



The YEAR IN REVIEW

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This article examines international tax developments relating to cryptocurrency reporting in 2021.

I. Introduction

Digital financial assets, referred to in this article as “cryptocurrency,” have become increasingly relevant for policymakers. Even though there is no uniform definition of cryptocurrency, its inherent and unique characteristics cause challenges for various policymakers. These challenges are often connected to the lack of centralized control and the anonymity typical for cryptocurrencies. Moreover, policymaking around cryptocurrency must address the valuation difficulties, the hybrid characteristics of such assets, as well as the rapid evolution of the underpinning technology.¹

During the December 2018 Buenos Aires G20 Summit, in the G20 Leaders’ Declaration “Building Consensus for Fair and Sustainable Development,” the need for regulation of cryptocurrency was acknowledged with the following statement, “We will regulate crypto-assets for anti-money laundering and countering the financing of terrorism in line with FATF [Financial Action Task Force] standards and we will consider other responses

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1. ORG. FOR ECON. COOP. DEV., TAXING VIRTUAL CURRENCIES: AN OVERVIEW OF TAX TREATMENTS AND EMERGING TAX POLICY ISSUES 7 (2020), <https://www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emerging-tax-policy-issues.htm> [<https://perma.cc/J88K-JQ97>].

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as needed.”² The use of cryptocurrency (with its lack of the key attributes of sovereign currencies) could increase the risks for tax evasion. This risk was, *inter alia*, explicitly addressed in the communiqués of the G20 Finance Ministers’ meetings held on March 3, 2018,³ and July 4, 2018.⁴ Even though it was acknowledged in the communiqués that cryptocurrency has the potential to improve the efficiency and inclusiveness of the financial system, concerns regarding tax evasion were raised.⁵

The trading of cryptocurrency has, through its widespread use in today’s world, become one of many examples of a truly international business. Virtual assets in the form of cryptocurrency are being held and used in various jurisdictions, while its owners are domiciled and taxed in other jurisdictions.

The fact that cryptocurrency, from an income tax point of view, is not regarded as a legal tender (fiat currency) in many jurisdictions, but rather as intangible personal property, has created some challenges for policymaking, as well as the accounting of capital gains in local tax reporting. Furthermore, cryptocurrency is highly volatile and, therefore, a single taxable person may have a high number of transactions each year to be reported in his or her tax return.⁶

Reportable cryptocurrency transactions vary from jurisdiction to jurisdiction, but, as one example, reportable cryptocurrency transactions in Sweden includes the sale of cryptocurrency, the exchange of cryptocurrency for other types of cryptocurrencies, the exchange of a cryptocurrency for a fiat currency (such as USD), and the use of cryptocurrency as a means of payment for the purchase of goods and/or services. Each reportable transaction increases the risk for errors and/or omissions. Therefore, challenges in complying with tax regulations may result in both intended and unintended tax evasions.

Exchange of information regulations between jurisdictions is frequently used to prevent various forms of tax evasion in relation to financial assets. Exchange of information regulations are often based on various bilateral agreements and executed through local legislation. The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the Organization for Economic Cooperation and Development

2. *G20 Leaders’ Declaration: Building Consensus for Fair and Sustainable Development*, G20 RSCH. GRP., (Dec. 1, 2018), <http://www.g20.utoronto.ca/2018/2018-leaders-declaration.html> [<https://perma.cc/WC7J-YKRW>].

3. *Communiqué, G20 Finance Ministers and Central Bank Governors Meeting, Buenos Aires* (Mar. 2018), MINISTRY OF FIN., JAPAN (Mar. 19-20, 2018), https://www.mof.go.jp/english/international_policy/convention/g20/180320.htm [<https://perma.cc/FB84-3VFL>].

4. *G20 Finance Ministers and Central Bank Governors Meeting: Communiqué, Buenos Aires* (July 2018), https://www.mof.go.jp/english/international_policy/convention/g20/20180722.htm.

5. *Id.*

6. Nicole Lapin, *Explaining Crypto’s Volatility*, FORBES (Dec. 23, 2021), <https://www.forbes.com/sites/nicolelapin/2021/12/23/explaining-cryptos-volatility/?sh=58510db97b54> [<https://perma.cc/7MTC-8RQK>].

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(OECD) Council on July 15, 2014,⁷ is one example of a standard for the exchange of information cross-border.⁸ The CRS calls on jurisdictions to obtain information from their financial institutions and automatically exchanges that information with other jurisdictions on an annual basis.⁹ It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as the common due diligence procedures to be followed by financial institutions.¹⁰

Local CRS or equivalent rules often exclude cryptocurrency from reportable transactions in relation to financial assets. For instance, Canada,¹¹ the Netherlands,¹² and the European Union¹³ do not include cryptocurrency transactions within the scope of their local CRS provisions.

Moreover, in light of the tax compliance risks described above, the OECD has identified a need for greater tax transparency for cryptocurrency.¹⁴ The OECD is, therefore, currently developing technical proposals to ensure an adequate and effective level of reporting and exchange of information with respect to cryptocurrency.¹⁵

The aim of this article, based upon country-by-country reporting, is to shed light upon some of the current uncertainties concerning the exchange of information of cryptocurrency transactions between jurisdictions.

II. Canada

Cryptocurrency is not legal tender (fiat currency) in Canada but is deemed to be intangible personal property.¹⁶ Under the Canadian Income Tax Act

7. ORG. FOR ECON. COOP. DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2D), at 3 (2017), <https://www.oecd-ilibrary.org/docserver/9789264267992-en.pdf?expires=1652400093&id=id&accname=guest&checksum=3A2D420D730757C12C7474BE96175610>.

8. *Common Reporting Standard (CRS)*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> [<https://perma.cc/PLE8-HZKN>].

