
***NEW TAX REPORTING DUE
DILIGENCE RULES FOR
PARTNERSHIPS, CRYPTOCURRENCY
& REITS***

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Today's Speakers



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Mark is a tax partner at the law firm of Mayer Brown. Mark's professional practice focuses on the tax consequences of a variety of capital markets products and strategies, including over-the-counter derivative transactions, swaps, tax-exempt derivatives and working with credit funds, offshore insurance companies and hedge funds. Prior to joining Mayer Brown, Mark was a partner at another International law firm, served as a Managing Director at Deutsche Bank, general counsel of a credit derivative company and, prior to that, Mark was a partner at Deloitte, where he led the Capital Markets Tax Practice. Mark began his legal practice at Skadden Arps and then worked at Weil Gotshal.



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Vadim Novik is the head of U.S. Tax Advisory for the Corporate and Investment Bank of JPMorgan Chase & Co. He is a tax generalist, but currently his practice is concentrated on capital markets and derivatives transactions; financial products, services, and technologies; planning considerations related to asset management, securitization and commodities; and the occasional acquisition, divestiture or joint venture. Ms. Novik advises businesses and other stakeholders on a diverse array of technical tax issues, including the taxation of financial products; corporate, partnership and international taxation; and U.S. federal tax reporting and withholding. Before joining JPMorgan Chase & Co., Mr. Novik was an executive director and tax counsel at Morgan Stanley, and an associate at the great firm of Debevoise & Plimpton LLP. He earned his J.D. degree, magna cum laude, from the New York University School of Law, where he was notes editor of the Law Review and received the Harry J. Rudick Memorial Award for Excellence in Taxation. He received an undergraduate degree in marketing, summa cum laude, from Rutgers University.

The New IRS Form W-9

Background: New Partnership Tax Reporting

- **Partnerships with interests in foreign partnerships may be required to complete and file Schedules K-2 and K-3**
- **Reporting is required if items of “international tax relevance” are passed through**
 - **Information affecting FTCs (even if no foreign income is earned)**
 - **Information affecting foreign derived intangible income (FDII)**
 - **Subpart F and GILTI**
 - **PTEP from foreign corporations**
- **Reporting is required if there are foreign partners (ECI & FDAP)**

Interaction of Schedules K-2 & K-3 with Form W-9

- **Partnerships with interests in lower-tier partnerships (& trusts) may not be able to complete Schedules K-2 & K-3 without receiving these Schedules from a lower tier partnership**
- **Upper-tier partnerships with foreign owners providing a Form W-9 to a lower-tier partnership must now check Box 3b**
- **If Box 3b is checked on the Form W-9, the lower-tier partnership must provide Schedules K-2 & K-3 to its partners**
- **Rules apply all entities taxable as partnerships (such as LLCs)**

Triggers to Checking Box 3b

- **Upper-tier partnership receives a Form W-8 from a partner or otherwise knows it has a non-US partner**
- **Upper-tier partnership receives a Form W-9 with Box 3b checked**

Pre-New Form W-9 Tiered Partnerships

- **Schedule K-2 & K-3 reporting began in 2022 for tax years beginning on or after 1/1/2021**
- **Upper-tier partnerships in existence in March 2024 are not required to provide a new Form W-9 to the lower tier partnership**
- **Lower-tier partnerships do NOT have a due diligence requirement to determine whether upper-tier partnership has foreign partners**
- **In these cases, the upper-tier partnership might not have sufficient information to complete Schedules K-2 & K-3**

Cryptocurrency Tax Reporting

2025 Form 1099-DA Released in April 2024

- Form must be provided by “brokers” to report sales and exchanges of “digital assets” undertaken on after January 1, 2025
- Form requires broker to identify itself as a particular type of broker – kiosk operator, payment processor, or wallet provider
- If there are multiple intermediaries, each one must issue a Form 1099-DA (duplicate reporting). No “closest to client” rule, unlike Form 1099-B reporting
- There is a high likelihood of multiple brokers reporting inconsistent information with respect to the same transaction



Information to Be Reported

- **Name, address and taxpayer identification number of the payer**
- **The date and time of disposition using Coordinated Universal Time**
- **Gross proceeds (dollars or fair market value of goods and services reduced by one-half of transaction costs)**
- **Cost or other basis**
- **Character of income recognized – LTCG, STCG or ordinary income**
- **Wash sale disallowed losses**
- **Digital asset address**




Background on Cryptocurrency Reporting

- **2021 US tax legislation required the IRS to promulgate rules for expanded tax reporting for “brokers” who facilitate cryptocurrency transactions in 2023 and after**
 - **The question as to who constitutes a broker for this purpose has generated considerable Congressional and industry attention**
- **At the end of August 2023, the IRS released 288 pages of proposed regulations. The proposed regulations leverage existing regulations for the reporting of securities transactions**
- **The proposed regulations are scheduled to become effective in 2025, but certain information must be gathered beginning in 2023**



