

# The Infrastructure Investment and Jobs Act's Attack on Crypto

## Questioning the Rationale for the Cryptocurrency Provisions

BY NICHOLAS ANTHONY

The Infrastructure Investment and Jobs Act has finally reached President Joe Biden's desk and has been signed into law. However, its ratification, with the cryptocurrency provisions in Section 80603 intact, signals the beginning of an attack on the cryptocurrency industry. If Congress does not wish to see the cryptocurrency industry leave the country just as the United States is becoming a global leader in cryptocurrency mining, Congress should amend the provisions that have set a de facto ban on legal cryptocurrency mining and exposed over 60 million Americans to new felony crimes.<sup>1</sup> Failure to do so will likely result in numerous legal challenges from the industry—especially if said provisions continue to rest on such a weak foundation.

### A BRIEF GUIDE TO CRYPTOCURRENCY MINING

Cryptocurrency mining serves two purposes: (1) it introduces new coins into circulation and (2) it confirms new transactions as they are added to the public ledger or blockchain.<sup>2</sup> The new coins added into circulation are introduced as payments to miners in return for their efforts. Although the process is quite complex, it is most commonly referred to as a sort of mathematical puzzle.

Entire warehouses of computers have been employed around the world to solve these puzzles. In fact, the energy costs of supporting computers that mine have been one of the greatest criticisms against bitcoin in recent years.<sup>3</sup> Yet said cost is not without reason. The difficulty of mining, something



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that scales with demand,<sup>4</sup> ensures that bad actors cannot change the public ledger on their own without incurring costs well above any benefit that might be gained. For, unlike paper money, digital currency is susceptible to double spending, or the process of sending the same money twice.<sup>5</sup> The mining process, however, averts such a risk without the need for third-party supervision (i.e., from a bank). It is this mining process that has been caught in the crosshairs of the law.

## THE AMENDMENTS TO SECTIONS 6045(C)(1) AND 6050I(D) OF THE INTERNAL REVENUE CODE

The law addresses the cryptocurrency industry in Section 80603.<sup>6</sup> It is here that two provisions amend the Internal Revenue Code (IRC) in a way that amounts to a de facto ban on legal cryptocurrency mining in the United States. Worse yet, it also requires an unjust level of surveillance that is enforced by threat of felony charges.<sup>7</sup>

The amendment to 6045(c)(1), commonly referred to as the “broker provision,” redefines the term “broker” in the IRC so that it includes “any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person.”<sup>8</sup> In doing so, Congress has categorized not just traditional exchanges (e.g., Coinbase, Kraken, etc., that are licensed and regulated at the state level) as brokers but also individual miners and even software developers. This provision thus requires exchanges, miners, and developers to report the name and address of each “customer.”<sup>9</sup> Yet this is information that many who will be newly defined as *brokers* in the IRC simply do not have access to. Therefore, by mandating that they report what they cannot possibly offer, Congress is effectively banning legal mining in the United States.

The amendment to Section 6050I(d) of the IRC might even be worse for the industry than the previous provision.<sup>10</sup> Currently, Section 6050I(d) requires anyone engaged in a business transaction of \$10,000 or more in cash to report the transaction to the IRS. The report must include the name and address of the payer, as well as their taxpayer identification number, the amount paid, the date, and the nature of the transaction. The law expands this requirement to also require reporting on business transactions involving \$10,000 or more in digital assets.<sup>11</sup>

Failure to comply with Section 6050I(d) can result in severe repercussions. For example, if someone spends over \$10,000 in cryptocurrency on a piece of art, the seller must file IRS Form 8300 within 15 days.<sup>12</sup> Failure to file, incorrect information, or missing information may result in a \$25,000 fine or five years in prison.<sup>13</sup> Such a consequence should not be the result of any law that has not been properly debated or heard by the public.

## UNJUST SURVEILLANCE

The design of these provisions makes it difficult to understand what Congress is seeking to achieve. There’s a big difference between paying taxes on the income earned through mining (i.e., the coins one is rewarded with) and reporting the transactions that one mines. And there’s an even bigger difference between requiring those that “effectuate transfers” to report information and requiring any business that receives a payment to do so. So, while one might make a case for the cryptocurrency industry to pay its “fair share” of taxes, the amendments to Sections 6045(c)(1) and 6050I(d) are clearly designed for surveillance purposes.