9. *Id.*

10. *Id.*

11. *Common Reporting Standard*, GOV'T CAN., <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/budget-2016-growing-middle-class/common-reporting-standard.html> [<https://perma.cc/L6XQ-2J3A>] (last visited May 12, 2022).

12. *Tax and Customs Administration to Share Information Automatically to Fight Against International Tax Evasion*, GOV'T NETH. (Oct. 29, 2014), <https://www.government.nl/latest/news/2014/10/29/tax-and-customs-administration-to-share-financial-information-with-other-countries-automatically> [<https://perma.cc/G4PF-TTZL>].

13. EUR. CT. AUDITORS, EXCHANGE OF TAX INFORMATION IN THE EU 6 (2019), https://www.eca.europa.eu/lists/ecadocuments/ap19_14/ap_tax_information.pdf [<https://perma.cc/SK76-DXNA>].

14. ORG. FOR ECON. COOP. DEV., *supra* note 1, at 9.

15. *Id.*

16. Can. Revenue Agency Ruling 2013-0514701I7 (Dec. 13, 2013), <https://taxinterpretations.com/cra/severed-letters/2013-0514701i7>.

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(ITA),¹⁷ cryptocurrency is a commodity.¹⁸ For tax purposes, the usage of cryptocurrency to purchase goods or services is treated as a barter transaction.¹⁹ A taxpayer who receives virtual currency in exchange for goods and services must compute their gross income based on the fair market value of the cryptocurrency received.²⁰

In Canada, the federal goods and services tax and the relevant provincial sales tax will also apply to the fair market value of any goods or services purchased with cryptocurrency. Profits and losses incurred on the trading of a virtual currency must be reported on the taxpayer's income tax return.²¹ Such profits and losses may be treated as being on account of capital or on account of income, depending on the relevant facts and circumstances.²² Effective May 18, 2019, suppliers of cryptocurrencies are exempt from the federal goods and services tax and from provincial sales taxes harmonized with the federal goods and services tax.²³

On March 19, 2021, the Federal Court issued the Canadian version of a U.S. John/Jane Doe summons, referred to under the ITA as an "Unnamed Persons Requirement" (UPR), on Coinsquare, a virtual currency exchange located in Canada, for purposes of enforcing Canada's income tax and VAT/sales tax.²⁴ Section 231.2(3) of the ITA and section 289(2) of the Canadian Excise Tax Act authorize a court to issue a UPR, if the Court is satisfied that (1) the group of unnamed persons is ascertainable and (2) requirements are met to verify compliance by persons in the group with their duties and obligations under the ITA and the Canadian Excise Tax Act, respectively. It is unclear whether the amendment to the Canadian Excise Tax Act, effective since May 18, 2019, to exempting suppliers of virtual currency from the collection of GST/HST, will apply to Coinsquare taxation years prior to May 18, 2019.²⁵

Specifically, the UPR is seeking information from customers with an address in Canada and whose account had at least \$20,000 on December 31 for any of 2014, through and including 2020, or whose accounts had a cumulative deposit of \$20,000 or more, as well as Coinsquare's 16,500

17. Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can).

18. Can. Revenue Agency Ruling 2013-0514701I7, *supra* note 16.

19. *Id.*

20. *Id.*

21. See Canada Revenue Agency Ruling 2013-0514701I7 (December 13, 2013), Examples.

22. *Id.*

23. *Excise and GST/HST News - No. 107*, GOV'T CAN. (Feb. 2020), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/news107/news107-excise-gst-hst-news-no-107-december-2019.html> [<https://perma.cc/NYD3-4JHZ>].

24. Minister Nat'l Revenue v. Coinsquare Ltd., T-1114-20 (2021), <https://aboutbtax.com/WpL> (Can.).

25. Kathryn Walker, *CRA's Request to Coinsquare Follows the IRS's Success with Coinbase*, LEXOLOGY (June 10, 2021), <https://www.lexology.com/library/detail.aspx?g=43ad91c3-8681-425a-a14d-e01359726e49> [<https://perma.cc/TTA6-2X5G>].

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largest customers between 2014 and 2020.²⁶ The UPR requires Coinsquare to provide the following information:²⁷

1. A list of all customer accounts, both active and inactive, either alone or jointly held with any other person(s) or business(es);
2. A detailed listing of all cryptocurrency and fiat currency transfers identifying the source and destination of all customers' deposits and withdrawals. Details should include the method of funding/withdrawal, the type of fiat currency/cryptocurrency transferred in/out, date, time, cryptocurrency address/bank accounts, transaction ID, amount, fees, and all other information Coinsquare captures regarding funding and withdrawals to/from all customer accounts, either alone or jointly with any other person(s) or business(es);
3. A detailed listing of all trading activity of its customers, including over-the-counter (OTC) or off-exchange trades and information indicating the following: trading pair, buy/sell order, date, time, amount, price per unit, fees, and transaction identifier, which can include a list of all known cryptocurrency addresses that were, or may have been, used during the period of its customers, either alone or jointly with any other person(s) or business(es);
4. A copy of the "know your customer" documentation of its customers;
5. A list of all deposit addresses of its customers, either alone or jointly with any other person(s) or business(es); and
6. All other additional information retained by Coinsquare relating to cryptocurrency or fiat transactions of its customers, either alone or jointly with any other person(s) or business(es).

