



The Wash-Sale Rule Would Break Crypto Tax Compliance

The legal and practical case against extending the tax code’s wash-sale rule to crypto
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Abstract

The wash-sale rule was designed for a narrow context: securities held as long-term investments, typically within a single account, where taxpayers can deliberately time tax losses without changing their economic position. Digital assets operate in a fundamentally different environment. They are used for transactions as well as investment, are frequently held for short periods of time, are commonly held across multiple wallets and platforms, and generate large numbers of transactions. This report argues that applying the wash-sale rule in this context would be not merely burdensome but fundamentally unworkable.

Beyond these practical failures, the report shows that extending the rule to digital assets is not justified by tax policy principles. The wash-sale rule targets economically empty transactions designed to manufacture tax losses without altering economic exposure. That concern does not translate to digital assets, where—like commodities and foreign currency—transactions typically reflect genuine use and changing positions, not the kind of abuse the rule was intended to address.

By walking through detailed real-world scenarios, this report demonstrates that a crypto wash-sale rule would undermine compliance, distort ordinary economic activity, and impose costs far exceeding any potential revenue gains.

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About Coin Center

Coin Center is a non-profit research and advocacy center focused on the public policy issues facing open blockchain technologies such as Bitcoin and Ethereum. Our mission is to build a better understanding of these technologies and to promote a regulatory climate that preserves the freedom to innovate using blockchain technologies.

I. Introduction

Draft legislation is circulating in Congress that would extend the tax code's "wash-sale rule" to bitcoin and all digital assets, as a part of a cryptocurrency tax package. Enacting this legislation would be a grievous mistake. Proposals to extend the wash-sale rule should be dropped.

The main purpose of this report is to show that applying the wash-sale rule to digital assets would be unworkable. Not merely burdensome or annoying, but genuinely unworkable. In tax policy, compliance costs get dismissed as afterthoughts—tedious both to calculate and to talk about. Here, they are the issue. The tax code's wash-sale rule cannot be adapted to crypto and it cannot be repaired by Treasury Department regulations. Nor can it be justified as an unfortunate but necessary compromise within an otherwise favorable tax-reform package. Its harms would overwhelm the combined benefits of the rest of any such package, and no amount of projected budget savings could change the calculus.

No one has actually walked through, in detail, what applying the wash-sale rule to cryptocurrency in a real world scenario would actually entail. This report does that, and the conclusion should be clear. Advocates for crypto will understand that a wash-sale rule is untenable. As importantly, digital asset skeptics should also appreciate that the rule is misplaced. The wash-sale rule targets economically empty sham transactions and, when it works as intended, the rule simply postpones the taxpayer's opportunity to claim a deduction until a genuine sale occurs. The rule has never been applied to commodities or foreign currencies for good reasons that also apply in spades to digital assets. Applying the rule to digital assets would create an accounting problem so vast and intractable that compliance could only be assured through an all-seeing computer software program with complete access to every single digital-asset account or address controlled by a taxpayer. It simply would not work.

This report aims to make these practical consequences visible, but it also addresses the deeper theory behind the rule. This is necessary to show that, even setting aside its practical consequences, leaving digital assets outside the wash-sale regime is neither special treatment nor at odds with any foundational norms of American tax design. That design itself reflects a compromise that recognizes taxpayer autonomy and the importance of private investment against the government's perennial interest in accelerating tax receipts into the present year.

II. Basics of the Wash-Sale Rule

The tax code's wash-sale rule¹ currently applies to stock and certain other securities. Applying the rule gets complicated quickly, but for a simple scenario, the basic rule is not hard to understand.

A. A Simple Example

Under the rule, if you sell a stock at a loss but buy it right back, you can't immediately book the loss on your taxes like you normally would to offset other capital gains and reduce the total amount of income subject to tax. Instead, you must tack that loss onto the cost of your "replacement purchase," adding to the tax basis of those replacement shares. The loss is disallowed, but only temporarily.

So, suppose you buy one share of XYZ stock at \$100. Later, perhaps toward the end of the tax year, as you eye your imminent tax burden, you sell it at \$80. That's the loss sale. If you stopped there, you would report that \$20 loss on your taxes, and no one would raise an eyebrow. It's important to dwell on this point. Even if the real reason you sold the share was to capture the \$20 loss, there is nothing wrong with that. No one would accuse you of shady behavior. Realizing a tax loss is fair game. In fact, as we'll see, the structure of our tax system actually encourages it.

But, suppose that the next day you buy a new share of the same XYZ stock, when XYZ is trading at \$75. That is the replacement purchase that triggers the application of the wash-sale rule. Triggering the rule means that, because of that repurchase, you don't get the \$20 capital loss right away. Instead, once the rule has been applied, you end up holding one share of XYZ stock with an adjusted basis of \$95.

We can calculate the share's adjusted basis of \$95 by starting with the replacement share's purchase price (\$75) and then increasing it by the amount of the loss (\$20) that is disallowed

¹ 26 U.S.C. § 1091; 26 C.F.R. §§ 1.1091-1, -2.

due to the wash-sale rule.² It's called a "disallowed" loss, but you don't actually lose it; the rule just postpones when you get to use that \$20 loss on your taxes. If you later sell the replacement share for \$105, your capital gain is \$10, even though the share itself went up by \$30, from \$75 to \$105. Or, if you later sell that replacement share for \$90, you'll report a loss of \$5 – so long, of course, that you don't also buy a share of XYZ stock within 30 days before or after *that* loss sale.

It's important to note here that when the wash-sale rule applies, the law does not purport to claim that there's anything inherently *wrong* with your trades. It does not "ban" any kind of trade; the law just says that in certain circumstances, you must wait to take your deduction. The law isn't trying to discourage you from, say, selling to cut your losses and then changing your mind to decide owning a particular stock is a good idea after all. The tax code just says that, if you trigger the wash-sale rule, you must postpone your loss deduction.

B. Scope and Limits of the Wash-Sale Rule

The rule has been around since 1921.³ Congress created it soon after the introduction of the income tax, in an era of rare stock ownership and slow, infrequent trades carried out by telephone. For more than a century since, the rule has applied only to stock and other securities. The rule has been expanded only once, in 1924, to include certain derivatives based on securities.⁴ It has never been extended to cover other kinds of assets. Indeed, until digital assets came along, Congress never seriously considered expanding the rule to any other type of asset.⁵

² The formula in the statute is a bit different, and reflects the century-old conception of a wash sale as a sham transaction that the law simply pretends never occurred. Because the loss sale was historically treated as a nonevent, the statute established the replacement share's basis as the *original* share's basis, plus some adjustments. Applying the statutory text to the XYZ stock example, "the basis [of the replacement share] shall be the basis of the stock or securities so sold or disposed of [in our example, \$100], increased or decreased, as the case may be, by the difference, if any, between the price at which the property was acquired [\$75] and the price at which such substantially identical stock or securities were sold or otherwise disposed of [\$80]." Section 1091(d). Thus, $\$100 + (\$75 - \$80) = \95 . Although the statute never actually refers to a "disallowed loss," it is easier, and always correct, to simply tack on the disallowed loss (as a positive number) to the cost basis of the replacement share: $\$75 + \$20 = \$95$.

³ Revenue Act of 1921, ch. 136, § 214(a)(5) (individuals) and § 234(a)(4) (corporations), 42 Stat. 227, 240, 255 (1921).

⁴ Revenue Act of 1924, ch. 234, § 214(a)(5), 43 Stat. 253, 269 (1924) (adding "or contracts or options to acquire").

⁵ In 2021, Congress considered an expansion of the wash-sale rule to target digital assets (as well as commodities and foreign currency); see below at footnote 37. For present purposes, two proposals are

Critically, the wash-sale rule has never applied to commodities or foreign currency. That simple fact should speak volumes. The current push for digital-asset tax reform is partly grounded in the view that cryptocurrency is analogous to those very categories. Not only are foreign currencies not included in the wash-sale rule, but Congress has even implemented exemptions to reduce the compliance burden of tracking similar transactions. Congress codified a de minimis exemption so that small foreign-currency gains from personal transactions are explicitly exempt from tax and—far more importantly—exempt from any obligation to track, record, and report the gains those transactions would otherwise generate.⁶ Coin Center views that exemption as a model for digital-asset tax reform.⁷ Extending the wash-sale rule to digital assets, meanwhile, is a radical move in the opposite direction.

The wash-sale rule has never applied to commodities or foreign currency, but we do know what can happen if commodities or things like currency are treated like securities. As readers should appreciate, in the wake of the Securities and Exchange Commission’s initiative to regulate most digital assets under the 1930s securities acts, treating digital assets as securities would render them effectively unusable for peer-to-peer transactions.⁸ We should not be surprised, then, that applying this one securities rule from the tax code would also make compliant use of cryptocurrency near impossible.

