

Infrastructure Investment and Jobs Act—Summary of Key Tax Components

On Monday, November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“Infrastructure Act”), Public Law No: 117-58. The Infrastructure Act is the result of the Bipartisan Infrastructure Framework (“Infrastructure Framework”) previously announced on June 24, 2021. *See* Ropes & Gray alert on [Bipartisan Infrastructure Framework](#). The \$1 trillion Infrastructure Act covers many of the Infrastructure Framework’s priorities for improvements to traditional infrastructure, including improvements to roads and bridges, rail, broadband internet, and some climate-related projects. The Infrastructure Act does not contain any of the tax increases previously proposed by the American Jobs Plan, Made in America Tax Plan, or American Families Plan (*see* Ropes & Gray [American Jobs Plan alert](#) and [American Family Plan alert](#)). To fund the Infrastructure Act there are, however, two tax-related changes: (i) increased required reporting of transactions involving the sale of digital assets, and (ii) an early end to the employee retention credits for certain eligible employers. The cryptocurrency reporting is designed to encourage taxpayers to report cryptocurrency transactions and to support IRS enforcement against taxpayers who do not report those transactions. Many have criticized the digital asset reporting as overbroad, and amendments were considered—but not passed—to narrow the reporting requirement.

Complete language for the Infrastructure Act can be found [here](#).

Required Reporting of Digital Asset Transactions

Section 80603 of the Infrastructure Act requires “brokers” to report transactions involving digital assets (including cryptocurrency or virtual currency) in a manner similar to the rules applicable to transactions in stocks; such reporting would include data on cost basis. To accomplish this, the Infrastructure Act amends Section 6045 of Internal Revenue Code of 1986 (the Code) to broaden the definition of “broker” and to add “any digital asset” to the list of instruments classified as a “specified security” with respect to which reporting is required, and by making corresponding adjustments to other Code sections. The Infrastructure Act’s definition of “broker” includes “any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person.” The Infrastructure Act’s definition of a “digital asset” means “any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary.” The new reporting rules apply to digital assets acquired on or after January 1, 2023, with required filings due starting in 2024.

The Infrastructure Act also amends Section 6050I, adding a requirement for brokers to report certain transactions with non-brokers and a requirement for anyone engaged in a trade or business that receives more than \$10,000 in digital assets in the course of the trade or business in one transaction or multiple related transactions to report such transactions to the IRS.

Many quickly criticized the Infrastructure Act’s proposed definition of broker as being too broad because the definition would encompass individuals who are mining cryptocurrency or otherwise developing software related to cryptocurrency. Two proposed—but unpassed—amendments in the Senate would have narrowed the definition of broker.

The Biden administration is focused on narrowing the tax gap by increasing IRS enforcement activities. The Infrastructure Act’s proposed reporting requirements would dovetail with other IRS activities surrounding taxpayer’s cryptocurrency holdings. For example, all individual taxpayers are required to disclose their cryptocurrency activity on their 2020 Form 1040, and early drafts of the 2021 Form 1040 contemplate requiring similar information. In early March 2021, the IRS announced Operation Hidden Treasure to trace cryptocurrency transactions and identify taxpayers who have omitted income from returns. In the spring of 2021, two U.S. federal courts granted the IRS permission to serve

John Doe summonses on cryptocurrency exchanges Kraken and Circle. Through those summonses, the IRS is seeking information regarding the exchanges' account owners and their transaction activity to ensure that users are complying with their tax obligations.

Early End to Employee Retention Credits

In Section 80604, the Infrastructure Act terminates employee retention credits three months early for all employers other than employers who qualify as a recovery startup business. While recovery startup businesses can continue to claim employee retention credits for qualified wages paid through the end of 2021, other eligible employers are only able to receive employee retention credits for qualified wages paid before October 1, 2021. The IRS has stated that they will be publishing guidance on the early termination of the employee retention credits. The early termination directly impacts previously eligible employers who had been planning on claiming the credit for the last quarter of 2021, and who were therefore not depositing and withholding the portion of the taxes that they planned on receiving as a credit.

The employee retention credits were created by, first, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and were then expanded by the Consolidated Appropriations Act of 2021 (CAA) and the American Rescue Plan Act (ARPA). *See* Ropes & Gray alerts on the [CARES Act](#), [CAA](#), and [ARPA](#). The CARES Act provided eligible employers with employee retention credits for qualified wages paid March 13, 2020–December 31, 2020 (inclusive). The CAA expanded the employee retention credits to qualified wages paid January 1, 2021–June 30, 2021 (inclusive), and increased the credit. The ARPA again expanded the employee retention credits to qualified wages paid after June 30, 2021 and before January 1, 2022, and increased the credit available to severely financially distressed employers. The ARPA also created a new category of eligible employers, referred to as “recovery startup businesses.”