Section 241(4)(e)(xii) of the ITA authorizes the Canada Revenue Agency (CRA) to exchange a taxpayer's information with another tax authority where there is authority to do so under a tax treaty, a tax information exchange agreement, or pursuant to the Convention on Mutual Administrative Assistance in Tax Matters.²⁸ A foreign authority may examine the taxpayer's information under the exchange provision of section 241 of the ITA. A taxpayer's information is defined in section 241 as information of any kind and in any form as obtained by the Minister of National Revenue for purposes of administering the ITA and would include all information obtained through a UPR.²⁹

²⁶ *Id.*

²⁷ *What the Canada Revenue Agency Is Doing to Fight the Underground Economy*, GOV'T OF CAN. (Oct. 23, 2020), <https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/tax-alert/what-canada-revenue-agency-doing-fight-underground-economy.html>.

²⁸ Convention on Mutual Administrative Assistance in Tax Matters, art. 4, Jan. 25, 1988, E.T.S. No. 127, as amended by the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matter, May 27, 2010, E.T.S. No. 208.

²⁹ Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can).

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Currently, a tax authority will not find its taxpayer's cryptocurrency account under the CRS information exchange or under the information exchange under the Intergovernmental Agreement (IGA) signed in 2014 with the Internal Revenue Service (IRS).³⁰ Both the CRS and the IGA allow for the exchange of information on a taxpayer's financial accounts. Although the United States is not a signatory to the CRS, Canada does share financial accounts belonging to U.S. persons (and certain entities whose controlling persons are U.S. persons) under the IGA. Canadian financial institutions must report to the CRA investment and bank accounts with balances exceeding \$50,000 held by U.S. persons (U.S. citizens, green-card holders, U.S. residents, or U.S. corporations).³¹ As of April 1, 2019, the CRA has sent over 700,000 records to the IRS for the 2017 taxation year.³² Under the IGA, the IRS provides the CRA with information on Canadian financial accounts held by tax residents of Canada. As cryptocurrency is not considered legal tender (fiat currency), a cryptocurrency account will not be considered a financial account.³³

As a member of the Joint Chiefs of Global Tax Enforcement (J5) and a member of the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), Canada will be able to obtain and share information on cryptocurrency holdings with other members of the J5 and JITSIC.³⁴

The J5 was formed in 2018 to combat tax evasion and is composed of the Australian Taxation Office (ATO), the Canadian CRA, the Dutch *Fiscale Inlichtingen en Opsporingsdienst* (FIOD), the United Kingdom's Her Majesty's

30. Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99, <https://laws-lois.justice.gc.ca/eng/acts/C-10.58/FullText.html> (Can.).

31. *Id.* at Annex I, § III(A)(1).

32. Francois Mathieu, *2019-0798711C6 STEP 2019 – Q.17 – Part XVIII of the Act*, VIDEO TAX NEWS, <https://members.videotax.com/technical-interpretations/2019-0798711C6-step-2019-q-17-part-xviii-of-the-act> [<https://perma.cc/JA4T-338M>].

33. Canada implemented the CRS on July 1, 2017. Canada's 2018 federal budget, released on February 27, 2018, allocated \$38.7 million over five years to the CRA for the purpose of implementing Canada's adoption of the CRS. Canada is committed to the CRS, and the Federal government stated that it allows the CRA to expand its offshore compliance activities and advance the Government's commitment to promote compliance and combat tax evasion. Canada requires Canadian banks, credit unions, brokerages, and other financial institutions to report to the CRA on financial accounts held by non-residents of Canada. See *Budget 2018: Equality and Growth for a Strong Middle Class*, GOV'T CAN. (Feb. 27, 2018), <https://www.budget.gc.ca/2018/docs/speech-discours/2018-02-27-en.html> [<https://perma.cc/BU7Y-6WUP>]. The first CRS exchange took place in 2018 with ninety jurisdictions currently activated for incoming data and sixty-four jurisdictions for outgoing data. See *CRS by Jurisdiction 2018*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm> (last visited May 12, 2022).

34. *Joint Chiefs of Global Tax Enforcement*, INTERNAL REVENUE SERV. (June 4, 2021), <https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement> [<https://perma.cc/CG3B-VNAZ>].

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Revenue & Customs (HMRC), and the U.S. IRS Criminal Investigation.³⁵ The J5's current focus is on cryptocurrency and on reducing "the growing threat to tax administrations posed by cryptocurrencies and cybercrime and to make the most of data and technology."³⁶

JITSIC currently consists of a membership of forty-two countries' national tax administrators with the objective of collaborating information and resources to actively tackle tax evasion and aggressive tax avoidance.³⁷ JITSIC is currently focusing on combatting tax evasion through cryptocurrency and is working with the OECD Forum on Tax Administration on this matter.³⁸

The CRA can also receive information on offshore cryptocurrency accounts through its Offshore Tax Informant Program (OTIP), a whistleblower program, which began in 2014.³⁹ Under OTIP, the CRA provides financial rewards to informants who provide information relating to major international tax evasion or aggressive tax avoidance.⁴⁰ Since the inception of OTIP, the CRA has assessed approximately \$60 million in additional taxes owing.⁴¹

Although a cryptocurrency account will not be deemed a financial account for CRS and IGA purposes, the information gained from the current UPR on Coinsquare, from audits, and through its whistleblower program will likely certainly be shared with the J5 and members of JITSIC.

III. Cayman Islands

The Standard for Automatic Exchange of Financial Account Information (Standard) was developed by the OECD and includes two components: (1) the CRS and (2) the Model Competent Authority Agreement (CAA).

On October 29, 2014, the Cayman Islands signed the multilateral CAA, and, on October 13, 2015, the Cayman Islands brought the CRS into its domestic law pursuant to The Tax Information Authority (International Tax Compliance) CRS Regulations, 2015 (now the 2021 Revision) (CRS

35. *J5 Reflects on Two-Years Pursuing Global Tax Cheats*, INTERNAL REVENUE SERV. (July 13, 2020), <https://www.irs.gov/newsroom/j5-reflects-on-two-years-pursuing-global-tax-cheats> [<https://perma.cc/74D9-VCQG>].