Generally speaking, if you dispose of an asset at a loss, you don’t need to monitor your other asset purchases to determine whether your loss might actually be disallowed. Only securities trigger the rule, and for 99 percent of taxpayers, one’s securities broker will handle all the monitoring and accounting calculations required.

Nothing else falls under the rule. Not gold bars, silver coins, uranium, pork bellies, oil, cattle, or orange juice. Not cars, land, houses, or art. Certainly not pesos, pounds, or euros. Nor does

circulating in Congress that would extend the rule to include digital assets. See below at footnotes 39 and 40.

⁶ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, Sec. 1104 (adding tax code section 988(e)).

⁷ *Six Ways Congress Can Make Crypto Taxes Work for Everyday Users*, Jason Somensatto, Coin Center Report (January 2026)

<https://www.coincenter.org/six-ways-congress-can-make-crypto-taxes-work-for-everyday-users/>.

⁸ It is important to note that even if a digital asset were an “investment contract” under the 1930s acts, it does *not* follow automatically that such an asset would be subject to the tax code’s wash-sale rule. Section 1091 is interpreted independently from the securities laws, and section 1091 “stock or securities” is narrower than the categories covered by the securities acts. *Gantner v. Comm’r*, 91 T.C. 713 (1988), *aff’d sub nom. Ganter v. Comm’r*, 905 F.2d 241 (8th Cir. 1990). See, however, the discussion in this report concerning possible expansion, by Congress, of the types of securities covered by the rule (section 4, “Expanded Definition of ‘Securities’ Covered by the Statute,” below).

it reach futures, options, or other derivatives whose underlying asset is any of those things, as long as the instrument itself is not stock or a security.

C. Tax Compliance Must Be Feasible

There are very good reasons the wash-sale rule has never applied to commodities or foreign currencies. The rule functions more-or-less adequately when the assets it applies to are (1) held solely as a financial investment, (2) typically held for long periods of time, and (3) held within a single account. If any condition fails, the tax accounting becomes extraordinarily complex and a dangerous trap for the unwary.⁹

All three conditions fail for crypto. Digital assets are not held solely as financial investments or always for long periods. Sometimes, some people wish to use digital assets for purposes other than strict buy-and-hold investment. Indeed, the current focus on crypto tax reform is about making ordinary use of digital assets feasible for Americans.

Additionally, a typical taxpayer does not hold digital assets in a single account. Like one's dollars dispersed among piggy banks, billfolds, savings accounts, checking accounts, and investment accounts, digital assets today are already routinely scattered across an array of separate locations. These include custodial cryptocurrency exchanges, traditional brokerage accounts, non-custodial hot wallets, cold hardware wallets, mobile payment apps, merchant or commerce accounts, specialized application-specific wallets, and even account-like positions in decentralized finance protocols. And, the technology is still new.

These facts about the real world mean that applying a wash-sale rule is wholly impracticable, because every loss, wherever realized, would have to be tracked and matched against acquisitions occurring anywhere else the taxpayer holds digital assets. That task would quickly become a bookkeeping problem of unmanageable complexity.

Tax compliance must be feasible. Humans and the technology they use must drive tax policy, not the other way around. But digital assets pose a genuine problem. Cryptocurrency makes

⁹ Investors, particularly those who engage in frequent short-term trading, are sometimes surprised to find that expected losses were instead disallowed under the wash-sale rule and tacked onto acquisitions, with the result that losses are carried into the next tax year and reported income is far higher than anticipated. In one alleged case, an investor reportedly began with \$30,000, traded heavily in leveraged positions, finished the year believing he had \$45,000 in net trading profits, and then received a Form 1099-B reporting \$1.4 million in taxable short-term capital gain. Shahar Ziv, *Robinhood Trader May Face \$800,000 Tax Bill*, Forbes (Mar. 26, 2021), <https://www.forbes.com/sites/shaharziv/2021/03/26/robinhood-trader-may-face-800000-tax-bill/>.

possible transfers of economic value of a variety and scale previously unimaginable, and without requiring help from a traditional bank or brokerage. And, all such transfers involve “property,” not regular dollars. Most such transfers involve financial gain or loss, however miniscule. Meanwhile, our income tax demands an accounting of all “realized gains,” which in turn must be expressed in U.S. dollars. For better and worse, blockchains track millionths of a cent as readily as they do dollars.

This presents a tremendous challenge for cryptocurrency. It also creates an irresistible opening for opponents to quietly constrain the technology by invoking “tax parity” under the guise of neutrality. That move often succeeds because the real stakes—how humans actually comply and whether systems can plausibly support that compliance—are treated as secondary concerns, if they are acknowledged at all. If cryptocurrency is to survive these often invisible forces that hobble its practical use, those constraints must be brought to the foreground and treated as first-order considerations, not dismissed as administrative afterthoughts.

The blockchain’s permanent and public record also contrasts with the practical realities that for a century have made general income tax compliance possible and good enough. Much non-compliance today is willfully ignored, by everyone. The IRS cannot admit it but administrability and de minimis thresholds implicitly govern compliance. The IRS won’t say it out loud, but the rest of us can:

No one reports the dollar bill found in the street. Across the land, children trade valuable Pokémon cards and neighbors swap babysitting, with nary a receipt in sight. Taxpayers bought baguettes in Paris with appreciated francs and *not a single one of them, ever*, confessed it on their Form 1040. When Congress added the de minimis currency gains exemption to the tax code in 1997, it was not making travelers’ tax compliance “easier.” It was legalizing reality.

Our new blockchains, on the other hand, never look away and never forget. If we want a humane tax system in a world of easy transfers of value and perfect digital memory, humans will have to write that mercy into the code. The critical first step is easy: we begin by declining to invite this Trojan Horse into the tax code under the banner of “parity” and without first understanding what it would actually mean.

II. Applying the Rule to Digital Assets

Here’s what the wash-sale rule would mean for crypto, shown through examples. Do not let your eyes glaze over. The mundane details are necessary to dispel basic misapprehensions that have survived precisely because no one worked through these mechanics.

Along with examples, the report also explains the history and theory of the rule, to show why not even the theory of the wash-sale rule supports extending the rule to crypto. It's critical to understand what the rule does and does not try to do, and where it sits within the larger tax system. The crucial point is that Congress was trying to neutralize a very specific distortion in the narrow context of securities investing. That context shows why the rule's absence in other markets is not some exotic "special loophole" for crypto or for anything else the rule doesn't presently reach. The "evil" that the rule targets—economically empty transactions designed solely to accelerate capital losses and postpone capital gains in response to a distortion *created by the capital-gains tax system itself*—is narrow. And that evil is nowhere near weighty enough to justify the remarkable havoc the rule would impose on ordinary crypto users, or the new distortions it would introduce by penalizing taxpayers' choice of economic activity.

The rest of this report assumes that, contrary to current law, digital assets are included in section 1091, the tax code's wash-sale rule. Each of the following sections introduces specific elements of the rule. These elements combine to make the rule utterly unwieldy for digital assets—or at least, unwieldy for any use of digital assets other than holding them as a financial investment for long periods of time in a single account. Note also that the full complexity cannot be appreciated until all these elements are understood, and further that the elements are not additive but combinatorial: each new feature multiplies the complexity of the others.

A. Apportionment and the 61-Day Window

Under the basic rule from section 1091, if you sell an asset at a loss and purchase a substantially identical asset within 30 days before or after the loss sale, that loss is disallowed to the extent of the replacement purchases and must be apportioned across the replacement purchases, where the apportioned loss is added to the basis of those replacement purchases.

This section explains these two basic features of the rule and where they come from, then illustrates how the rule plays out in a very simple example involving digital assets.

1. History and Theory of Tax Code Section 1091

Today, the concept of a wash sale is widely understood through the lens of tax code section 1091. For many people familiar with the concept, wash sale simply *means* a pair of trades occurring within the 61-day window. But this statutory definition is not the original or the substantive meaning of a wash sale.

One hundred fifteen years ago, before the income tax existed, a wash sale meant a sham transaction used to fabricate the appearance of trading volume or to manipulate prices. The core feature was simple: nothing actually changed except the paper trail. The same person ended up with the same economic position.

Only with the introduction of the income tax did the term come to include its modern meaning reflected in section 1091. Because our system taxes capital gains only when realized, and because investors often control when they realize gains and losses, the tax system itself created a distortion that did not previously exist. *Because of the income tax*, the rational investor prefers immediate losses, which reduce today's tax bill and keep more money in his pocket that can be invested and earn more returns. Delaying gains, in turn, pushes taxes into the future, allowing returns on money that otherwise would have gone to paying taxes immediately. This point is critical: without an income tax, these preferences don't exist.

