



## Tax Notes Today

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### Bitcoin Guidance Not Designed to Answer All Questions

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Summary by **taxanalysts**


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Full Text Published by **taxanalysts**

Guidance released last year on the tax treatment of virtual currency transactions was meant to set out general tax principles rather than answer all questions, Andrew Keyso Jr., IRS associate chief counsel (income tax and accounting), said March 25.

On the anniversary of the IRS's first virtual currency guidance (Notice 2014-21, 2014-16 IRB 938 ) , Keyso explained during an American Bar Association Section of Taxation webcast that the notice was an "effort to dip our toe in the water." He went on to explain that the IRS wasn't attempting to establish a new taxation regime for virtual currencies. "Our view of this, to draw an analogy, is to treat it like bartering transactions," he said. (Prior coverage )

Notice 2014-21, issued in March 2014, stated that virtual currencies such as bitcoin should be treated as property. Keyso said the IRS grappled with treating virtual currencies as currency under the tax code but decided against it because the Service had difficulty with that treatment under federal law. Bitcoin isn't issued by a government, isn't legal tender in the United States, and isn't a widely used medium of exchange, he said. "In our view, bitcoin was more held for speculation and not for commerce," Keyso said.

Despite the guidance, many questions remain. The ABA tax section on March 24 delivered comments  to the IRS and Treasury regarding the tax treatment of virtual currencies. An issue addressed in both the comment letter and webcast was how to track gain and loss in virtual currency transactions.

Under the IRS's view, a taxpayer would have to track basis and recognize a gain or loss on all virtual currency transactions for goods and services, regardless of how small.

"I think that is one of the biggest challenges of bitcoin," said Bryan C. Skarlatos of Kostelanetz & Fink LLP. Some questions that arise are how to track each transaction; which bitcoin was used; what the basis in the bitcoin was; and what the fair market value was at the time of the exchange, he said.

In considering whether to treat virtual currency as property or currency, the IRS recognized that a consequence of treating it as foreign currency would be that section 988(e) could apply, Keyso said. Section 988(e) provides a de minimis exception from recognizing gain or loss on foreign currency personal transactions of \$200 or less. The IRS, however, didn't think it had the authority to apply the currency rules to virtual currency, he said.

Both Skarlatos and Keyso said they are confident that there are solutions to these issues because some services are already available online to track bitcoin transactions.

### No Effective Date

Keyso said that when the IRS issued the bitcoin guidance, taxpayers often asked if there was an effective date for it. He said the notice indicates that it reflects the IRS's view of past virtual transactions as well as future ones.

Kathryn Keneally of DLA Piper said the IRS guidance is similar to the interpretive guidelines from the Financial Crimes Enforcement Network, which said that an "administrator" or "exchanger" of digital currency is a financial institution and is subject to the Bank Secrecy Act. The FinCEN guidance, like the IRS guidance, was a statement of how the government is interpreting the law, she said.

### FBAR and FATCA

There still isn't an answer on whether taxpayers are required to disclose a bitcoin account for foreign bank account report purposes. Under FBARs, taxpayers must disclose a financial interest in, or signatory authority over, foreign financial account holdings over \$10,000.

Although no guidance has been issued on that matter, a recent case, *United States v. Hom*, No. C 13-3721 WHA (N.D. Cal. June 2014), provides possible clarification on the issue. In *Hom*, the court held on a motion for summary judgment in a civil FBAR case that online gambling accounts are foreign financial accounts subject to FBAR reporting.

"I think for the [Justice Department] and FinCEN, this is a very short analytical step to saying that at least certain holdings of virtual currency are similarly subject to the FBAR requirement," Peter D. Hardy of Post & Schell PC said. Although it seems that some holdings are subject to FBAR reporting, there is still a question about where the currencies are stored, he said.

The Foreign Account Tax Compliance Act requires some foreign financial institutions to report their U.S. account holders to the IRS or face withholding taxes. Whether online holders of virtual currencies qualify as financial institutions for FATCA purposes remains an unsettled question, according to Skarlatos.

Skarlatos said that given the recent *Hom* decision, it would be possible for the government to take the position that some third-party holders of virtual currencies are financial institutions. "I

think there is an open question but a real chance that they are financial institutions," he said.

### Subject to Form 8300 Reporting?

Form 8300, "Report of Cash Payments Over \$10,000 Received in a Trade or Business," requires a taxpayer to report the receipt of more than \$10,000 in a trade or business and is a function of the IRC and the Bank Secrecy Act. For purposes of the form, currency is defined as coins or currency of the United States or any other country, and instruments such as cashier checks and money orders.

Keyso said he believes that virtual currencies don't fit the definition of currency for purposes of the regime, and therefore, receipt of virtual currencies in a trade or business isn't subject to Form 8300 reporting.

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### Tax Analysts Information

**Code Sections:** Section 61 -- Gross Income Defined  
Section 988 -- Foreign Currency Transactions

**Jurisdiction:** United States

**Subject Areas:** Financial institutions  
Financial instruments  
Financial products and banking  
Property taxation

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