36. *Joint Chiefs of Global Tax Enforcement*, *supra* note 34.

37. *Joint International Taskforce on Shared Intelligence and Collaboration*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/forum-on-tax-administration/jitsic/> [<https://perma.cc/AT2A-QTYP>] (last visited May 12, 2022).

38. *Id.*

39. *Report Offshore Tax Cheating – Overview*, GOV'T CAN. (Jan. 25, 2021), <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/offshore-tax-informant-program.html> [<https://perma.cc/653Q-Y4WA>].

40. *Id.*

41. Rudy Mezzetta, *CRA Assesses Nearly \$60 Million under Offshore Tax Informant Program*, INV. EXEC. (Nov. 27, 2020), <https://www.investmentexecutive.com/news/industry-news/cra-assesses-nearly-60-million-under-offshore-tax-informant-program/> [<https://perma.cc/2UBJ-FHZ4>].

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Regulations).⁴² The CRS Regulations are regulations passed under the framework of the Tax Information Authority Act (2021 Revision) that establishes the Cayman Islands' Tax Information Authority (TIA) as the "competent authority."

Every Cayman Islands entity organized under the laws of the Cayman Islands will have a classification under the CRS. Cayman Islands entities that are classified as Financial Institutions may have reporting obligations.⁴³

Each Financial Institution must identify whether it maintains financial accounts and whether those accounts are reportable. Reportable Accounts are those held by reportable persons, which are defined by reference to the Reportable Jurisdictions. Only those jurisdictions that have entered into either the multilateral CAA or a bilateral CAA are included on the Reportable Jurisdictions list.⁴⁴

In order to carry out this process, a Reporting Financial Institution is required to establish and maintain written policies and procedures designed to identify reportable Financial Accounts. Each Financial Institution will be obliged to confirm, on an annual basis, that it maintains up to date written policies and procedures.⁴⁵

An account is treated as a Reportable Account from the date on which it is identified as such to the date on which it ceases to be a Reportable Account (e.g., because the account holder ceases to be a Reportable Person or the account is closed or transferred in its entirety).

Subject to certain exceptions, each Reporting Financial Institution must report specific information with respect to each of its Reportable Accounts, including, but not limited to, (1) the name, address, jurisdiction(s) of residence, taxpayer identification number(s), date, and place of birth (in the case of an individual) of each Reportable Person that is an Account Holder; (2) its Controlling Persons, if relevant; (3) its account number and value; and (4) the amounts paid to the account holder during the reporting period.⁴⁶

Any failure to comply with the requirements of the CRS Regulations can constitute a criminal offense on the part of the relevant entity, and, further, any such contravention will result in an imputed offense by the directors, general partner, trustee, or equivalent officers (noting that individuals may have a defense, if they can prove that they exercised reasonable diligence to prevent the contravention).⁴⁷

42. Tax Information Authority Act (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision) [Cayman CRS Regulations] https://legislation.gov.ky/cms/images/LEGISLATION/SUBORDINATE/2015/2015-0061/TaxInformationAuthorityInternationalTaxComplianceCommonReportingStandardRegulations_2021%20Revision.pdf (Cayman Is.).

43. *Id.* at pt. 1, § 2(a)(b) (explaining the definitions of the Act).

44. *Id.* at pt. 2, § 7.

45. *Id.* at pt. 2, § 7(1)

46. *Id.* at pt. 2, § 9.

47. *Id.* at pt. 3, § 21.

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The monetary penalties for such offenses are severe, as they reach up to approximately \$61,000 for an offense by a corporate body or individual who forms (or forms part of) an unincorporated Cayman Financial Institution.⁴⁸ For other individuals, the penalties can reach up to approximately \$24,400.⁴⁹ Custodial sentences are also possible for certain offenses including:

1. Failure to produce information requested by the TIA (up to two years); or
2. Providing the TIA with misleading information (up to five years).⁵⁰

The TIA also has powers to impose administrative penalties (i.e., without a court process and subject to a lower evidentiary threshold) of up to approximately \$61,000, supplemented by daily penalties of approximately \$120 for continuing contraventions.⁵¹

The vast majority of Financial Institutions situated in the Cayman Islands are investment funds, and the holders of Financial Accounts would, therefore, be holders of equity or debt interests. For traditional investment funds that issue equity, the fund would report on the equity interest holders. As most funds are now regulated in the Cayman Islands, we expect that most, if not all, funds (including funds that invest solely in crypto assets) are complying with their due diligence and reporting requirements under the CRS Regulations.

Entities that are issuers of cryptocurrencies would not typically be required to comply with the CRS Regulations, unless the issuer was acting as a Financial Institution. Even then, the issuer may be unable to identify any Financial Accounts if the rights and attributes of the issued cryptocurrencies were neither equity nor debt interests. For example, it is possible that a crypto asset that entitles the holder to distributions could be regarded as neither a debt interest nor an equity interest. In such cases, the Financial Institution may be limited to reporting solely on its shareholders, as opposed to the holders of its crypto assets.

IV. European Union and the Netherlands

In the European Union (EU), the CRS, as developed by the OECD, was implemented through amendments to the directive on administrative cooperation in the field of taxation (the Administrative Cooperation Directive).⁵² The CRS is incorporated in this directive through two

48. *Id.* at pt. 3, § 22.

49. *Id.*

50. Tax Information Authority Act §§ 24(1), 24(A)(2) (2021 Revision) (Cayman Is.).

51. *Id.* § 25.

52. Council Directive 2011/16/EU of Feb. 15, 2011, on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, art. 8 O.J. (L 64) 1, 6–7, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0016&from=EN>.