But we do have an income tax, and those preferences are completely legitimate. They arise from the time value of money and the mechanics of realized-gain taxation. Suppose you have a losing investment that you have firmly decided to sell, and the only remaining question is whether to sell on December 31 or January 2. The answer is December 31. Anyone urging otherwise is proposing a voluntary donation to the treasury, which Congress has thoughtfully provided for elsewhere.¹⁰

But, these preferences are still distortions: our realization-based income tax does indeed push investors toward timing choices that diverge from what pure investment logic would dictate in a no-tax world. At a macro level, those distortions impose real economic costs, but they are part of the bargain struck in 1913 when Americans decided to fund the federal government through an income tax. At the margins, ever since the 16th amendment was ratified, investors have been nudged to sell losing investments sooner than they otherwise would, and to hold winning investments longer than they otherwise would.

And at the margins, we can also say that the federal government resents these taxpayer preferences, because the treasury has the opposite incentive: it prefers to receive its tax revenue this year, not next year.¹¹ These are not distortions that can be eliminated by tinkering

¹⁰ 31 U.S.C. § 3113.

¹¹ Note that tax code section 1091 applies only to losses. If a taxpayer sells appreciated stock and immediately buys it back, the gain is realized immediately; the taxpayer is neither required nor permitted to defer it. Anti-abuse rules do not object to *that* kind of wash sale, because it produces tax, not tax reductions. The principal provision allowing deferral of realized gains through reinvestment in similar property – section 1031 – has been repeatedly narrowed over time. *See*: Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13303, 131 Stat. 2054, 2123 (limiting section 1031 to real property).

with the tax code. They are deep features of our tax system because they are caused by our tax system.

Nonetheless, in 1921, Congress decided it could mitigate one corner of that distortion. Congress enacted a tax rule targeting a narrow kind of tax-motivated transaction: the wash sale, a paired sale and repurchase that leave the investor economically unchanged except for a paper loss.

The concept was simple: if it's a sham transaction, it should be ignored for tax purposes. If an investor pretends to trade, the tax law will pretend the trade never happened. The loss is simply disallowed until there's a real sale. No one gets hurt, and the next time the investor can choose to skip the charade—and save on broker fees—and make only real trades.¹²

That's the theory. The problem is, the law can't easily divine an investor's motivations. And it's not always clear whether a trade is intended to leave the investor in the same economic position. Investors can be crafty. They might make their replacement purchase the day *before* the loss sale. Or perhaps a week before. And they might structure it so they don't end up in *exactly* the same economic position; they might repurchase more, or less, of the security sold in the loss sale.

So, in 1921, Congress imposed a bright-line rule to approximate the underlying concept and to catch efforts to avoid it.¹³ The legislative history is scant, and the proposal appeared to meet little opposition or debate.¹⁴ That statute disallowed any loss if substantially identical securities were purchased within the 61-day window surrounding the loss sale. The statute assumed a simple pattern of sale and repurchase and did not specify how losses were to be treated beyond disallowing the immediate deduction.¹⁵

¹² Before the deregulation of brokerage commissions in the mid-1970s, trading costs were a significant share of transaction value. Under the New York Stock Exchange's fixed commission schedule, brokers in the late 1960s and early 1970s often charged fees approaching one percent of a trade's value, per side.

¹³ Revenue Act of 1921, ch. 136, § 214(a)(5) (individuals) and § 234(a)(4) (corporations), 42 Stat. 227, 240, 255 (1921).

¹⁴ One industry group did announce its opposition. "It is the intent of the revenue act to permit the deduction of losses in determining net income subject to tax. The sale of securities in the open market definitely determines the taxpayer's loss. This committee is therefore of the opinion that a loss should be deductible if the amount thereof is definitely ascertained by a bona fide sale, and that the repurchase of the security or other property should not in any way affect the deduction of the loss." Brief of the Committee on Banking Institutions on Taxation, in Supplemental Briefs Submitted to the Committee on Finance, United States Senate, Sixty-Seventh Congress, First Session, on the Proposed Revenue Act of 1921, at 5, available at www.finance.senate.gov/imo/media/doc/PrtSupplementalBriefRevAct.pdf.

¹⁵ "Men are now selling securities at 10 o'clock in the morning and buying them back at 12 o'clock, in order to claim a loss." Statement of Dr. T. S. Adams, quoted in I.T. 1365, C.B. I-1, 152 (1922), drawn from

In 1924, Congress clarified the consequences of that disallowance by specifying how the basis of replacement shares would be determined—treating the wash sale as a continuation of the taxpayer’s original investment rather than a completed sale.¹⁶ In 1932, Congress addressed another ambiguity left unresolved by the original statute by establishing rules for cases in which the number of shares repurchased differed from the number sold, supplying what I refer to as the apportionment rules.¹⁷ Very little in the statute or regulations has changed since then.¹⁸

But the legal category should not be confused with a substantive wash sale. It is easy, once a prophylactic line is drawn, to mistake the line itself for the underlying evil. That leads to the view that anything outside the line—in our case, assets other than stocks and securities—is a loophole waiting to be closed in the name of “tax parity.” That framing magnifies problems that arise only because the bright line exists, not because of any underlying abuse that actually calls for a remedy or lends itself to a workable one.

Confusing the statutory line with the underlying evil also encourages an opposite mistake: assuming that transactions caught by the statutory rule *should* be treated as abusive simply because they fall within the rule’s reach. As Alice’s example will show, many transactions the statute reaches bear no resemblance to the sham, economically empty trades that motivated the doctrine in the first place.

2. Investor Hypothetical: Alice

To illustrate the statutory window and the apportionment rules, consider a simple example. Alice buys 1.0 bitcoin on December 1 for \$110,000 and enters the new year holding only that

the 1921 hearings before the Senate Committee on Finance. See also I.T. 1353, C.B. I-1, 150–51 (1922), an early ruling holding that “no loss may be claimed with respect to the stock purchased at \$158 a share and sold for \$125 a share” where substantially identical stock was repurchased within the statutory window, but offering no guidance on the subsequent tax treatment of the replacement shares.

¹⁶ Revenue Act of 1924, ch. 234, § 214(a)(5), 43 Stat. 253, 269 (1924) (specifying the basis of replacement shares following a wash sale, effectively treating the replacement shares as a continuation of the taxpayer’s original investment). See fn. 2 *supra*.

¹⁷ Revenue Act of 1932, ch. 209, § 118, 47 Stat. 169, 185 (1932) (addressing situations in which the number of shares acquired within the wash-sale window differed from the number sold and authorizing proportional disallowance and basis adjustment). See Regulations 77, art. 661 (1933) (implementing these apportionment requirements through a chronological allocation of disallowed loss to replacement shares), which survives unchanged in the present Treas. Reg. sections 1.1091(c) and (d).

¹⁸ The wash-sale provision was carried forward without material change into the Internal Revenue Code of 1939, ch. 2, § 118, 53 Stat. 12, 47 (1939), and later recodified as section 1091 in the Internal Revenue Code of 1954, ch. 736, § 1091, 68A Stat. 1, 332 (1954). See Treas. Reg. § 1.1091-1 (1956).

1.0 bitcoin. Alice practices “first-in-first-out” tax accounting and has signed up to invest in bitcoin by purchasing 0.1 bitcoin on the first of every month, as a part of an automatic, recurring investment program:

- Dec. 1 – BTC = \$110,000: Alice buys 1.0 BTC; cost basis \$110,000.
- Jan. 1 – BTC = \$100,000: Alice buys 0.1 BTC through a monthly recurring purchase.
- Jan. 31 – BTC = \$102,000: Alice sells 1.0 BTC, for which her cost basis is \$110,000.
- Feb. 1 – BTC = \$103,000: Alice buys 0.1 BTC through a monthly recurring purchase.
- Feb. 15 – BTC = \$104,000: Alice sells 0.1 BTC (the BTC she purchased on Jan. 1).
- Mar. 1 – BTC = \$105,000: Alice buys 0.1 BTC through a monthly recurring purchase.

Here’s an illustration of Alice’s transactions under existing law:

Purchases

Dec. 1 (BTC = \$110,000)	
Purchase:	1.0 BTC
(regular purchase)	
Cost basis:	\$110,000

Jan. 1 (BTC = \$100,000)	
Purchase:	0.1 BTC
(monthly recurring purchase)	
Cost basis:	\$10,000

Feb. 1 (BTC = \$103,000)	
Purchase:	0.1 BTC
(monthly recurring purchase)	
Cost basis:	\$10,300

Mar. 1 (BTC = \$105,000)	
Purchase:	0.1 BTC
(monthly recurring purchase)	
Cost basis:	\$10,500

Sales

Jan. 31 (BTC = \$102,000)	
Sale:	1.0 BTC
Proceeds:	\$102,000
Cost basis:	\$110,000
gain/loss	-\$8,000

Feb. 15 (BTC = \$104,000)	
Sale:	0.1 BTC
Proceeds:	\$10,400
Cost basis:	\$10,000
gain/loss	\$400

Under existing law, Alice has two sales, one creating a loss of \$8,000 and one resulting in a gain of \$400.¹⁹

Next, we apply the wash-sale rule to Alice's transactions. Alice's January 31 sale is a loss sale: \$110,000 cost versus \$102,000 proceeds. That loss sale must be resolved under the statute before turning to any other loss sale occurring later in time.²⁰ She acquired BTC within 30 days before the loss sale (Jan. 1), and also within 30 days after the loss sale (Feb. 1 and, because February has only 28 days, Mar. 1).