Yet legislated surveillance is largely unnecessary. A public ledger is far more transparent for law enforcement than most traditional banks and far more traceable than paper money.<sup>14</sup> In a study from earlier this year, Kristine Johnson and Michael Garcia wrote,

Due to the pseudonymous, but not private, nature of Bitcoin and other digital currencies, it is possible to “follow the money” to see where laundered currencies travel to and from, and in some cases tie the activity to actors holding the wallets.<sup>15</sup>

For those that are less tech-savvy, firms like Chainalysis, Coin Metrics, and CipherTrace (among others) offer blockchain analysis services that can assist in tracing transactions. It is this level of transparency that allowed the FBI to recover funds paid in the Colonial Pipeline hack in May 2021.<sup>16</sup> And for anything not readily available on the public ledger, law enforcement agencies can use the existing channels of the U.S. justice system to secure warrants or subpoenas—a process that is only made easier by the evidence readily available on the blockchain.

Critics have long argued that the cryptocurrency industry is a “haven for money laundering and tax evasion,”<sup>17</sup> but the facts are not on their side. Former CIA director Michael Morell, alongside Josh Kirshner and Thomas Schoenberger, confirmed as much in an April 2021 report.<sup>18</sup> They found that criminal activity among all cryptocurrencies as a percentage of total cryptocurrency activity from 2017 to 2020 was less than 1 percent.

To put that figure into perspective, it is estimated that criminal activity through traditional financial intermediaries makes up 2 to 4 percent of global gross domestic product. After reviewing these findings, Morell concluded, “Put simply, blockchain analysis is a highly effective crime fighting and intelligence gathering tool.” One official at the Commodity Futures Trading Commission added that it’s “easier for law enforcement to trace illicit activity using Bitcoin than it is to trace cross-border illegal activity using traditional banking transactions, and far easier than cash transactions.”<sup>19</sup>

Therefore, it would be far more efficient for the government to look at the blockchains themselves—like many law enforcement agencies already do—than require countless individuals to report transaction after transaction to the IRS. As noted by James Burnham, former counselor to the U.S. attorney general, “indiscriminately flooding federal filing cabinets with information about already-public transactions is unlikely to enhance enforcement efforts.”<sup>20</sup>

## FIAT TAXES

When the cryptocurrency industry rallied and several senators tried to amend the provisions in question, there was one barrier: \$28 billion.<sup>21</sup> The Joint Committee on Taxation (JCT) estimated that these new provisions would yield \$28 billion in tax revenue over the course of 10 years. Therefore, for the provisions to be taken out, Congress would need to find a new source for the money so that the infrastructure bill in its final form would be paid for—at least, paid for on paper. That constraint was why Sen. Ted Cruz’s (R-TX) amendment to strike the cryptocurrency provisions from

the bill received so little attention.<sup>22</sup> Cruz’s amendment was the ideal choice, but without identifying a new source of funding, it was a political nonstarter. Therefore, the industry instead rallied around Sens. Cynthia Lummis (R-WY), Pat Toomey (R-PA), and Ron Wyden’s (D-OR) amendment that would have only changed the language so that the provisions would not be so all-encompassing.<sup>23</sup> By not striking the funding source completely, the latter amendment had a better chance of being heard, but the Senate still failed to change the language.

However, it’s not clear how legitimate this funding constraint really is because the exact source of the \$28 billion has yet to be explained. The Senate is relying on JCT estimates, but the JCT has offered little more than the figures in Table 1.<sup>24</sup> When asked how the JCT came to the \$28 billion projection, a spokesperson said that the JCT does not usually make its methodology public.<sup>25</sup> Given the stakes for the industry, it is important to know how reliable this number is, even more so given that the JCT estimates appear to assume that the cryptocurrency industry is engaged in mass tax avoidance.<sup>26</sup> If the revenue-raising projection is solely fiat, it should not have been treated as a binding constraint for these provisions—the \$28 billion could simply have been assigned to any number of other provisions.

## AN IRS UNDER PRESSURE

Another area that the JCT did not comment on is whether the IRS will be able to handle the weight of the new reporting requirements. Before Congress passed the infrastructure bill, the JCT should have explained how it expects the IRS to absorb the related expenses as it implements the new rules. Currently, it does not look like the IRS can take on the task without it, and the public, incurring massive costs.