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annexes.⁵³ Annex I, titled: “Reporting and Due Diligence Rules for Financial Account Information,” includes a nearly literal copy of the OECD CRS text.⁵⁴ Annex II, titled: “Complementary Reporting and Due Diligence Rules for Financial Account Information,” includes six instructions from the OECD CRS commentary, which means that the EU CRS provisions largely align with the OECD standards.⁵⁵ But, in order to have effect for EU member state residents, the directive must be implemented in the national laws of the various EU member states. Under certain circumstances, EU Directives can be directly relied upon without implementation.

The Netherlands has implemented the Administrative Cooperation Directive through a change in its Law on the International Assistance for the levy of taxes (LIA).⁵⁶ The Law now, in many cases, directly refers to the Administrative Cooperation Directive, with the result that the CRS provisions now directly apply in the Netherlands.

The goal of the introduction of the CRS in Dutch legislation is to prevent tax avoidance in relation to financial assets. For this purpose, an OECD Implementation Handbook has been circulated, which explains how reporting financial institutions must gather the information that they need to report to the Dutch tax authorities.⁵⁷ The financial institutions must conduct due diligence on accounts that are kept for their customers and must report certain information about these accounts.⁵⁸ A practical guide for execution of these duties has also been circulated, which also explains how to deal with Foreign Account Tax Compliance Act (FATCA) reporting obligations under U.S. law.⁵⁹ Further, the execution of the CRS obligations is laid down in an executive order on identification and reporting instructions for the CRS.⁶⁰

Currently, cryptocurrency and e-money do not fall within the scope of the EU or Dutch CRS provisions. The current Administrative Cooperation Directive does provide for reporting obligations for financial institutions,

53. Council Directive 2014/107/EU of Dec. 9, 2014, Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, art. 1(2)(b), 2014 O.J. (L 359) 1, 3–4, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0107&from=EN>.

54. *Id.* at Annex I, 2014 O.J. (L 359) 8–27.

55. *Id.* at Annex II, 2014 O.J. (L 359) 28–29.

56. Dutch parliamentary papers, II 2014–2015, 34276, no. 3 (Neth.).

57. ORG. FOR ECON. COOP. DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS - IMPLEMENTATION HANDBOOK 7 (2d ed. 2018), <https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf> [https://perma.cc/3EQE-H46D].

58. *Id.* at 65.

59. Leidraad FATCA/CRS met technische toelichting bij de NL IGA en de CRS-regelgeving Besluit van 23 juni 2020, no. 2020-115390 [FATCA/CRS guideline with technical explanation of the NL IGA and the CRS regulations, Decision of June 23, 2020, no. 2020-115390] (Neth.).

60. Uitvoeringsbesluit identificatie- en rapportagevoorschriften Common Reporting Standard [Implementing Decree Identification and Reporting Regulations Common Reporting Standard] (2018) (Neth.).

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but cryptocurrencies are not considered assets that fall within the scope of the assets governed by the Administrative Cooperation Directive. Consequently, the Dutch (and probably many other EU) tax authorities lack information on crypto assets. As a result, exchange of information on such assets is currently not possible. Possible taxable transactions executed in cryptocurrency or profits realized with cryptocurrency trading itself currently remain out of sight of the tax authorities. Further, the lack of central overview on cryptocurrency, the high level of anonymity, and the hybrid characteristics constitute challenges for tax authorities.⁶¹

In order to close this information and reporting gap, on November 23, 2020, the EU Commission proposed to extend the scope of the Administrative Cooperation Directive to include cryptocurrency in financial institutions' reporting obligations.⁶² The goal of the EU Commission is to introduce harmonized transparency and publication obligations in relation to crypto assets for crypto-asset service providers and issuers, as well as for e-money institutions.⁶³ The EU Commission aimed to have the amendment to the Administrative Cooperation Directive published in the third quarter of 2021, but, as of December 2021, it has not been published.

In the Netherlands, the Dutch Central Bank has a certain level of supervision over crypto assets, which is based on the EU's Fifth Anti-Money Laundering Directive, as implemented in the Dutch's so-called Anti Money-Laundering and Anti-Terrorism Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*) (Wwft).⁶⁴ On the basis of this statute, private individuals and legal entities must register with the Dutch Central Bank, if they offer conversion services between official currency and cryptocurrency and/or offer crypto wallet services.⁶⁵ But the obligations that follow from this law are not comparable to CRS obligations, as applicable for financial assets under the LIA, and the reporting obligations are also not comparable with the reporting obligations for financial institutions, as described above.

61. *Public Consultation: Exchange of Information Framework in the Field of Taxation*, 196 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 2 (2021); see also *European Commission Opens Public Consultation into Collection and Exchange of Taxpayer Information from Digital Platform Providers*, GLOB. TAX NEWS (Feb. 17, 2020), <https://globaltaxnews.eu.com/news/2020-5229-european-commission-opens-public-consultation-into-collection-and-exchange-of-taxpayer-information-from-digital-platform-providers> [<https://perma.cc/9QTF-FR4P>].

62. *Commission Roadmap to Extend Scope of DAC to Crypto-Assets And E-Money (DAC8)*, 69 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 3 (2020); see also *Commission Roadmap to Extend Scope of DAC to Crypto-Assets and E-money (DAC8)*, MALTA INST. TAX'N (Nov. 25, 2020), <https://maintax.org/news/commission-roadmap-to-extend-scope-of-dac-to-crypto-assets-and-e-money-dac8/>.

63. *Public Consultation: Exchange of Information Framework in the Field of Taxation*, 196 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 3 (2021); see also *European Commission Opens Public Consultation into Collection and Exchange of Taxpayer Information from Digital Platform Providers*, *supra* note 61.

64. *Wet ter voorkoming van witwassen en financieren van terrorisme* ("Wwft") [Anti-Money Laundering and Anti-Terrorism Financing Act] (2022) (Neth.).

