Cryptocurrency and the Bipartisan Infrastructure Bill: Two Competing Amendments and their Implications for the Crypto Industry

Article
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The long-awaited infrastructure bill took a new turn in recent days as a bipartisan group of senators filed an amendment which would clarify the cryptocurrency-related provisions buried in the legislation. Senators Ron Wyden (D-Ore.), Patrick Toomey (R-Pa.), and Cynthia Lummis (R-Wyo.) teamed up to advance the amendment which clarifies the meaning of “brokers” under the bill.

The infrastructure bill would require crypto "brokers" to report information about crypto transactions, such as price points and customer information to the Internal Revenue Service (IRS). In its current form, the infrastructure bill broadly defines a “broker” to include those who regularly provide services in connection with the transfer of digital assets, and imposes an IRS reporting duty upon them. The broker provision has generated widespread criticism, as it would result in a sweeping inclusion of most crypto-related entities, including miners, node operators, and software developers that do not have access to the type of “know your customer” (KYC) information that the law would require.

An amendment proposed by Senators Wyden, Toomey, and Lummis would clarify that “brokers” mean only those persons who conduct transactions on exchanges where consumers buy, sell, and trade digital assets. It would exempt people who engage in mining or staking, selling hardware or software that an individual may use to control a private key (also known as a “wallet”), or develop digital assets or their corresponding protocols or software from IRS reporting.

Specifically, the amendment provides that “nothing in this section shall be construed to create any inference that…any person [is deemed to be a broker if they are] solely engaged in the business of:

- Validating distributed ledger transactions,
- Selling hardware or software for which the sole function is to permit a person to control private keys which are used for accessing digital assets on a

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distributed ledger, or

- Developing digital assets or their corresponding protocols for use by other persons, provided that such other persons are not customers of the person developing such assets or protocols.

However, just one day after the Wyden-Toomey-Lummis amendment was filed, a second group of senators filed their own amendment, led by Rob Portman (R-Ohio), Mark Warner (D-Va.), and Kyrsten Sinema (D-Ariz.). The Portman-Warner-Sinema amendment largely mimics subsections A and B from the Wyden-Toomey-Lummis amendment, but excludes subsection C, which would subject crypto software developers, and other critical "consensus" or protocol developers, to the stringent IRS reporting obligations in the infrastructure bill. As a result, the Portman-Warner-Sinema amendment has been widely criticized by the crypto industry as illogical and detrimental to the innovation and development of cryptocurrencies and their related technologies. The crypto industry overwhelmingly supports the Wyden-Toomey-Lummis amendment, which would exclude software developers and other consensus or protocol developers from tax-reporting obligations, because they argue that such developers should not be considered "brokers" under the infrastructure bill.

The bill defines a digital asset as "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary." This definition is overbroad and is designed to include cryptocurrencies, such as bitcoin, Ethereum and any other representation of value that may be developed in the future. The bill does not address cryptocurrencies that are held outside of exchanges (self-custody) and stored in "cold storage."

The new reporting obligations would put a significant burden on any individuals or entities that fall under the definition of a "broker." If the bill is passed as written, anyone deemed a "broker" will need to comply with these reporting requirements and report to the IRS when even a fraction of a cryptocurrency is transferred or conveyed. It is possible that some mining operations, node operators, software developers, or small exchanges that are unable to comply with the requirements would cease to exist or would move off-shore.

On Sunday, the Senate voted to invoke cloture, which effectively ends discussion of the amendments and sets the infrastructure bill on a path for a final vote in the Senate. Members of the crypto community continue to lobby Senators for consideration of the amendments, particularly the Wyden-Toomey-Lummis amendment. Late Monday, a third amendment was proposed as a compromise between the Wyden-Toomey-Lummis and Portman-Warner-Sinema factions. However, this amendment failed to achieve the unanimous consent required to pass. Therefore, the original language of the bill defining broker stands in the Senate bill. The House of Representatives takes up the bill next month and could attempt to propose alternative language that could be considered by the Senate at a later date.