All three purchases are replacement purchases which trigger the application of the wash-sale rule. In total, Alice bought 0.3 BTC in the 61-day window that applies to her January 31 loss sale of 1.0 BTC. That means only 0.3 of the 1.0 BTC she sold, or 30 percent, is treated as "replaced" under the rule.

Thirty percent of a \$8,000 loss is \$2,400. The replacement purchases are dealt with in chronological order.²¹ The first \$800 of that loss is added to the basis of the January 1 purchase. The next \$800 is applied to the basis of the February 1 purchase. The final \$800 is assigned to the March 1 purchase. The remaining 70 percent or \$5,600 of the loss is allowed. Applying the rule, the January 31 loss sale results in the following adjustments:

- Lot 1 – Jan. 1, 0.1 BTC: cost basis \$10,000; adjusted basis \$10,800
- Loss sale, Jan. 31: 1.0 BTC sold: \$2,400 disallowed loss; \$5,600 allowed loss
- Lot 2 – Feb. 1, 0.1 BTC: cost basis \$10,300; adjusted basis \$11,100
- Lot 3 – Mar. 1, 0.1 BTC: cost basis \$10,500; adjusted basis \$11,300

The statute must be applied to each loss sale, beginning with the earliest loss sale, in chronological order. Only after a given loss sale has been fully evaluated and had its disallowed loss tacked on to replacement purchases within the 61-day window can the process be applied to subsequent loss sales.

Note that for Alice's three new purchases of BTC in lots 1, 2 and 3, Alice's record of her purchase price no longer determines her basis. Per the above timeline, Alice subsequently sells Lot 1 on February 15, when the price of a bitcoin is \$104,000. Her proceeds from that sale of 0.1 bitcoin are therefore \$10,400, which is \$400 more than she paid for it, but she does not

¹⁹ The February 15 sale is not relevant at the moment, because at present we are evaluating the consequences of the January 31 loss sale, which triggers a search only for purchases.

²⁰ Treas. Reg. § 1.1091-1(b).

²¹ I.R.C. § 1091(b); Treas. Reg. § 1.1091-1(c).

realize a \$400 gain. Due to the adjustment of basis caused by the first-in-time January 31 loss sale, her adjusted basis in the bitcoin sold on February 15 is \$10,800. Her sale for \$10,400 is therefore another loss sale.

So, as of February 15, Alice has \$400 of new loss that may or may not be disallowed. First, Alice must go back in time 30 days to see if she has any purchases of bitcoin that have not already had their basis adjusted by application of the wash-sale rule. Here, she does not; the February 1 purchase is within the 61-day window, but that purchase already had its basis adjusted in connection with the earlier January 31 loss sale and is therefore exempt from further adjustment under the rule.²²

Next, Alice must wait 30 days after the loss sale—through March 17—to see if any subsequent purchases will disallow some or all of the potential \$400 loss. On these facts, the first 15 days after the new loss sale are a bit tricky, because the window for the earlier-in-time loss sale remains open through March 2.

Indeed, the March 1 purchase had its basis adjusted pursuant to the earlier-in-time loss sale, so that March 1 purchase does not count as a replacement purchase for the February 15 loss sale. Upon the expiration of the earlier window on March 2—resulting in the recognition of \$5,600 of the initial \$8,000 loss from the January 31 loss sale—any purchases occurring on March 3 through March 17 will count as replacement purchases for the February 15 loss sale. That is, the first 0.1 BTC that Alice purchases during that window will have the \$400 of loss tacked onto its basis. If Alice purchases more than 0.1 BTC during that window, only the first 0.1 BTC acquired will have its basis adjusted, and the remainder of the new BTC will remain available for adjustment in the event of another loss sale occurring within 30 days of that purchase.

²² Treas. Reg. § 1.1091-1(c).

Here is an illustration of Alice's transactions applying the rule:

Purchases		Sales	
Dec. 1 (BTC = \$110,000)			
Purchase:	1.0 BTC		
(regular purchase)			
Cost basis:	\$110,000		
Jan. 1 (BTC = \$100,000)			
Purchase:	0.1 BTC		
(monthly recurring purchase)			
Cost basis:	\$10,000		
Additional basis:	\$800		
Adjusted basis:	\$10,800		
Feb. 1 (BTC = \$103,000)			
Purchase:	0.1 BTC		
(monthly recurring purchase)			
Cost basis:	\$10,300		
Additional basis:	\$800		
Adjusted basis:	\$11,100		
Mar. 1 (BTC = \$105,000)			
Purchase:	0.1 BTC		
(monthly recurring purchase)			
Cost basis:	\$10,500		
Additional basis:	\$800		
Adjusted basis:	\$11,300		
		Jan. 31 (BTC = \$102,000)	
		Sale:	1.0 BTC
		Proceeds:	\$102,000
		Cost basis:	\$110,000
		gain/loss	-\$8,000
		loss apportioned to Jan. 1 purchase	-\$800
		loss apportioned to Feb. 1 purchase	-\$800
		loss apportioned to Mar. 1 purchase	-\$800
		loss allowed	-\$5,600
		Feb. 15 (BTC = \$104,000)	
		Sale:	0.1 BTC
		Proceeds:	\$10,400
		Adjusted basis:	\$10,800
		gain/loss	-\$400

As noted, Alice buys bitcoin every month as part of a routine, automatic investment schedule. Nothing about her activity suggests a tax-motivated scheme. Indeed, such regular purchases are common among retail bitcoin investors. But the statutory wash-sale rule does not ask why

a taxpayer bought or sold, and it does not attempt to separate ordinary investing from deliberate tax-loss timing. It applies the same way to everyone. The rule is intentionally blunt and mechanical.

B. Almost Everything Counts as Buying and Selling

Typical long-term investors simply buy and sell securities. But under the wash-sale rule, any *disposition* of an asset will qualify as a loss sale and almost any *acquisition* will count as a replacement purchase.

A disposition is a loss sale so long as it results in a loss that can be used on one's taxes.²³ And for the second step of a statutory wash sale, any acquisition of an asset will count as a rule-triggering replacement purchase if it is acquired by purchase or through a taxable exchange.²⁴

That means the rule is triggered when people *use* or *spend* digital assets, not just when people buy or sell them as investments. Any time you've got an otherwise-deductible loss, that's a loss sale. And almost every method of acquiring that asset will count as a replacement purchase.

1. Earning and Spending Hypothetical: Bob

Bob holds 1.0 bitcoin purchased January 1 with a cost basis of \$105,000, and he practices "first-in-first-out" tax accounting using a single bitcoin wallet (i.e., a single set of private keys controlling all of his bitcoin):

- Jan. 1 – BTC = \$105,000: Bob buys 1.0 bitcoin.

²³ The statute applies to any loss from "any sale or other disposition" of a qualifying asset. I.R.C. § 1091(q). The formal test here is whether the taxpayer has a loss that can be deducted under tax code section 165.

²⁴ An acquisition counts as a replacement purchase if it is "by purchase or by an exchange on which the entire amount of gain or loss was recognized by law." I.R.C. § 1091(a). The IRS paraphrases this requirement as including any acquisition made in a "fully taxable trade." IRS Publication 550 (2024), at 87. Extending the wash-sale rule to digital assets would raise substantial interpretive questions under this provision, as the IRS and the courts have never had occasion to address how it applies to forms of acquisition that may be common for digital assets but rare or nonexistent for stocks and other securities. Those issues are beyond the scope of this report but should not be underestimated for their effect on the complexity and cost of complying with the law. The IRS has made clear, however, its view that receiving property as compensation or payment qualifies as a replacement purchase. See Rev. Rul. 73-329, 1973-2 C.B. 71.

- Mar. 15 – BTC = \$100,000: Bob receives 0.1 bitcoin as his monthly salary.
- Mar. 18 – BTC = \$98,000: Bob pays 0.01 bitcoin for a conference ticket.
- Mar. 20 – BTC = \$95,000: Bob pays 1.0 bitcoin for a car.
- Mar. 21 – BTC = \$94,000: Bob sells his bicycle, receiving 0.01 bitcoin as payment.
- Mar. 22 – BTC = \$93,000: Bob receives 0.01 bitcoin, a gift from his uncle.