65. *Id.* at §1.1, art. 1(1)(a).

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Regarding the applicability of the Dutch tax regime to cryptocurrency, the tax framework has not particularly adjusted to the existence of new asset classes such as cryptocurrency. For Dutch income tax purposes, the two most important elements of the taxation of cryptocurrency—the mining of cryptocurrency and the owning or trading of cryptocurrency—are viewed in accordance with existing Dutch definitions and interpretations.

In the case of owning or trading cryptocurrency, generally, the tax treatment of these items is seen as comparable to any other portfolio investment and taxed as any other asset on the basis of net asset value.⁶⁶ The Dutch net asset income taxation (so-called “box 3” taxation) applies to certain types of assets, based on their fair market value on January 1st of each tax year. A deemed yield varying between 1.82 percent and 5.53 percent over this net asset value is subject to the applicable “box 3” tax rate. On December 24, 2021, the Dutch Supreme Court ruled that the method of a deemed yield calculation is discriminatory where it deviates from the actual yield realized on the net assets.⁶⁷ For tax years 2017 and onwards, it is currently unclear if the actual yield or a deemed yield will be used to determine the income over the box 3 assets.

Alternatively, active trading in cryptocurrency could be considered an entrepreneurial activity under certain circumstances. If the crypto trading or mining is considered an entrepreneurial activity, then the results of such activity are subject to income tax based on the actual result (in box 1), with a rate of between 37.7 percent and 49.5 percent. According to current court cases, trading in cryptocurrency should generally not be considered an entrepreneurial activity because the efforts involved in such activity do not contribute to the creation of added value.⁶⁸ Also, for the activity of currency mining, the current view is that this activity should not be considered an entrepreneurial activity⁶⁹ because it has a very low probability of resulting in the realization of a benefit, given the marginal chances of actually mining a coin.⁷⁰

A final remark can be made on a court case in relation to the mining of bitcoins for VAT purposes.⁷¹ In this case, an enterprise claimed deductibility of input VAT in relation to bitcoin mining. The inspector claimed that the activities qualified as financial services or mediation services in relation to financial services, in which case input VAT can only be deducted to the extent the service is provided to recipients outside the EU. The problem is that the taxpayer needed to prove where the recipients of the service were

66. Wet inkomstenbelasting 2001 [2001 Income Tax Act], art. 5.3(1) (Neth.).

67. HR 24 December 2021, ECLI:NL:HR:2021:1963.

68. P. Kavelaars, NTFR 2021/2377 – Cryptocurrency, NDFR, <https://www.ndfr.nl/content/NTFR2021-2377> [<https://perma.cc/CUJ9-L8QA>].

69. Wet inkomstenbelasting 2001 art. 3.2 (Neth.).

70. In November 2021, this chance was estimated at 1 in 22 trillion. See Kristina Zucchi, *Is Bitcoin Mining Still Profitable?*, INVESTOPEDIA (Mar. 12, 2022), <https://www.investopedia.com/articles/forex/051115/bitcoin-mining-still-profitable.asp> [<https://perma.cc/V243-E7J6>].

71. Court of the Hague 15 Jul. 2020, ECLI:NL:RBDHA:2020:7543 (Neth.).

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residing. The taxpayer used statistical records on the bitcoin market to demonstrate where, in principle, his recipients should reside, claimed on that basis that ninety-eight percent of the recipients reside outside the EU, and reclaimed input VAT on this basis.⁷² The lower court referred this matter of proof to the Dutch Supreme Court, which held that proof can be furnished by any means, causing the Hague Court to adjust the reclaim entitlement to seventy-five percent.⁷³

V. Panama

Panama is part of the Global Forum for Transparency and Exchange of Tax Information of the OECD⁷⁴ and currently has a rating of partially compliant. In Panama, financial institutions must comply with international standards and with the reporting required by the CRS and FATCA.

In 2020, Panama published the updated list of reportable jurisdictions for the purpose of exchanging financial information under the CRS. The list includes sixty-four jurisdictions,⁷⁵ and financial institutions should report information regarding accounts whose holders are tax residents in a reportable jurisdiction to the Tax Authority⁷⁶ by July 31st of each year.

Financial institutions must obtain information from their clients that can demonstrate their tax residence, the place or jurisdiction where they generate their income, or where they carry out their economic activities. In addition, if the tax residence is not the Republic of Panama, and the individual is generating passive income, which is credited to their bank accounts, the financial institution must request their income statements or the documents that justify, support, or certify that individual's foreign income.

In 2017, Panama signed the Convention on Mutual Administrative Assistance in Tax Matters (MAC).⁷⁷ Panama has been fairly proactive in signing bilateral treaties with seventeen countries to avoid double taxation (Barbados, Czech Republic, France, Ireland, Italy, Korea, Luxembourg, Mexico, Netherlands, Portugal, Qatar, Singapore, Spain, United Arab Emirates, England, and Vietnam).

72. *Id.* ¶ 8.

73. Court of the Hague 10 Jan. 2021, ECLI:NL:RBDHA:2021:10751 (Neth.).

74. ORG. FOR ECON. COOP. DEV., GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES: PANAMA 2019 (SECOND ROUND) 11 (2019), <https://www.oecd.org/countries/panama/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-panama-2019-second-round-5f2584a0-en.htm> [<https://perma.cc/3HEY-JB3Y>].

75. *See* Exec. Decree 343, Off. Gazette 29063-B (July 7, 2020) (Pan.).

76. Dirección General de Ingresos, DGI (Pan.).

77. *See* Law 5 Convention on Mutual Administrative Assistance in Tax Matters (MAC), (Feb. 21, 2017) (Pan.).