Transactions That Will Be Subject to Information Reporting

- **Dispositions of digital assets will be subject to information reporting:**
 - **Cash**
 - **Digital assets for other digital assets that “differ materially in kind or extent”**
 - **Stored value cards**
 - **Broker services (including gas fees)**
 - **Property that itself is subject to information reporting (securities and real estate)**



Transactions Exempt From Information Reporting

- **The direct purchase of goods (other than securities & real estate) and services with digital assets will not be subject to information reporting.**
 - **Exempt transactions processed by an intermediary, however, are subject to reporting by the intermediary (called a digital asset middleman).**
- **Cryptocurrency received in airdrops and hard forks will not be subject to reporting**
- **Loans of cryptocurrencies will not be subject to information reporting**




Rules for Cryptocurrency Derivatives

- **Dual reporting will not be required. Derivatives will be reportable either as a security or a cryptocurrency, but not both**
- **Derivatives may be characterized digital assets if they trade on the blockchain**
- **Derivatives are characterized as securities if they are not blockchain-traded**
- **The asset subject to the derivative will play no part in the characterization of the derivative**
- **Derivatives physically settled in crypto will be subject to reporting**



More on Cryptocurrency Derivatives

- **Trading on private or permissioned ledgers will be subject to reporting**
- **Trading subject to reporting will include orders filled from dealer inventory as well as open market transactions**
- **Digital asset reporting will take precedence over reporting for regulated futures contracts**
- **Digitized assets will be subject to digital asset reporting only, not reporting as securities**
- **But digitized real estate transactions will be subject to real estate reporting only**



Determining When a Person Is a Digital Asset Broker

- **List of Persons treated as brokers include:**
 - **Digital asset platforms**
 - **Payment processors**
 - **Hosted wallet providers**
 - **Cryptocurrency issuers that regularly offer to redeem their coins (such as stablecoin issuers)**
 - **Digital Asset Middlemen**



Digital Asset Middlemen

- **Digital asset middlemen will include DAOs, whether or not the DAO is formed as an entity or just a collection of governance tokens**
- **Any person who provides facilitative services that effect sales of digital assets by customers**
- **Any person who controls payment asset services**
- **Persons who facilitate the purchase and sale of securities and real estate with digital assets**



Exemptions from Digital Asset Reporting

- **Merchants that accept digital assets as payment for goods and services**
- **Miners**
- **Stakers**
- **Hardware sales**
- **Software licensing**



Exemptions for Foreign Transactions

- **Location of transactions is determined with reference to the residence of the broker and customer**
 - **Office location is irrelevant**
- **Broker must perform the acts necessary to complete the transaction from outside of the US and the instructions to complete the transaction must emanate from outside of the US.**
- **Any indication that the client is a US person will trigger reporting**

Domestically-Controlled REIT Look-Thru Rules

FIRPTA Rules for Domestically-Controlled REITs

- **FIRPTA (Code § 897) imposes US tax on dispositions of stock of US Real Property Holding Companies (USRPHCs) by non-US persons**
- **A USRPHC is a US corporation holding US real property interests that exceed 50% of the value of its total assets**
- **A private REIT with non-US owners “directly or indirectly” holding less than 50% in value of the REIT’s stock is not a USRPHC during 5 year period preceding the date of the sale of the stock (shorter period if REIT is not in existence for 5 years)**

The Use of US C Corporations

- **Many funds created C corporations to hold the stock of a REIT, taking the position that the C corporation would be treated as a US shareholder. PLR 200923001 supported this conclusion**
- **Foreign investors could sell stock in the C corporation without FIRPTA tax because the REIT stock was not treated as a USRPI**
- **In December 2022, the IRS proposed rules that would look through certain US corporations to their shareholders to determine if a REIT was domestically-controlled, that is, not stopping at the C corporation level**
- **Final Regulations adopt the original rule with substantial changes and a lengthy grandfather period for existing structures**

The Final Regulation Look-Thru Rule

- **The final regulations require a REIT to look-thru a US C corporation if more than 50% of the value of the C corporation stock is held by non-US persons during the 5-year testing period**
- **Foreign ownership is determined by looking through partnership shareholders to the partners**
- **In the parlance of the regulations, a “foreign controlled domestic person” is a “look-through person”**
- **Qualified foreign pension funds are treated as foreign persons, even if they could qualify for a FIRPTA exception**

The Transition Rule

- **Domestic C corporations in existence on April 25, 2024 do not have to apply the look-thru rule until April 24, 2034 provided:**
 - **1. USRPIs acquired by the REIT after April 25, 2024 do not exceed 20% of USRPIs held by the REIT as of such date (Asset Test)**
 - **2. The aggregate increases in ownership by non-look thru persons after April 25, 2024 are less than 50 percentage points (Ownership Test)**

The Asset Test

- **Does development trigger the asset test if the value of improvements hits the 20% threshold?**
- **Are Section 1031 exchanges considered the acquisition of new property?**
- **Are dispositions followed by new acquisitions treated wholly as acquisitions?**
- **Are ordinary course repairs treated as acquisitions?**

Thank You!