Bob's purchases of a conference ticket and car are "dispositions" under section 1091 and therefore both will count as loss sales if the transactions result in a loss. His receipt of salary and payment for the bicycle will count as replacement purchases because he has "acquired" the asset in fully taxable transactions.

We can illustrate these transactions as follows. This shows Bob's tax situation under existing law:

Purchases/Acquisitions

Jan. 1 (BTC = \$105,000)	
Purchase: (regular purchase)	1.0 BTC
Cost basis:	\$105,000

Mar. 15 (BTC = \$100,000)	
Acquisition: (receipt of salary)	0.1 BTC
Cost basis:	\$10,000

Mar. 21 (BTC = \$94,000)	
Acquisition: (receipt of bicycle payment)	0.01 BTC
Cost basis:	\$940

Mar. 22 (BTC = \$93,000)	
Acquisition: (receipt of gift)	0.01 BTC
Basis:	\$930*
*depends on further facts	

Sales/Dispositions

Mar. 18 (BTC = \$98,000)	
Disposition: (payment for conference)	0.01 BTC
Proceeds:	\$980
Cost basis:	\$1,050
gain/loss	-\$70

Mar. 20 (BTC = \$95,000)	
Disposition: (payment for car)	1.0 BTC
Proceeds:	\$95,000
Cost basis:	
0.99 BTC @ \$105,000:	\$103,950
0.01 BTC @ 100,000:	\$1,000
gain/loss:	
(\$94,050 - \$103,450):	-\$9,900
(\$950 - \$1,000):	-\$50

In summary, under existing law Bob has a loss of \$70 from purchasing the conference ticket and a loss of \$9,950 from purchasing the car. After these dispositions, Bob still holds 0.11 bitcoin:

0.09 BTC with a cost basis of \$9,000 (based on BTC \$100,000).

0.01 BTC with a cost basis of \$940 (based on BTC \$94,000).

0.01 BTC with a basis that may or may not be \$930 (perhaps based on BTC \$93,000, but the tax basis of gifts can be complicated²⁵).

Now consider Bob's tax accounting if the wash-sale rule applies:

Bob's March 18 disposition of 0.01 bitcoin to purchase the conference ticket is a loss sale because the value of that 0.01 bitcoin at disposition (\$980) is less than its cost when acquired (\$1,050). That \$70 loss must be apportioned to any replacement purchases occurring in the 61-day window. Bob's January 1 purchase of 1.0 bitcoin lies outside the date window and is not affected. The earliest replacement acquisition occurs on March 15, when Bob receives 0.1 bitcoin in salary.

Here, the replacement acquisition of 0.1 bitcoin exceeds the loss sale of 0.01 bitcoin. So, the \$70 loss is apportioned to the first 0.01 of bitcoin acquired on March 15.²⁶ That 0.01 unit of bitcoin had a cost basis of \$1,000, to which is added the \$70 disallowed loss, resulting in an adjusted basis of \$1,070. That 0.01 bitcoin unit must thereafter be tracked as a distinct tax lot, leaving 0.09 bitcoin acquired as salary on March 15 with an as-yet unadjusted basis of \$9,000.

Bob's disposition of the 1.0 bitcoin used to purchase the car is the next loss sale to be considered. Actually, it is *two* loss sales, because it involves the disposition of two different lots of bitcoin: first, it is a disposition of the remaining 0.99 bitcoin Bob purchased on January 1. And second, it is the disposition of the first 0.01 bitcoin (out of a total of 0.1 bitcoin) that Bob acquired as salary on March 15.

The statute must first be applied to the disposition of the 0.99 bitcoin; only when that process is complete can the wash-sale rule be applied to the subsequent disposition of the remaining 0.01 bitcoin.²⁷

²⁵ When bitcoin is received as a gift, the donee generally takes the donor's basis, subject to special rules when the asset's value at the time of the gift is less than the donor's basis. If Bob does not know his uncle's basis, Bob's basis defaults to fair market value at the date of the gift. See tax code section 1015.

²⁶ I.R.C. §1091(c); Treas. Reg. § 1.1091(d).

²⁷ Treas. Reg. § 1.1091(b).

Bob's single payment of 1.0 bitcoin must be disaggregated this way, because the statute requires determining whether each disposition produces a loss, the amount of loss attributable to each lot, and the order in which any such losses are applied to replacement purchases. In this case, *both* dispositions are loss sales, because both the 0.99 bitcoin lot and the 0.01 bitcoin lot are disposed of for less than their respective adjusted basis. The 0.99 bitcoin loss sale must be resolved before turning to the subsequent 0.01 bitcoin loss sale.

The loss from the 0.99 bitcoin lot is \$9,900, which amounts to \$100 per 0.01 unit of bitcoin. That \$9,900 must be apportioned to any replacement acquisitions occurring within the 61-day window.

There remains 0.09 bitcoin acquired on March 15 that has not yet had its basis adjusted. Accordingly, nine 0.01 units of the loss, or \$900, is apportioned to that lot, resulting in 0.09 bitcoin with an adjusted basis of \$9,900.

Bob's receipt of 0.01 bitcoin on March 21 as payment for his bicycle also counts as a replacement acquisition as it falls within 30 days of the March 20 loss sale. The cost basis of that 0.01 bitcoin was \$940, to which \$100 of loss is apportioned, resulting in an adjusted basis of \$1,040.

Here's an illustration of Bob's tax situation applying the wash-sale rule:

Purchases/Acquisitions		Sales/Dispositions	
Jan. 1 (BTC = \$105,000)			
Purchase: (regular purchase)	1.0 BTC		
Cost basis:	\$105,000		
(later sold on Mar. 18 and Mar. 20)			
Mar. 1 (BTC = \$100,000)			
Acquisition: (receipt of salary)	0.1 BTC		
Cost basis of first 0.01 BTC:	\$1,000		
Additional basis (Mar. 18 loss sale)	\$70		
Adjusted basis of first 0.01 BTC (later sold on Mar. 20):	\$1,070		
Cost basis of remaining 0.09 BTC:	\$9,000		
Additional basis from Mar. 20 loss sale:	\$900		
Adjusted basis of remaining 0.09 BTC:	\$9,900		
		Mar. 18 (BTC = \$98,000)	
		Disposition: (payment for conference)	0.01 BTC
		Proceeds:	\$980
		Cost basis:	\$1,050
		Disallowed loss, apportioned to first 0.01 BTC acquired Mar. 15:	-\$70
		Mar. 20. (BTC = \$95,000)	
		Disposition: (payment for car)	1.0 BTC
		Total proceeds from sale of 2 lots:	\$95,000
		Lot 1:	
		Proceeds from remaining 0.99 BTC purchased Jan. 1:	\$94,050
		Basis of 0.99 BTC purchased Jan. 1:	\$103,950
		Loss on 0.99 BTC: (loss per 0.01 BTC = -\$100)	-\$9,900
		disallowed loss, apportioned to 0.09 BTC acquired Mar. 15:	-\$900
		disallowed loss, apportioned to 0.01 BTC acquired Mar. 21:	-\$100
		remaining disallowable loss, 0.89 BTC:	-\$8,900
		Lot 2:	
		Proceeds from sale of 0.01 BTC acquired on Mar. 15:	\$950
		Adjusted basis of 0.01 BTC (\$1,000 + \$70)	\$1,070
		disallowable loss on 0.01 BTC:	-\$120
Mar. 21 (BTC = \$94,000)			
Acquisition: (receipt of bicycle payment)	0.01 BTC		
Cost basis:	\$940		
Additional basis from Mar. 20 loss sale:	\$100		
Adjusted basis (\$940 + \$100)	\$1,040		
Mar. 22 (BTC = \$93,000)			
Acquisition: (receipt of gift)	0.01 BTC		
Basis:	\$930*		
*depends on further facts			

As a matter of ordinary tax practice, nothing prevents Bob from aggregating the results from identified lots to compute his gain or loss. Once FIFO or specific identification determines which units were sold, it is routine to sum the basis of those units and compare that total to the total proceeds. So, absent the wash-sale rule, Bob could therefore report the car purchase as the disposition of 1.0 BTC with an aggregated basis of \$104,950. That figure is not an approximation; it is the exact result dictated by first-in-first-out accounting. No further lot-level distinctions would matter, because no subsequent tax consequences turn on which particular satoshis were sold.