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Panama has a territorial tax system; therefore, local income is subject to income tax and to the execution of yearly annual returns.⁷⁸ Corporations and foundations of private interest with foreign income that do not carry out operations that are perfected, consumed, or produce their effects within the Republic of Panama have been required to keep accounting records and maintain supporting documentation of their operations since January 1, 2017.⁷⁹

In this regard, the new legislation outlines accounting records as the data that clearly and precisely indicates the commercial operations of legal persons, their assets, liabilities, and its patrimony, which allow them to determine the financial situation of the legal entity and prepare financial statements, if necessary.⁸⁰

The supporting documentation may include contracts, invoices, receipts, or any other documentation necessary to support the transactions carried out by a legal entity.

The accounting records and supporting documentation may be kept in the offices of its registered agent within the Republic of Panama or in any other place within or outside the Republic of Panama provided by its administrative agencies.⁸¹

The registered agent must have a copy of the accounting records as of April 30th of each year. Likewise, the registered agent must send each year to the competent authority a list of those entities that have shared their accounting records and those that have not. Thus, legal entities registered in Panama with foreign income crypto activities must prepare accounting records each year, and the registered agent is obliged to monitor the activity with a risk-based approach and report any suspicious activity to the Financial Analysis Unit (UAF).

Failure to comply with these obligations will result in the suspension of corporate rights to the legal entity that can lead to its dissolution and penalties from \$5,000 to \$5,000,000.

Although Panama has implemented FATCA and the CRS, cryptocurrencies are not considered financial assets subject to reporting by a

78. Gisela Porras, *Global Tax Guide to Doing Business in Panama*, DENTONS, <https://www.dentons.com/en/services-and-solutions/global-tax-guide-to-doing-business-in/panama> (last visited May 12, 2022).

79. See Law 52 Accounting Records and Supporting Documentation for All Operations That Did Not Have Their Effects in the Republic of Panama, *Gaceta Oficial*, Oct. 27, 2016) (Pan.).

80. See Law 254 Adjustments to the Legislation on International Tax Transparency and the Prevention of Money Laundering, (Nov. 11, 2021) (Pan.).

81. In cases where they are kept in a place other than the offices of the resident agent, legal entities must provide to the resident agent, in writing: (1) The physical address of accounting records and supporting documentation. (2) The name and contact details of the person who keeps them in their custody. (3) Legal entities must inform the registered agent, in writing, of any change in the physical address or contact information regarding where the accounting records and supporting documentation are kept, within a period of no more than fifteen business days, counted as of the date the respective change was approved. See Law 254, *supra* note 79.

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financial institution, as crypto trading platforms and crypto exchanges are not considered financial institutions by domestic law.⁸² Cryptocurrencies are seen as unregulated virtual assets; therefore, the entities that trade with cryptocurrencies are not subject to reporting obligations yet, unless the cryptocurrencies are under the management of a deposit custodian (crypto asset custodians). In that case, the custodian who is considered, by law, a financial institution must collect and exchange financial information with the respective reportable jurisdictions.

With regards to the regulation of cryptocurrencies, Panama has drafted two preliminary laws under the approval of the Panama National Assembly, which are intended to introduce definitions of crypto assets, e-money, and other virtual currencies⁸³ and regulate due diligence procedures and licensing.⁸⁴

The OECD is currently developing technical discussions regarding the effectiveness of reporting and the exchange of information on cryptocurrencies in order to improve tax transparency. In addition, the OECD is reviewing the impact of VAT, income, and property tax on transactions related to crypto assets.⁸⁵

As of December 2021, there is no information on Panamanian banks willing to develop their own virtual currencies and, as cryptocurrency is not considered to be legal currency, we expect it will be considered only a virtual asset.

Lastly, with respect to the measures regarding virtual asset service providers, domestic laws in Panama still do not include direct provisions for this type of entity, although Panama follows the Financial Action Task Force and OECD recommendations and is constantly implementing changes in its legislation to comply with their standards.⁸⁶

82. See Law 51 That Establishes the Regulatory Framework for the Implementation of the Exchange of Information for Tax Purposes Creating Obligations and Appropriate Controls for Supervision and Compliance, by Virtue of the Agreements Signed by the Republic of Panama, *Gaceta Oficial*, (Oct. 27, 2016).

83. Preliminary Draft Law: Crypto Law: Making Panama Compatible with the Digital Economy, Blockchain, Cryptocurrencies, and the Internet, Ch. 3, art. 3(6) (Sep. 6, 2021).

84. Preliminary Draft Law 101: The Use of Virtual Currencies or Cryptocurrencies and Their Management (Aug. 17, 2021) (Pan.).

85. See ORG. FOR ECON. COOP. DEV., *supra* note 1, at 32.

86. See FIN. ACTION TASK FORCE, UPDATED GUIDANCE FOR A RISK-BASED APPROACH TO VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS 4 (2021), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf> [<https://perma.cc/A6Z6-PYEZ>].

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VI. United States

Currently, the United States has not adopted the CRS.⁸⁷ The U.S. IRS has, at least initially, determined that the country's rough equivalent to CRS, the FATCA provisions, sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended (the IRC or the Code), do not currently apply to virtual currency.⁸⁸

Other U.S. reporting provisions under the Code or under the Bank Secrecy Act may or may not apply to cryptocurrency transactions, depending upon the particular type of cryptocurrency involved and how the cryptocurrency fits into currently used terminology.

