeled Bitcoin exchanges.\textsuperscript{228} This has not changed Canada’s position that Bitcoin is not a currency and is not recognized as legal tender.\textsuperscript{229}

While Brazil has acknowledged the potential for regulation of Bitcoin via mobile payment systems and electronic currencies, other countries have gone so far as to accept Bitcoin as an alternative payment method.\textsuperscript{230} In early 2014, the Estonian Tax Authority recognized Bitcoin as an alternative payment method and defined how Bitcoin transactions should be taxed—as capital gains.\textsuperscript{231} Estonia is also taking steps to establish its own cryptocurrency, Estcoin.\textsuperscript{232} Alternatively, New Zealand has taken a more hands-off approach, with the Reserve Bank of New Zealand stating:

\begin{quote}
The Reserve Bank of New Zealand Act prohibits the issuance of bank notes and coins by any party other than the Reserve Bank. However, the Reserve Bank has no direct power over any form of alternative payments medium.

Non-banks do not need our approval for schemes that involve the storage and/or transfer of value (such as ‘bitcoin’)—so long as they do not involve the issuance of physical circulating currency (notes and coins).\textsuperscript{233}

The governments of numerous countries have gone so far as to issue warnings to consumers and businesses about Bitcoin. The European Banking Authority (EBA) issued a warning in 2013 about the dangers of
\end{quote}

\begin{itemize}
\item \textsuperscript{227} See id.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id. (citing David George-Cosh, \textit{Canada Says Bitcoin Isn’t Legal Tender}, \textit{WALL ST. J.} (Jan. 16, 2014), http://blogs.wsj.com/canadarealtime/2014/01/16/canada-says-bitcoin-isnt-legal-tender/).
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\end{itemize}
virtual currencies and transactions involving virtual currencies.\textsuperscript{234} Shortly after the EBA statement, France, a member of the European Union, released a report warning of the dangers of virtual currencies.\textsuperscript{235} Singapore is another country that has warned of the dangers of dealing with virtual currencies and the suspected connections to money laundering and other illegal activities.\textsuperscript{236}

Numerous countries have taken a position on the taxation of transactions involving Bitcoin, including Finland, Australia, Estonia, and Norway.\textsuperscript{237} Both Norway and Finland base their theories of taxation on how the Bitcoin is used.\textsuperscript{238} Capital property is taxed as a capital gain, while the sale of goods and services is treated as ordinary income and subject to relevant taxes, including value-added tax.\textsuperscript{239}

Two countries have taken steps to recognize Bitcoin as a currency. The Swedish Tax Board has issued a preliminary ruling that Bitcoin is regulated and treated as a currency in Sweden and that the value-added tax is not applicable to Bitcoin trade.\textsuperscript{240} In Japan, Bitcoin and other virtual currencies

\textsuperscript{234} EUROPEAN BANKING AUTH., WARNING TO CONSUMERS ON VIRTUAL CURRENCIES 2–3 (2013), https://www.eba.europa.eu/documents/10180/598344/EBA+Warning+on+Virtual+Currencies.pdf; see also Regulation of Bitcoin in Selected Jurisdictions, supra note 223 (citing EUROPEAN BANKING AUTH., supra).


\textsuperscript{237} Regulation of Bitcoin in Selected Jurisdictions, supra note 223.

\textsuperscript{238} Id. (Norway (citing Bruk av bitcoins – skatte- og avgiftsmessige konsekvenser [Use of Bitcoins – Tax Issues], SKATTEETATEN (Nov. 11, 2013), http://www.skatte etaten.no/no/Radgiver/Rettskilder/Uttalelser/Prinsipputtalelser/Bruk-av-bitcoins—skatte—og-avgiftsmessige-konsekvenser/); Finland (citing Inkomstbeskattning av Virtuella Valutor [Income Taxation of Virtual Currencies], VERO SKATT (Aug. 28, 2013) http://www.vero.fi/sv-FI/Detaljerade_skatteanvisningar/Inkomstbeskattning_av_virtuella_valutor%282828454%29)).

\textsuperscript{239} Id.