The IRS has been under immense pressure during the pandemic: stimulus checks went missing, tax refunds have been delayed, and phone calls have gone unanswered.<sup>27</sup> Such issues are due partly to the unique nature of the pandemic, but they are also not far from the norm. Since 2010, the IRS

Table 1

### Estimated tax revenue

Year	2024	2025	2026	2027	2028	2029	2030	2031	2022–2031
Millions of dollars	1,526	2,862	3,349	3,559	3,797	4,013	4,282	4,582	27,970

Source: Joint Committee on Taxation.

workforce has decreased by 20 percent, and several government officials have claimed that the IRS does not have the resources it needs to meet its current workload.<sup>28</sup> Natasha Sarin, deputy assistant secretary for economic policy at the Department of the Treasury, wrote in September 2021, “Currently, an under-staffed IRS, with outdated technology, is unable to collect 15 percent of taxes that are owed, and a lack of resources means that audit rates have fallen across the board.”<sup>29</sup> IRS Commissioner Charles Rettig voiced this sentiment to Congress in April 2021 when he said, “The IRS absolutely needs more resources across all lanes.”<sup>30</sup>

However, even in its current form, the IRS is not a small agency. It has roughly 76,000 employees.<sup>31</sup> Expanding its duties to include launching a new surveillance program over the cryptocurrency industry would require an unprecedented expansion.<sup>32</sup> As it stands, the industry would likely be forced to incur immense regulatory costs while the information reported does little more than sit in federal filing cabinets.

To get a better idea of the size of those regulatory costs, consider the case of suspicious activity reports (SARs).<sup>33</sup> Banks file SARs when an employee is suspected of insider trading or a customer is suspected of criminal activity. It’s a simple premise, but the reporting can be daunting. The Financial Crimes Enforcement Network updated its measurements in 2020 and reported that it can take a financial institution as long as five hours to file a single SAR, more than double the previous two-hour estimate.<sup>34</sup> SARs may not be a perfect comparison, but they do offer an additional insight: the standard financial reporting framework is not an efficient model. Of the 640,000 SARs filed in 2017, a Bank Policy Institute study found that only 4 percent of the reports “warranted follow-up inquiries from law enforcement.”<sup>35</sup> The amount that required legal action is likely far less than that. Worse yet, it’s very possible that the requirements levied by the law will be more burdensome because financial institutions traditionally have the information for SARs readily available whereas participants in the cryptocurrency industry do not. In effect, the cryptocurrency industry now faces a massive regulatory burden that may not even lead to an increase in tax revenue.

## A LEGAL CHALLENGE

Senators, industry leaders, and cryptocurrency enthusiasts responded en masse in August 2021 when the news

broke that there were provisions focused on cryptocurrencies tucked away in the infrastructure bill.<sup>36</sup> Since then, cryptocurrency advocacy groups have been preparing legal challenges against the provisions.<sup>37</sup> Those challenges will likely focus on the idea of the “third-party doctrine” and its applicability to the cryptocurrency industry.

The third-party doctrine resulted from the 1976 Supreme Court ruling in *United States v. Miller*. The Court ruled that Americans do not have a Fourth Amendment right to privacy when it comes to financial data that is voluntarily given to a third party (e.g., a financial institution). The Court wrote, “The depositor takes the risk, in revealing his [or her] affairs to another, that the information will be conveyed by that person to the Government.”<sup>38</sup> Since then, the third-party doctrine has been used to defend the past 50 years of Bank Secrecy Act surveillance.<sup>39</sup>

However, no such ruling has been made about the reporting of cash transactions in the context of a business transaction—a case in which there is no third party—as required in Section 60501(d). In fact, Section 60501(d) came after the Supreme Court’s 1976 decision in *United States v. Miller*.<sup>40</sup> Therefore, it stands to reason that there is no such case to be made with two individuals engaged in a business transaction—regardless of whether it is in cash or cryptocurrencies.

