

More Charitable Crypto Donations Spur Calls For Rule Change

By **David van den Berg**

Law360 (January 22, 2021, 6:44 PM EST) -- As growth in digital currency values since March 2020 has made charitable donations of virtual currency more attractive, calls are coming for the Internal Revenue Service to change guidance in a way that could spur more philanthropy.

Virtual currency prices have been volatile recently. The price for bitcoin, the largest virtual currency, started 2021 under \$30,000. It topped \$41,000 earlier in January and dropped below \$31,000 before rising again, according to CoinMarketCap.com, a price-tracking website. In 2019, prices ranged from about \$3,400 to about \$13,000, and fell below \$5,000 in March 2020, according to the site.

The price for ethereum, the second largest virtual currency, started 2021 around \$730 and topped \$1,300 Jan. 9 before falling below \$1,000 the next day, according to the site. The price rose to just above \$1,420 on Jan. 19 before falling below \$1,200 and rising again, the site shows. In March 2020 prices were below \$120, but rose to over \$720 by year's end.

A relatively small number of organizations, including some high-profile entities, accept donations of virtual currency now. Rising values may help grow a new donor class for charities to reach out to, and donations of virtual currency can deliver significant tax benefits. However, there are challenges for donors and charities, including a requirement for a qualified appraisal of donations.

Current IRS virtual currency guidance includes a 2014 notice treating it as property for tax purposes. The agency also said in a December 2019 update to frequently asked questions that charities must report virtual currency donations to the IRS. The IRS also issued final regulations in 2018 regarding charitable contributions that require a qualified appraisal for donated property when a charitable deduction of more than \$5,000 is claimed.

Applying that requirement to donations of virtual currency regularly traded on exchanges doesn't seem to meet any policy goal, LaVerne Woods of Davis Wright Tremaine LLP said.

"The trade price of virtual currency on an exchange on the date of the gift, as with publicly traded securities, is the most reliable indicator of value, and any appraiser will presumably look to the market price on an exchange," she said. "The IRS almost certainly did not consider this issue when it released IRS Notice 2014-21, characterizing virtual currency as property and thereby bringing the appraisal requirement into play. But the time has come for the IRS to remove this burden on an important new form of charitable giving."

Like Woods, Christopher Moran of Venable LLP told Law360 that guidance exempting donations of exchange-traded virtual currency from the appraisal requirement would further donations. There's a need for guidance on the appraisal issue, and the problem is there's no guidance now defining virtual currency as readily valued property, he said.

"IRS guidance such as a notice stating that cryptocurrency traded on a recognized exchange is treated as 'readily valued property' for purposes of Section 170(f)(11)(A)(ii)(I) would solve the issue," he said, referring to a section of the Internal Revenue Code.

As Woods and Moran called for revisiting the appraisal rule, Andrea Kramer of McDermott Will & Emery LLP noted another concern about it. She said virtual currency donors will likely face difficulty in finding a qualified appraiser. Meeting generally accepted appraisal standards shouldn't be difficult — the challenge is the rule that a qualified appraiser must have two years of experience in valuing the type of property being appraised, she said.

"I suspect that the pool of appraisers who can meet this requirement is quite small," she said. "Many virtual currencies are new to the marketplace." She added that the two-year experience standard is likely going to exclude many appraisers from meeting it for virtual currencies.

Lisa Zarlenga, Elinor Ramey and John Cobb, all of Steptoe & Johnson LLP, said in written comments to Law360 that they too had heard from taxpayers who say it's difficult to find an appraiser and costly to meet the requirements.

"The regulations put relatively stringent restrictions on who may act as a qualified appraiser," they said. "However, because reliable market prices exist for publicly traded cryptocurrencies, there appears to be little downside to relaxing the regulatory requirements for qualified appraisals in the case of donations of publicly traded cryptocurrencies."

The U.S. Treasury Department and the IRS, they said, could provide a safe harbor for appraisals that rely on a generally accepted source for spot market prices of cryptocurrencies. They noted that the agency has allowed such reliance for purposes of determining the value of cryptocurrency for inclusion in income.

Lawmakers in Congress could also exempt publicly traded virtual currencies from the appraisal requirement as they have publicly traded securities, they said.

Challenges for donors and charities regarding virtual currency donations may not be limited to appraisal issues. The volatility of virtual currency values itself is a limiting factor for donations, Kramer said. Woods also noted price volatility and said donations are attractive when values are high, but will lose their lure when values drop. Still, she said, given the growing acceptance of using virtual currency, the growth potential for charitable donations of it could be enormous.

A range of nonprofits accept virtual currency donations now. The website of The Giving Block, an organization that helps charities accept virtual currency donations, lists more than 100 entities that take them, ranging from United Way Worldwide to Meals on Wheels of Alameda County in California.

Pat Duffy, co-founder of The Giving Block, said that his organization's charity user base had grown more than 600% since the beginning of 2020, and that donation volume soared more than 4,000% in the same period.

Donors have traditionally been technology-savvy men ages 18 to 35, but that's changing now as cryptocurrency is becoming easier for retail investors, and institutional investors are getting involved too, he said. Still, the number of donors is far larger than the number of organizations accepting virtual currency donations is now, Duffy said.

"The land grab is just beginning to ramp up for charities in crypto," he said. "For charities that begin fundraising crypto now, the sky is the limit."

The IRS' website calls virtual currency a digital representation of value. It functions as a medium of exchange, a unit of account, and/or a store of value, the agency said. Cryptocurrency is a type of virtual currency that uses cryptography to validate and secure digitally recorded transactions. Bitcoin, the agency also said, is an example of convertible virtual currency, in that it has an equivalent value in real currency or acts as a substitute for it.

Duffy's company isn't the only one that helps nonprofits get virtual currency donations. James Lawrence, co-founder and CEO of Engiven, a company that focuses on the faith community but has a diverse set of clients, said he expected massive growth in the space.

Lawrence estimates fewer than 500 organizations accept donated virtual currency now, but by 2025, he expects virtual currency giving will be 10% of all charitable giving by individuals in the country.

Lawrence's company and the Salvation Army's Western Territory in the Western U.S. announced in December an arrangement for donations of bitcoin and ethereum into the organization's kettles. Lt. Col. Kyle Smith, the Western Territory's secretary for communications, confirmed a report that the division received two bitcoins worth about a combined \$50,000 from a Hawaii donor. Contributors nationwide can contribute to the Western Territory, and funds from the cryptocurrency donation will be used in that region, he said.

Omri Marian of the University of California, Irvine School of Law, highlighted tax benefits for virtual currency donors. He said he expected considerable growth in donations of virtual currency to charities and called virtual currency a fantastic tax instrument.

"You get to avoid capital gain, and get a deduction for the full value," he said, adding that for some who invested early in bitcoin and held onto it, the tax benefit can be very lucrative.

While donors can receive significant tax benefits, donors and charities may run a risk of greater government scrutiny of virtual currency. For its part, the IRS has signaled its plans to examine cryptocurrency transactions. The IRS' criminal investigation arm said in its 2020 annual report that cybercrime rooted in cryptocurrency was an area of focus.

When asked about the impact of the IRS' scrutiny of virtual currency on donations of it to charities, Alexander Reid of Morgan Lewis & Bockius LLP called it a welcome development. He said the IRS would soon be sophisticated on the matter.

"That means that charities should be able to understand better some of these risks through future guidance," he said. "On the other hand, it also means that caveat emptor, because if you get some crypto, you might get a knock on your door from the IRS."

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