\textsuperscript{240} Id. (demonstrating that the decision to not apply value-added tax to cryptocurrencies has been appealed by the Swedish Tax Authority) (citing Mervardesskat: Handel med Bitcoins [VAT: Trade with Bitcoins], SKATTERATTSNAMNDEN, (Oct. 14, 2013), http://skatterattsnamnden.se/skatteat
have legislatively been declared legal currencies.241

C. Accounting Industry Reactions to Cryptocurrencies

While some countries weigh the legality of Bitcoin, others are considering how Bitcoin and cryptocurrencies should be accounted. When Japan’s legislature passed legislation to make Bitcoin legal currency, the Accounting Standards Board of Japan also agreed to “create a framework to determine how the accounting sector can address digital currency.”242

The Australian Accounting Standards Board published Digital Currency–A Case for Standard Setting Activity in late 2016, noting that the International Financial Reporting Standards by the International Accounting Standards Board lacked clarity and guidance on cryptocurrencies.243

Most recently, the U.S. Financial Accounting Standards Board (FASB) has indicated that they are “considering whether it needs to develop accounting guidance for digital currencies.”244 The Chamber of Digital Commerce encouraged FASB to develop accounting standards, writing: “As there is a lack of clear guidance for these digital currencies, there is currently a diversity of views on the accounting . . . .”245

VI. CONFLICTING LEGAL AND REGULATORY INTERPRETATIONS OF CRYPTOCURRENCIES

The U.S. economy is based on currency, using the dollar as its denomination. Until 2009 and the introduction of Bitcoin as a cryptocurrency, the economy functioned relatively seamlessly using.

242. Id.
245. Id.
currency, although bartering was still employed to a limited extent. Cryptocurrencies have created a new approach to paying for goods and services, an approach that many are embracing, considering the volume of trades and level of market capitalization. The wide array of governmental agencies that collectively create and enforce the laws and regulations guiding individual lives are applying respective subjective logic to cryptocurrencies to determine how they should be treated for that agency’s specific purposes. This is creating contradictory views and applications of cryptocurrency. This lack of a collective approach to cryptocurrencies is putting users, exchanges, and merchants at a disadvantage and perhaps hindering the development and growth of cryptocurrencies. The IRS has added to this confusion by classifying cryptocurrencies as property.

A. Treated as Currency

Numerous governmental agencies and courts have pointed out the similarities between cryptocurrencies and the U.S. dollar. Courts have used a variety of terms to refer to cryptocurrency and Bitcoin, including “digital payment system,” “online digital banking service[],” “digital asset and an innovative payment system released as open-source software[],” and something that “operates as a medium of exchange like cash.”

246. See FIN-2013-G001, supra note 145.
247. See supra Part II.B.
249. See supra Part III.
250. See supra Part III.
Moving beyond terminology, courts have labeled cryptocurrencies as currency: “Bitcoin is an electronic form of currency unbacked by any real asset and without specie, such as coin or precious metal,” and therefore, “Bitcoin is a currency or form of money.”

The judicial cases that have addressed the definition and classification of cryptocurrencies have not been, for the most part, focused on cryptocurrency, but instead on the facts and circumstances of the case, with cryptocurrency being regarded as a tertiary issue. With the appellate structure of federal courts, the issue has not been decided by a higher court.

FinCEN clearly views cryptocurrency as the equivalent of currency to, in its view, properly apply its mission to the expanding cybercurrency market and the related crimes that may be perpetrated. Both FinCEN and the IRS acknowledge that cryptocurrency is not currency, but it may operate as a de facto currency. But while FinCEN’s regulations are intended to ensure those who commit financial crimes are held accountable, the IRS’s regulation instead applies to anyone using, receiving, or investing in cryptocurrency.

It is not defensible that most individual states have refrained from taking a position on cryptocurrencies, given that under the Constitution, currency is one of the enumerated powers of the federal government.