Section 1091 dismantles that workable accounting reality. Once the wash-sale rule applies, aggregation is no longer permitted where it would interfere with the statute's required matching of loss sales to replacement purchases. Losses must be disallowed only on particular units, only to the extent those units are replaced, and the disallowed loss must be added to the basis of particular replacement units. The statute therefore requires tracing loss and basis at the unit level.²⁸

It is important to pause here to appreciate what this means in reality, because even Bob's example radically understates the real-world difficulty of applying the wash-sale rule. Digital-asset markets do not resemble the trading environment that was assumed by the wash-sale rule in 1921. Bob's example treats his January 1 purchase of 1.0 bitcoin as a single lot. In practice, however, clicking a single "buy" order on an exchange may be executed as multiple partial fills at slightly different prices. Each fill carries its own basis and acquisition time for tax purposes.²⁹ While such fragmentation is ordinarily harmless, it becomes

²⁸ Section 1091 conditions both loss disallowance and basis adjustment on the identity of specific units. Under § 1091(b), a loss is disallowed only "with respect to the particular shares" sold at a loss, and under § 1091(c), any disallowed loss must be added to the basis of the "particular shares" acquired as replacement purchases. I.R.C. § 1091(b), (c); Treas. Reg. § 1.1091-1(a). Because the statute requires determining loss disallowance and basis adjustment by reference to specific units, and the regulations implement that matching by reference to the chronological order in which shares are sold and acquired, wash-sale consequences cannot be determined on an aggregated or averaged basis. See Rev. Rul. 70-231, 1970-1 C.B. 19 (wash-sale determinations must be made by reference to the specific shares sold and the specific shares acquired, rather than by averaging blocks of stock).

²⁹ Under the general cost-basis rule of section 1012, property is taken into account at its actual cost, and acquisitions at different prices constitute separate basis determinations. See I.R.C. § 1012; Treas. Reg. § 1.1012-1(a). Where fungible property is acquired through multiple executions at different prices, as is common with modern exchange trading, each execution carries its own basis and acquisition time for tax purposes – in plain English, each such execution is a separate tax lot. Although those units may ordinarily be aggregated arithmetically, section 1091 makes unit-level identity legally consequential by conditioning loss disallowance and basis adjustment on specific units and their order of acquisition.

consequential once section 1091 applies, because loss disallowance and basis adjustment must be applied by reference to specific units.³⁰

Once section 1091 applies, ordinary market mechanics—partial fills, batch payments, fragmented receipts—cease to be benign accounting details. They become multiplicative drivers of tax complexity. What would otherwise be a single acquisition or disposition can become dozens or hundreds for tax purposes, each carrying its own basis adjustment or loss analysis. The wash-sale rule does not merely add steps to an otherwise workable process; it converts routine digital-asset activity into a combinatorial accounting problem that scales with transaction granularity rather than economic substance.

Back to Bob's example, where we continue with the simplifying assumption that each acquisition involves one single tax lot. On the facts provided, after apportioning \$100 of loss to the March 21 acquisition, Bob possesses \$8,900 of loss from the March 20 disposition of 0.99 bitcoin that may or may not be disallowed, depending on whether he acquires more bitcoin before April 20, which is the close of the 61-day window. Each 0.01 bitcoin Bob acquires before April 20 will have \$100 added to its basis, until all 0.89 units of loss have been reassigned.

Next, note that Bob also possesses \$120 of disallowable loss from the second disposition that occurred on March 20, involving 0.01 bitcoin that was acquired on March 15 and had its basis adjusted due to the earlier March 18 loss sale. That \$120 loss will only be disallowed if Bob acquires 0.01 bitcoin after first acquiring 0.89 bitcoin pursuant to the prior loss sale.

Treasury's recent broker-reporting regulations for digital assets reflect this same unit-level conception by requiring brokers to report basis and acquisition date separately for each reportable unit or lot, rather than permitting consolidation of economically similar units into a single averaged position. *See* Treas. Reg. § 1.6045-1(a)(15)(i). These reporting rules do not create wash-sale obligations, but they confirm Treasury's understanding that digital asset positions consist of discrete units whose identities must be tracked separately for tax purposes when substantive rules—such as section 1091—make unit identity relevant.

³⁰ To see the magnitude of the problem, suppose Bob acquired the 1.0 bitcoin used to purchase the car through 100 separate partial fills at 100 slightly different prices over the course of a single day. Under tax code section 1012, each fill constitutes a separate unit with its own basis and acquisition time. When Bob later disposes of 0.99 of that 1.0 bitcoin in a single transaction, that disposition cannot be analyzed as a single loss event. Instead, the taxpayer must determine which 99 of the 100 units were disposed of, then calculate the gain or loss on each unit separately, beginning with the first unit. Only after applying the statute to the first loss sale thus identified, *see* Treas. Reg. § 1.1091-1(b), can the process be repeated for the next loss sale, involving the second partial fill of Bob's buy order. Each disallowed portion must then be matched, again in chronological order, to specific replacement acquisitions within the statutory window, with basis adjustments made unit-by-unit. This analysis must be repeated independently for each subsequent disposition. The statute thus requires loss and basis tracing at the level of individual micro-units, even where the economic transaction appears singular and continuous.

What about Bob’s acquisition of 0.01 bitcoin on March 22, a gift from his uncle? It’s exempt from the wash-sale rule, because receiving a gift is not a fully taxable “exchange” under section 1091.

2. The Wash-Sale Rule Should Not Apply to Bob

When a taxpayer makes frequent transactions, there is no time or opportunity to exploit the tax system by accelerating losses and deferring gains. By its own logic, the wash-sale rule should not apply. The 1921 rule was designed for the investor who holds a position for long periods, periodically finds himself sitting on a paper loss near year-end, and has both the incentive and the ability to sell solely to lock in the loss while buying back the same position to remain invested. That strategy depends on discretionary timing. The investor must be able to decide whether a gain or loss should fall into this year or next year. Only with that freedom can he exploit the distortion baked into realized-gain taxation—namely, that immediate losses are more valuable than future losses.

That’s one reason why the rule has never applied to foreign currencies like euros and yen or to commodities like soybeans and corn: people actually *spend* currencies and *use* commodities for purposes other than realizing gains. Some investors may hold such assets long enough to benefit from their ability to expedite losses and postpone gains to future tax years. But that’s the state of nature in our realization-based system. Commodities, currencies, and digital assets are not the anomaly; securities are, because the nature of their use by typical investors lends itself to a targeted policy governing economically empty sham transactions.

If a taxpayer does not have flexible timing choices, then the distortion created by the income tax cannot be exploited, and there is nothing for the wash-sale rule to police. A person who is regularly using an asset—either by trading it frequently or, as with Bob, by earning it, spending it, and receiving it as payment—never returns to a previously held economic position. Every acquisition and disposition changes his economic exposure because he is using the asset as a medium of exchange. The conditions that make the classic wash-sale tactic possible—patient holding, selective selling, deliberate re-entry—simply do not exist in this environment.³¹

³¹ As lower trading commissions and computers made short-term trading and day-trading viable for a wider public, the wash-sale rule became a much more dangerous trap for the unwary. That contributed to Congress’s creation, in the 1990s, of a mark-to-market election for frequent traders, a defining feature of which is that the wash-sale rule does not apply. See I.R.C. § 475. A similar mark-to-market election for digital assets may be a good idea, but it would not mitigate the consequences of the wash-sale rule itself. The only solution is to keep the wash-sale rule entirely off the table for digital assets.

As noted earlier, it is easy to mistake the bright-line rule created by section 1091 for the underlying evil the rule was originally intended to address. Instead of targeting transactions that lack economic substance, the rule can be reimagined as a general limitation on the recognition of losses—regardless of whether the taxpayer exercises control over the timing of those losses.

That reimagination of the rule would, in this author's view, be a mistake. Recasting section 1091 as a general device to prevent taxpayers from accelerating losses or deferring gains reframes ordinary realization behavior as suspect. But it does more than that: it treats loss realization itself as a problem to be managed, even where no manipulation or taxpayer control over the timing is present.

That reframing is not a defense of section 1091; it is a critique of realization doctrine itself. A realization-based tax system necessarily permits taxpayers to recognize gains and losses when property is disposed of—sometimes by choice, and sometimes as a result of events outside the taxpayer's control. Even if that reimagining were accepted notwithstanding its tension with the reality of our income tax, once the rule is no longer anchored in identifying abuse but instead in routinely retiming otherwise valid losses, the case for the rule rises or falls even more heavily on whether it can be administered at acceptable cost. At that point, compliance burdens are no longer a tolerable byproduct of anti-abuse enforcement; they become central to the rule's justification.

Few among us could accurately calculate Bob's tax exposure with a pencil and paper, even for just several transactions. It's true that software could do it. Indeed, your broker already does track your securities wash sales—but only within a single account.³² Brokers are not required to track wash sales across multiple accounts owned by a single taxpayer. And obviously, a broker does not know what's happening in accounts held elsewhere. So, even in the highly regulated world of broker-mediated securities investing, for all wash sales occurring across accounts, it is the taxpayer's duty to comply with the wash-sale rule. We'll see next why this matters.