The third-party doctrine likely does apply to reporting required by 6045(c)(1) where anyone “effectuating transfers” would in fact be a third party. However, in this case, it is likely the doctrine itself will be challenged as it is unclear how appropriate the 45-year-old ruling is in the new digital age. Supreme Court Justice Sonia Sotomayor suggested as much in *United States v. Jones* in 2012:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.<sup>41</sup>

## CONCLUSION

While some have started to prepare legal challenges and others have prepared follow-up legislation to defuse the

requirements,<sup>42</sup> one thing remains very clear: Section 80603 of the law is an attack on the cryptocurrency industry. Its rationale rests on a weak foundation, and it is unclear if the provisions will even achieve what its supporters intend. Therefore, it would be a grave mistake to let it stand and regulate the industry out of the country—especially as the

## NOTES

1. In 2021, Richard Laycock and Catherine Choi found that roughly 59.1 million Americans own some form of crypto. See Richard Laycock and Catherine Choi, “A Rising Number of Americans Own Crypto,” *Finder* (blog), June 24, 2021.

2. Euny Hong, “How Does Bitcoin Mining Work?,” *Investopedia*, September 21, 2021.

3. Diego Zuluaga, “Why Bitcoin Is Not an Environmental Catastrophe,” *Cato at Liberty* (blog), Cato Institute, September 4, 2018.

4. “Network Difficulty,” Blockchain.com, <https://www.blockchain.com/charts/difficulty>.

5. Jamie Redman, “Triple-Entry Bookkeeping: How Satoshi Nakamoto Solved the Byzantine Generals’ Problem,” *Bitcoin.com*, August 2, 2020.

6. Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. (2021).

7. For a more comprehensive breakdown, see Abraham Sutherland, “Research Report,” Proof of Stake Alliance, September 17, 2021.

8. 26 U.S.C. § 6045.

9. 26 U.S.C. § 6045(c)(2).

10. 26 U.S.C. § 60501.

11. The rule applies to all businesses except financial institutions, which already report large cash transactions under the Bank Secrecy Act. However, as Abraham Sutherland notes, in its rush, Congress forgot to amend the act’s language to include digital assets. Thus, financial institutions are exempt from reporting large cryptocurrency transactions for the time being. See Sutherland, “Research Report,” pp. 10–11.

12. Internal Revenue Service, “Report of Cash Payments over \$10,000 Received in a Trade or Business,” IRS Form 8300, revised August 2014.

United States has become a new global leader in cryptocurrency mining. This is not to say the industry should not be held to the letter of the law. Rather, it is that any legislation that has the power to affect the lives of millions of Americans should first be openly debated in Congress, not pushed through the reconciliation process as merely an afterthought.

13. See Internal Revenue Service, “Reporting Cash Payments of over \$10,000,” Publication 1544, revised September 2014, p. 4; and 26 U.S.C. § 7203.

14. Rick Gladstone, “Pandora Papers: A Money Bomb with Political Ripples,” *New York Times*, October 4, 2021; Tom Emmer (@RepTomEmmer), “Distributed ledgers allow us to easily and accurately trace crypto. Make no mistake, cash is still king for criminals—disappointing to see @RepClever spread misinformation about traceability at our @FinancialCmte hearing today,” Twitter, October 14, 2021, 2:39 p.m.; and Adam Ludwin, “How Anonymous Is Bitcoin?,” *Coin Center*, January 22, 2015.

15. Kristine Johnson and Michael Garcia, “Digital Currencies’ Role in Facilitating Ransomware Attacks: A Brief Explainer,” *Third Way*, May 3, 2021.

16. Tuan Phan, “Did the FBI Hack Bitcoin? Deconstructing the Colonial Pipeline Ransom,” *ISACA Now Blog*, July 1, 2021; and Office of Public Affairs, “Department of Justice Seizes \$2.3 Billion in Cryptocurrency Paid to the Ransomware Extortionists Darkside,” press release, Department of Justice, June 7, 2021.

17. Alan Rappaport, “Infrastructure Deal Puts Cryptocurrencies in Washington’s Cross Hairs,” *New York Times*, July 30, 2021; and Nick Anthony (@EconWithNick), “.@BradSherman says “#Bitcoin, it’s not just for narco-terrorists anymore... It’s for tax evaders, too,” Twitter, April 15, 2021, 11:20 a.m., <https://twitter.com/EconWithNick/status/1382715481874960384?s=20>.

18. Michael Morell, Josh Kirshner, and Thomas Schoenberger, “An Analysis of Bitcoin’s Use in Illicit Finance,” Crypto Council for Innovation, April 6, 2021.