Although most regulatory and judicial decisions and statements were made after the IRS issued Notice 2014-21 classifying cryptocurrency as property, all the characteristics that these government agencies and courts

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257. Shavers, 2013 WL 4028182, at *1 (citing Dion, supra note 21, at 167).
258. Id. at *2.
260. States have an appellate structure as well, but Bitcoin cases at the state level are almost non-existent and certainly were not relevant enough to devote a Part to in this Article.
261. See FIN-2014-R012, supra note 150, at 1, 5.
263. Mission, supra note 144.
used to liken cryptocurrencies to currency existed when the IRS made their ruling.

The extensive and overlapping levels of regulation at the federal level (not to mention the additional layers at the state and local levels) are not a new challenge for businesses and consumers. Although there are examples of regulatory divergence when comparing state and federal laws,267 the more typical situation is that laws on the federal level tend to complement each other, as opposed to the conflict that is seen with cryptocurrency. The IRS's classification of cryptocurrency as property is an example of the regulatory discrepancy.268

B. Fluctuating Value of Cryptocurrency

Classifying cryptocurrency as property may make sense when the varying valuation of cryptocurrency is considered. In its current form and ecosystem, cryptocurrencies are extremely volatile, sometimes losing hundreds of dollars in value in a single hour—or even more over a day or two—seemingly for no reason.269 While the value of currency remains constant (even while the value of a product may fluctuate),270 the value of a cryptocurrency does fluctuate, sometimes significantly. A dollar in currency will buy what a dollar is worth—$1 of gas, a bottle of water, etc. It is the value of the item that may increase or decrease, not the value of the dollar.

In 2009, 10,000 Bitcoins were purchased for $50;271 today, one Bitcoin

267. An example of state and federal regulatory conflict is evident in the wide variation and enforcement of marijuana laws, where marijuana is regarded as an illegal Schedule I drug at the federal level but is legally permitted in numerous states for both medical and recreation purposes. See Sarah Jacoby, Why We Still Have To Put A Disclaimer on All of Our Weed Articles, REFINERY 29 (Jan. 19, 2017), http://www.refinery29.com/2017/01/136859/marijuana-state-vs-federal-laws-drug-scheduling.


270. Note that while U.S. currency can fluctuate in reference to other currencies, the federal government does not denote a specific value for one U.S. dollar, even while the government may impact that value through monetary policy.

271. Benjamin Wallace, The Rise and Fall of Bitcoin, WIRED (Nov. 23, 2011),
is worth over $4,600.\textsuperscript{272} While marketable securities may have fluctuations like this, the U.S. dollar does not. Beyond the substantial long-term appreciation in Bitcoin in the last decade, day-to-day fluctuations can also be volatile. Today, you may need one Bitcoin to buy a computer; tomorrow, the same computer may take less than one Bitcoin, because the value of Bitcoin changes.

The valuation fluctuations of cryptocurrency can provide challenges when treating cryptocurrency like property. When reporting currency transactions to the IRS—for example, in the form of wages, dividend income, or mortgage interest—thought does not need to go into what is the value of the dollar amount being reported. Given the significant valuation fluctuations that can occur daily in cryptocurrencies, that valuation can be troublesome.\textsuperscript{273} But IRS forms are not set up to report amounts in cryptocurrency—the cryptocurrency must be converted to a dollar figure in order for a transaction involving cryptocurrency to be reported to the IRS.\textsuperscript{274}

The classification of cryptocurrency as property by the IRS does allow the government to tax cryptocurrency transactions based on its appreciation when a transaction occurs.\textsuperscript{275} But for the classification as property, any reporting on the transaction to the IRS would be deferred, if not completely avoided.