IRC section 6045 requires brokers, including barter exchanges, to report transaction information in regard to certain transactions. The reports include the name and address of the customer, as well as the gross proceeds of the transaction. The Treasury Regulations clarify that the reporting applies to each sale by a customer of the broker if, in the ordinary course of a trade or business in which the broker stands ready to effect sales to be made by others, the broker effects the sale or closes the short position opened by the sale.⁸⁹

IRC section 6045(c)(1)(B), as amended by the Infrastructure Investment and Jobs Act, expands the definition of "broker" for returns required to be filed after December 31, 2023, for the purposes of IRC section 6045(c)(1) by adding "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."⁹⁰

In addition, brokers are required to provide statements that include the customer's basis in specified securities.⁹¹ For returns required to be filed after December 31, 2023, IRC section 6045(g)(3)(B)(iv) includes "digital assets" as "specified securities," triggering basis reporting obligations on the part of brokers.⁹² "Digital assets" is defined in IRC section 6045(g)(3)(D) as "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary."⁹³ This means any broker that effectuates a sale or trade of a digital asset is required to report the name of the customer and the basis of the digital asset.

87. See ORG. FOR ECON. COOP. DEV., *CRS by Jurisdiction*, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/> [<https://perma.cc/KG8B-YJVR>] (last visited May 12, 2022).

88. INTERNAL REVENUE SERV., INFORMATION REPORTING ADVISORY COMMITTEE PUBLIC REPORT 66 (2018), <https://www.irs.gov/pub/irs-pdf/p5315.pdf> [<https://perma.cc/4RWU-Q8E7>].

89. 26 C.F.R. § 1.6045-1.

90. 26 U.S.C. § 6045(c)(1)(C).

91. 26 U.S.C. § 6045(g)(2)(A).

92. 26 U.S.C. § 6045(g)(3)(B)(iv).

93. 26 U.S.C. § 6045(g)(3)(D).

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In addition, for returns required to be filed after December 31, 2023, IRC section 6045A is amended by adding the requirement that any broker that transfers a digital asset from an accountant maintained by a broker to an account not maintained by a broker is required to report the transfer.⁹⁴ This prevents transfers of digital assets to private wallets in order to escape the reporting rules after the amendments by the Infrastructure and Jobs Act take effect.

Separately, for returns required to be filed after December 31, 2023, IRC Section 6050I(d), as amended by the Infrastructure and Jobs Act, adds any digital asset to the list of the types of property treated as cash for the purposes of the obligation of trades or business to report the receipt of cash in connection with the trade or business.⁹⁵ In general, IRC section 6050I requires persons in trades or businesses to report receipts of cash more than \$10,000.⁹⁶

The U.S. Financial Crimes Enforcement Network (FinCEN) has previously issued guidance on how FinCEN regulations apply to money transmission dominated in value that substitutes for currency, specifically, convertible virtual currencies (CVCs).⁹⁷ In general, money transmitters must comply with certain recordkeeping, reporting, and transaction-monitoring obligations.⁹⁸ Under such guidance, a person who creates or sells a CVC software application or platform may be exempt from Bank Secrecy Act reporting obligations as to those actions but may still have Bank Secrecy Act reporting obligations as a money transmitter if the seller or developer also uses the application or platform to accept or transmit currency funds, or value that substitutes for currency, such as a CVC. For these purposes, money transmission services are defined to mean 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 by any means.⁹⁹

Other FinCEN guidance provides that, as long as a broker or dealer in real currency or other commodities accepts and transmits funds solely for the purpose of effecting a bona fide purchase or sale of the real currency or other commodities for or with a customer, such person is not acting as a money transmitter under the regulations. But if the broker or dealer transfers funds between a customer and a third party that is not part of the

94. 26 U.S.C. § 6045A(a).

95. 26 U.S.C. § 6050I(d).

96. 26 U.S.C. § 6050I(a)(1)–(2).

97. U.S. DEP'T OF TREASURY, FIN. CRIMES ENF'T NETWORK, APPLICATION OF FINCEN'S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES 1 (2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [<https://perma.cc/X8EV-DW84>].

98. Examples of such requirements include the filing of Currency Transaction Reports (31 C.F.R. § 1022.310) and Suspicious Activity Reports (31 C.F.R. § 1022.320(a)(1)), whenever applicable, general recordkeeping maintenance (31 C.F.R. § 1010.410), and recordkeeping related to the sale of negotiable instruments (31 C.F.R. § 1010.415).

99. 31 CFR § 1010.100(ff)(5)(i)(A).

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currency or commodity transaction, such transmission of funds is no longer a fundamental element of the actual transaction necessary to execute the contract for the purchase or sale of the currency or the other commodity, and the broker or dealer becomes a money transmitter.¹⁰⁰

FinCEN has also proposed regulations that would add “convertible virtual currency” to the definition of “money.”¹⁰¹

100. U.S. DEP’T OF TREASURY, FIN. CRIMES ENF’T NETWORK, APPLICATION OF THE DEFINITION OF MONEY TRANSMITTER TO BROKERS AND DEALERS IN CURRENCY AND OTHER COMMODITIES 2 (2008), <https://www.fincen.gov/sites/default/files/guidance/fin-2008-g008.pdf>. *See also* Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43,594 (U.S. Dep’t of Treasury July 21, 2011), <https://www.federalregister.gov/documents/2011/07/21/2011-18309/bank-secrecy-act-regulations-definitions-and-other-regulations-relating-to-money-services-businesses>.

101. Joint Notice of Proposed Rule Making, 85 Fed. Reg. 68,005 (amending C.F.R. Title 31, Ch. X, Section 1010.100 (eee)(2)(ii)). For these purposes, convertible virtual currency means a medium of exchange (such as cryptocurrency) that either has an equivalent value as currency, or acts as a substitute for currency, but lacks legal tender status. *See also* Notice of Proposed Rule Making, RIN 1506-AB47, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 86 Fed. Reg. 3897 (U.S. Dep’t of Treasury Jan. 15, 2021), <https://www.federalregister.gov/documents/2021/01/15/2021-01016/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets>.