19. Morell, Kirshner, and Schoenberger, “Analysis of Bitcoin’s Use in Illicit Finance,” pp. 3, 5.

20. James Burnham, “The Infrastructure Bill Should Not Target Cryptocurrency,” *Law360*, October 19, 2021.

21. Kellie Mejdrieh, Victoria Guida, and Brian Faler,

“Cryptocurrency Tax Changes Spark Clash between White House, Key Democratic Senator,” *Politico*, August 4, 2021.

22. Ted Cruz, “Sen. Cruz Leads Fight to Remove Harmful Regulations on Cryptocurrency from Wasteful Infrastructure Bill,” press release, August 9, 2021, <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-leads-fight-to-remove-harmful-regulations-on-cryptocurrency-from-wasteful-infrastructure-bill>.

23. Ron Wyden, Cynthia Lummis, and Patrick Toomey, “Amendment to H.R. 3684,” <https://www.finance.senate.gov/imo/media/doc/Wyden%20Lummis%20Toomey%20Crypto%20Amendment.pdf>.

24. “JCX-33-21 (August 02, 2021),” Joint Committee on Taxation, August 2, 2021.

25. Nikhilesh De, “Senate Advances Infrastructure Bill without Amending Crypto Provision,” *CoinDesk*, August 9, 2021.

26. See Rainey Reitman, “The Cryptocurrency Surveillance Provision Buried in the Infrastructure Bill Is a Disaster for Digital Privacy,” Electronic Frontier Foundation, August 2, 2021.

27. Lorie Konish, “Still Missing a Stimulus Check? What to Know about Claiming the Funds,” *CNBC*, May 4, 2021; and “IRS Operations during COVID-19: Mission-Critical Functions Continue,” Internal Revenue Service, updated November 1, 2021. In 2020, the IRS received more than 100 million calls. Of these, the IRS only answered around 24 million calls. See “National Taxpayer Advocate Delivers Annual Report to Congress; Focuses on Taxpayer Impact of COVID-19 and IRS Funding Needs,” Internal Revenue Service news release, January 13, 2021; and Michelle Singletary, “If You Call the IRS, There’s Only a 1-in-50 Chance You’ll Reach a Human Being,” *Washington Post*, April 23, 2021.

28. “National Taxpayer Advocate Delivers Annual Report to Congress” *IRS Press Release*, January 13, 2021.

29. Natasha Sarin, “The Case for a Robust Attack on the Tax Gap,” Department of the Treasury, September 7, 2021,

30. Abby Vesoulis, “The IRS Is Struggling to Keep Up—and That’s Bad for Everyone,” *Time*, June 29, 2021.

31. “IRS Budget & Workforce,” Internal Revenue Service, updated June 24, 2021, <https://www.irs.gov/statistics/irs-budget-and-workforce>.

32. Enforcement activities (e.g., investigations, examinations, etc.) cost the IRS over \$4 billion in 2020 alone. See “IRS Budget & Workforce.”

33. For a helpful guide to suspicious activity reports, see “What Is a Suspicious Activity Report?,” Thomson Reuters, <https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report>.

34. Agency Information Collection Activities, 85 Fed. Reg. 31598 (May 26, 2020); “FinCEN’s Estimate of the Costs and Burden of Filing SARs Is Evolving, but Needs Private Sector Input,” RegTech Consulting LLC, June 2, 2020; and Sarah Aberg and Bochan Kim, “FinCEN Issues Notice on SARs Filing Figures,” *Corporate & Securities Law Blog* (blog), Sheppard Mullin, June 8, 2020.

35. “Getting to Effectiveness—Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance,” Bank Policy Institute, October 29, 2018.

36. Victoria Guida, “Washington Wakes Up to Crypto Influence amid Infrastructure Fight,” *Politico*, August 9, 2021.

37. Peter Van Valkenburgh, “An Unworkable and Arguably Unconstitutional Tax Change Tucked Away in the Infrastructure Bill,” *Coin Center*, September 17, 2021.

38. *United States v. Miller*, 425 U.S. 435 (1976).

39. Michael J. Casey, “A Reckoning Looms for America’s 50-Year Financial Surveillance System,” *Cato Journal* (Spring/Summer 2021): 367–82.

40. *United States v. Miller*.

41. *United States v. Jones*, 565 U.S. 400 (2012).

42. Van Valkenburgh, “An Unworkable and Arguably Unconstitutional Tax Change.” In a session on Twitter Spaces on October 18, 2021, Rep. Warren Davidson (R-OH) said that his office was preparing to make a standalone bill if there was not an amendment.