\textbf{C. Independent from Government or Quasi-Government Control}

In general, and by design, cryptocurrencies are detached from any country or physical backing.\textsuperscript{276} While some cryptocurrencies may be identified by their connection to or popularity in specific regions or countries, each is distinctly separate from and not controlled by a government or quasi-governmental entity.\textsuperscript{277} While this provides challenges
to the recognition and usage of cryptocurrencies, it also makes cryptocurrencies attractive to many users.278

While independence from government oversight may be beneficial, it can also be considered detrimental to the long-term viability of cryptocurrencies.279 Cryptocurrencies are entirely speculative and have value only while consumers and traders of cryptocurrencies believe they have value.280

The IRS does refer to the fact that virtual currencies are not recognized as legal tender in any jurisdiction. Otherwise, the IRS acknowledges that cryptocurrency is “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. In some environments, it operates like ‘real’ currency,” says the IRS, without expanding on why the issue of being recognized as legal tender overrides all other characteristics of being considered a currency.281

D. Discouraging Use by Applying Property Concepts to Cryptocurrency

Classifying cryptocurrency as property may have a consequence of discouraging its use and impeding the advancement of digital commerce. Classifying cryptocurrencies as property raises several taxation issues or practices that may complicate ownership and use—issues that are not present with currency transactions.

Whenever a taxpayer disposes of property, the taxpayer must determine what the gain or loss is on the transaction.282 The character of that gain or loss is dependent upon whether the asset was a capital asset in the hands of the taxpayer.283 The same rules would apply to cryptocurrency.284 Users and owners of cryptocurrency must determine if they are holding the

278. See Bitcoin Seeks Recognition From U.S. GAAP, supra note 244.
280. Id. at *5–6.
283. Id.
cryptocurrency as a capital asset or not. In Notice 2014-21, the IRS states:

A taxpayer generally realizes capital gain or loss on the sale or exchange of virtual currency that is a capital asset in the hands of the taxpayer. For example, stocks, bonds, and other investment property are generally capital assets. A taxpayer generally realizes ordinary gain or loss on the sale or exchange of virtual currency that is not a capital asset in the hands of the taxpayer. Inventory and other property held mainly for sale to customers in a trade or business are examples of property that is not a capital asset.

So, for example, in the hands of a casual user, Bitcoin would be considered a capital asset. As a capital asset, the user would have to track the basis of each unit of Bitcoin. According to IRS Publication 551:

If you can adequately identify the shares of stock or the bonds you sold, their basis is the cost or other basis of the particular shares of stock or bonds. If you buy and sell securities at various times in varying quantities and you cannot adequately identify the shares you sell, the basis of the securities you sell is the basis of the securities you acquired first.

If, however, the user of cryptocurrency has moved beyond the definition of capital asset and instead uses the cryptocurrency for inventory, then inventory flow assumptions may need to be considered if the taxpayer meets the minimum requirements listed in Publication 538. Applying specific identification, LIFO, or FIFO methods to a ledger-based, non-physical asset may lead to inherent problems that are beyond the scope of this Article.

The final challenge for a user of cryptocurrencies would be valuing transactions in U.S. dollars. All transactions, whether capital or inventory, must be reported in U.S. dollars for tax purposes. The Internal Revenue Code in general, and Notice 2014-21 specifically, is clear that consumers and businesses are expected to apply these protocols to transactions involving

285. Id.
286. Id.
288. Id. at 2.
We have seen the improvement of consumer software in products such as Quicken and QuickBooks by Intuit, which have both improved personal financing tracking. The financial-services sector has also improved financial tracking and reporting, specifically the tracking of stock basis for consumers, thus making tracking and reporting capital gains and losses easier. If cryptocurrencies continue to grow in popularity, technology will surely find a way to meet the needs of cryptocurrency investors, traders, and users.

VII. CONCLUSION

The IRS has taken the position that cryptocurrencies should be considered property. That position is contradictory to the view of several other federal stakeholders, including courts and regulatory agencies. The IRS’s position is also contradictory to how users view and use cryptocurrencies, and how the market has accepted cryptocurrencies for the purchase of goods and services.

While the IRS’s decision to classify cryptocurrencies as property may align with the practical position that only the federal government is permitted to coin money, it is not acknowledging the daily function of cryptocurrencies and instead enforcing what some would consider onerous reporting and tracking requirements that could be detrimental to the growth of cryptocurrencies.

291. Id. at A-1.
293. Id.
295. See Moreau, supra note 35 (stating that some retailers are accepting cryptocurrencies as a form of payment, including Overstock.com, Expedia, Newegg, Dish, and more).