C. Multiple Accounts and Wallets

To comply with gain taxation requirements, taxpayers already must determine which digital assets they are disposing of, either via a rule like first-in-first-out or by specifically identifying the assets. Each asset lot has a cost basis and a date of acquisition. That's complicated, and it is indeed a deep problem for cryptocurrency adoption, but at least it is possible to track and determine tax basis from within each respective wallet or account. We now reach the key factor

³² See Treas. Reg. §1.6045-1(d)(6)(iii)(B).

that, combined with all the other complications, renders a wash-sale rule truly, deeply unworkable:

Disallowed losses must be tacked onto the basis of replacement acquisitions *no matter where those acquisitions occur*. The wash-sale rule applies to *the taxpayer*, not to each account.

Under any realistic pattern of ordinary digital asset use—involving multiple wallets and addresses, multiple exchanges, different custodial accounts, traditional brokerage accounts, DeFi transactions, and so on—the tracking and accounting required to apply this rule correctly becomes functionally impossible for any human being.

Consider a normal scenario for a digital asset user. Charlie transacts in ether (ETH), the native token on the ethereum blockchain. The price of ETH is down. Over the course of weeks—or perhaps just a few hours—Charlie registers a loss sale each time he sells ETH, pays using ETH, swaps using ETH, or pays gas fees using ETH. Charlie triggers a potential replacement purchase each time he acquires ETH.

Charlie notches these sales and purchases across any number of accounts, wallets, custodial exchanges, payment apps, and even traditional brokerages. A loss from a sale anywhere must be transferred and precisely apportioned to the chronologically correct replacement purchase occurring anywhere else. First, it might be apportioned to a purchase occurring 30 days prior—to the extent a previously disallowed loss has not already been assigned to that purchase—then next to more recent purchases, and then to future purchases.

Each loss sale and each replacement purchase may occur in a separate account. In one account, the amount of remaining disallowable loss must be tracked as portions of that loss are assigned to acquisitions occurring in other wallets and accounts. In another account, the basis of acquired ETH must be adjusted by an amount or amounts determined by the first account and possibly additional other accounts.

To give some sense of the complexity, suppose a sale of ETH in Charlie's custodial exchange account gives rise to a \$1,000 loss, and Charlie has no other loss sales among any of his accounts for the preceding 30 days:

- The first dollar of that \$1,000 loss may be tacked on to the basis of ETH Charlie acquired in his payment app 30 days earlier.
- The second dollar of that \$1,000 loss may be tacked on to the ETH Charlie acquired 29 days prior from selling an NFT using his NFT wallet.

- A third fraction of that \$1,000 loss may be tacked on to the basis of a purchase of ETH made on a decentralized exchange using another wallet.
- And so on: every acquisition of ETH, wherever it occurs, may need to have its basis adjusted.
- And for every ETH exchange involving another digital asset, the same tracking and adjustments must be made for that second digital asset, in the event it is ever disposed of at a loss and re-acquired within the 61-day window.
- Note that whenever Charlie pays a gas fee with ETH, that payment is a loss sale if ETH's price at the time of the transaction is lower than its price at the time of its acquisition. That creates a few cents of loss that must be tacked on to any qualifying acquisitions occurring within the 61-day window.

For any non-trivial number of transactions occurring across wallets and platforms, no human could plausibly do Charlie's taxes unassisted. The tax code, and Americans' annual tax-reporting ritual, is complex and mystifying enough as it is. But the difficulty here arises even earlier than reporting. We should be wary of a tax system in which a taxpayer engaging in ordinary economic activity cannot, *even in theory*, assemble the transaction-level facts required to complete Form 8949—before questions of reporting, forms, or tax-preparation software even arise.

More fundamentally, because the tax consequences of many digital-asset transactions would remain provisional—turning on other transactions falling within a cascading set of overlapping 61-day windows—a taxpayer would be unable to know, even at an intuitive level, where they stand after a transaction: whether it produced a gain or a loss, how large it was, or whether that result might later be undone. The law would detach tax consequences from the moment of economic action itself, leaving taxpayers unable to assign stable economic meaning to their own transactions in real time.

But even if we are content to alienate taxpayers from the ordinary understanding that gains and losses are fixed at the time of a transaction, it is not clear that software can realistically accomplish the task, either. For such a software program to ensure compliance, it would need to connect to *every* account a taxpayer controls. That includes every custodial exchange account, traditional brokerage account, non-custodial hot wallet, cold hardware wallet, payment app, merchant or commerce account, and application-specific wallet.

To function, such a system would have to ingest, classify, and reconcile every relevant transaction, and determine wash sale consequences with chronological consistency.

Nothing remotely close to that exists today. Even if a system capable of integrating transaction-level data across every wallet, account, and platform were feasible, enforcing the wash-sale rule would require a level of centralized aggregation and reconciliation that is fundamentally at odds with the basic design and use of digital assets.

D. “Substantially Identical” Assets

The existing statute implementing the wash-sale rule provides that acquisitions of “substantially identical” assets trigger the loss disallowance rules. This adds considerable complexity to the application of the rule. We do not need to explore the outer boundaries of this rule here. It is enough to note two categories of “substantially identical” assets that would likely trigger the rule for digital assets and create serious difficulties for any software product intended to offer full compliance with the rule.

First, the IRS would likely maintain that holdings in exchange-traded products that hold a single digital asset should be treated as substantially identical to that asset. If bitcoin were brought under section 1091, a purchase of IBIT, GBTC, or any other spot bitcoin ETP held through a traditional brokerage would likely be treated as a replacement purchase of bitcoin itself. Likewise, for ethereum, the purchase of an exchange-traded fund or product such as ETHE or ETHA would likely serve as a replacement acquisition for ETH sold at a loss.³³

Second, the IRS would also maintain that wrapped and synthetic versions of a token such as BTC or ETH satisfy the “substantially identical” standard. Because such tokens can be used on blockchains other than their native blockchain, compliance with the wash-sale rule requires confirmation whether, during the 61-day window surrounding the loss sale of such an asset on any chain, a version of that asset is acquired on any other blockchain. Any software solution would have to not only track data from every blockchain, but reliably integrate chronologically all acquisitions and dispositions across such blockchains.

³³ Apportioning the disallowed loss from a disposition of a fraction of an ethereum token to the basis of a share in an ETP such as ETHE would itself present a formidable challenge. Among other problems, the amount of ETH that an owner of an ETP share constructively owns changes over time due to the product sponsor’s deduction of administration fees. If this reality were enough to establish that such an ETP is not “substantially identical” to ethereum itself, that fact alone would strongly counsel against the extension of the rule to digital assets. While the point of this report is to demonstrate how inapt the rule is for assets that are actually used and held for short periods of time across numerous accounts, the goal of increasing current-year treasury receipts obviously depends on the rule reaching investors with significant positions that yield significant gains or losses. Allowing sophisticated buy-and-hold investors to skirt the rule through ETPs, while ensnaring everyday users of cryptocurrency in an impossible compliance exercise with truly negligible effects on actual tax revenue, would be an especially perverse outcome.

The “substantially identical” rule in tax code section 1091 adds remarkable complexity and uncertainty to the application of the wash-sale rule. However, the more important observation concerns the *limits* of the “substantially identical” rule—and what those limits tell us about the importance of the wash-sale rule itself.

In short, the rule does not reach assets that are, say, “substantially similar.” That simple fact has long meant that—especially for sophisticated investors—it is possible to follow a loss sale with a purchase of substantially similar assets, allowing the investor to retain more-or-less the same economic exposure while permitting the immediate deduction of the loss.

This reality reveals once again that the rule is not a foundational principle of our tax code. Where taxpayers *do* change their economic exposure—even modestly—by acquiring economically similar assets, the rule has never sought to punish that activity by imposing costly compliance burdens and deferring the loss. Congress has not sought to expand the rule, and—more notably—courts and the IRS have maintained a rather strict interpretation of the “substantially identical” standard.³⁴

And as the examples in this report were intended to show, any routine *use* of digital investments typically alters a taxpayer’s economic exposure. For the same reasons the statute continues to permit the acquisition of similar but not identical assets, the statute should not be extended to punish the use of an asset class where typical patterns of use also result in a changed economic position.

E. Related Parties, the IRA Twist, and Other Complications

According to the IRS, if you have a loss sale “and your spouse or a corporation you control buys substantially identical stock, you also have a wash sale.”³⁵ And, if you sell at a loss and, during the 61-day window, purchase a substantially identical asset through your tax-exempt individual retirement account, the wash-sale rule also applies. In that situation, the disallowed loss is not apportioned to the replacement purchase; it is simply disallowed, permanently.³⁶

If the IRS is correct that the wash-sale rule is triggered by acquisitions made by one’s spouse, then a software product capable of ensuring compliance with a crypto wash-sale rule would

³⁴ See, e.g., Erika W. Nijenhuis, *Wash Sales Then and Now*, 82 *Taxes* 181, 186–189 (Mar. 2004).

³⁵ IRS Publication 550 (2024), p. 87, www.irs.gov/pub/irs-pdf/p550.pdf.

³⁶ IRS Rev. Rul. 2008-5, mark-to-market purposes); Build Back Better Act 2008-3 I.R.B. 272, www.irs.gov/pub/irs-drop/rr-08-05.pdf.

require access to every account and wallet controlled by you and also every account and wallet controlled by your spouse.³⁷ Then, any loss incurred by either person might, any time within the 61-day window, be disallowed for that person and added to the tax basis of the substantially identical asset acquired by the spouse.

This report does not purport to address every feature of the wash-sale rule or every complication that would arise in the digital-asset context. Many additional issues—far more than could be addressed in these pages—would further undermine the rule’s administrability. Here are several:

1. “Contracts or Options” Are Included in Rule

Section 1091 currently also applies to contracts and options to acquire substantially identical assets, raising significant interpretive and compliance challenges not explored in this report.

2. FIFO and Specific Identification

The examples in this report assume “first-in-first-out” identification of the particular units of digital assets that are disposed of. In fact, taxpayers may elect to identify the specific units involved in a sale, introducing vast additional complexity into the tracking and calculation of disallowed losses.

3. Holding Period

In addition to a record of the precise tax lots acquired and disposed of, along with the date and time of each such transaction, the software that tracks transactions across all of a taxpayer’s wallets and blockchains must also track and adjust the applicable holding period. Where a loss is disallowed and tacked on to the basis of a replacement purchase, that replacement purchase

³⁷ The IRS is likely incorrect about the rule for spouses, unless perhaps the quoted sentence from IRS guidance is properly interpreted as saying the rule applies when “your spouse [*whom*] you control buys substantially identical stock.” The statute is pretty clear; the rule is triggered by acquisitions of “the taxpayer,” not other taxpayers. See I.R.C. § 1091(a). In 2021, Congress considered—and the House of Representatives actually passed—an updated wash-sale rule that expressly extended the rule to replacement purchases made by “related parties” including spouses, dependents, and taxpayer-controlled and taxpayer-controlling entities. U.S. House of Representatives, *Build Back Better Act*, H.R. 5376, 117th Cong., § 138152 (as passed by the House Nov. 19, 2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/5376/text/eh>. That proposal to extend the wash-sale rule was removed during Senate consideration and was not enacted in the final legislation.

assumes the holding period of the asset giving rise to the loss, for the purpose of determining whether the later sale of that asset gives rise to a short-term or a long-term gain or loss.³⁸

4. Expanded Definition of “Securities” Covered by the Statute

As discussed above, section 1091 applies to “stock or securities,” which has been interpreted by courts and the IRS as a narrower category of instruments than is subject to the securities laws. Various recent proposals to expand the reach of section 1091 to additional assets have, in addition to reaching “digital assets,” included an expansion of the traditional securities and other assets reached by the rule. Even leaving aside the issue of digital assets, these proposed changes should spark careful scrutiny, including from traditional investors who have no interest in digital assets.³⁹

5. Expansive Definition of “Digital Assets” Covered by the Statute

Recent proposals to include digital assets in section 1091 have also specified that the statute would expressly apply to any derivative based on any digital asset, as well as to any notional principal contract relating to any digital asset.⁴⁰ The upshot of these provisions is that *any* loss

³⁸ I.R.C. § 1223(3).

³⁹ See, e.g., Press Release, *Lummis Unveils Digital Asset Tax Legislation* (July 3, 2025), available at www.lummis.senate.gov/press-releases/lummis-unveils-digital-asset-tax-legislation/; draft legislative text § 4, available at www.lummis.senate.gov/wp-content/uploads/Lummis-Crypto-Tax-Bill.pdf (expanding the wash-sale rule by replacing “stock or securities” with “any security (as defined in section 475(c)(2)),” thereby including not only traditional securities but other financial instruments treated as securities for mark-to-market purposes); Build Back Better Act, H.R. 5376, 117th Cong., § 138152 (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/5376/text/eh> (creating a new section 1091(g) which expanded the wash-sale rule to securities described in section 475(c)(2), as well as expressly extending the rule to digital assets, commodities, and foreign currencies and applying the rule to acquisitions by “related parties”). See also discussion draft released by Reps. Miller and Horsford on Dec. 20, 2025, available at horsford.house.gov/sites/evo-subsites/horsford.house.gov/files/evo-media-document/miller-horsford_digital-asset-tax-bill-discussion-draft.pdf (replacing “stock or securities” with “any security” as defined in tax code section 165(g)(2), which would extend the wash-sale rule beyond corporate stock to certain debt instruments and other capital assets treated as securities for worthless-security purposes, but would avoid the broader reach of the section 475(c)(2) framework); Digital Asset PARITY Act, discussion draft dated Mar. 27, 2026, available at www.taxnotes.com/research/federal/legislative-documents/legislative-text/digital-asset-protection-accountability-regulation-innovation-taxation-and-yields-digital-asset/7vjnn (updated discussion draft that would apply to “any stock or security,” without cross-reference).

⁴⁰ See Lummis proposal, *id.*, Sec. 4, creating new section 1091(g)(2).

involving or tied to the value of a digital asset is intended to qualify as a loss sale, and entering any position tied to digital assets is intended to qualify as a replacement acquisition.

6. Mining and Staking

Digital asset users may regularly acquire mining and staking rewards. At the time of this writing, the IRS continues to hold the view that these reward tokens constitute the taxpayer's immediately taxable income.⁴¹ On that view, such tokens constitute replacement assets under section 1091. Accordingly, the tax basis of each such token or fraction of a token acquired by the taxpayer must be increased by proportionally tacking on any loss from any disposition of a substantially identical asset occurring within the relevant 61-day window, regardless of which account or wallet that loss occurs in. Like the gas fees required to post transactions on a cryptocurrency network, the payment of which will constitute a loss sale whenever that gas fee's token is trading for less than it was when acquired, mining and staking rewards introduce a persistent source of replacement acquisitions that must have their basis increased whenever the taxpayer's dominion and control over such tokens is established within the 61-day window surrounding any disallowable loss.

I. Conclusion

The wash-sale rule works tolerably well when three conditions hold: people are investing rather than transacting, they hold assets for long periods, and they do so within a single account. Digital assets routinely defeat all three.

In a realization system, a transaction ordinarily settles its own tax meaning. Buy at a set price and that becomes your basis. Sell for less than you paid and that is a loss. The wash-sale rule disrupts that clarity. Losses become provisional, turning on the outcome of any other transaction in a 61-day window. Basis is no longer simply one's cost, but a number subject to revision by other transactions, applied in strict chronological order.

This is not the familiar difficulty of completing confusing tax forms. The problem arises earlier, in determining what transactions even mean for tax purposes, when that meaning can be altered by unrelated activity that has not yet occurred.

The examples of Alice and Bob were simple by design. Add only a few more transactions and pencil-and-paper reasoning becomes impossible. Ten transactions become dozens of

⁴¹ See Abraham Sutherland, *Phantom Income and the Taxation of New Cryptocurrency Tokens*, 178 Tax Notes Federal 669 (Jan. 30, 2023), available at ssrn.com/abstract=4362822.

interdependencies. A year of economic activity becomes a maze with a single correct path through it, where one omitted transfer, one misordered entry, or one stray timestamp forces the entire sequence to be recalculated. Add substantially identical assets, assets spread across innumerable wallets and platforms, and the possibility that relevant activity occurred somewhere the taxpayer does not think to look. Layer in spouses' accounts, fractional units and micro-transactions that multiply the number of distinct tax "lots," and the complexity multiplies exponentially.

The result is a system in which establishing whether a single loss is allowed requires reconstructing and reconciling an entire year of activity across accounts and time—something no ordinary taxpayer, and no ordinary bookkeeping system we could plausibly expect every taxpayer to maintain, can realistically do.

A wash-sale rule for digital assets makes no sense—full stop. The reality of how digital assets are actually used renders compliance computationally overwhelming, if not practically impossible. Nor can the statute be salvaged through carveouts or special exceptions. The tax code already contains longstanding tools for disregarding transactions that lack economic substance.⁴² We do not need a new wash-sale regime for digital assets; we need clarity, simplicity, and a tax framework that accommodates actual human activity and the tools actual humans choose to use. A tax system that respects autonomy and investment should not be tinkered into a regime that makes ordinary use of a new technology unworkable. Cryptocurrency deserves better than the under-examined extension of an old tool to a new category—and taxpayers deserve a code that respects the logic of its own design, accepts the primacy of taxpayer control over the realization of income, and doesn't confuse bright-line rules with the substantive abuses they were meant to address.

⁴² Courts have long disregarded transactions lacking economic substance under established anti-abuse principles. See, e.g., *Gregory v. Helvering*, 293 U.S. 465 (1935). Congress later codified a version of this principle in tax code section 7701(o). See also *Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945).