



June 21, 2024

VIA [IRS.gov/formscomments](https://www.irs.gov/formscomments)

Internal Revenue Service
Attn: CC:PA:LPD:PR (NTF1099DA)
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Draft Form 1099-DA

Ozone Networks, Inc., d/b/a OpenSea (“OpenSea”), welcomes the opportunity to submit these comments in response to the draft Form 1099-DA (the “Draft Form”), which the Internal Revenue Service (“IRS”) issued on April 18, 2024, following the release of the proposed regulations regarding gross proceeds and basis reporting by digital asset brokers under section 6045 (the “Proposed Regulations”).¹ In particular, our comments address how the Draft Form may apply to non-fungible tokens (“NFTs”).² OpenSea has previously also filed comments on the Proposed Regulations (the “Previous Comments”).³

We believe that tax certainty is important for the development of web3 technology, and we support the government’s efforts to provide taxpayers with the information they need to comply with their tax obligations regarding digital asset transactions. That said, we believe the government should balance those efforts with (i) the compliance burden the Draft Form and the Proposed Regulations, if finalized without revision, would impose on potential brokers, (ii) the risk of duplicative reporting via the Draft Form that will confuse taxpayers and the IRS, and, as outlined in our Previous Comments, (iii) Congress’s intent regarding the scope of its expansion of the information reporting regime to digital assets.

As currently written, the Proposed Regulations—and, by extension, the Draft Form—reflect overinclusive definitions of the terms “digital asset” and “broker”:

- **“Digital Asset” definition:** The term “digital asset” is currently defined in section 6045(g)(3)(D) of the Internal Revenue Code, in relevant part, as “any digital representation of value which is recorded on a cryptographically secured distributed ledger” Most NFTs are *not* “digital

¹ 88 Fed. Reg. 59,576 (Aug. 29, 2023).

² NFTs are identifiable units within a data infrastructure environment (*i.e.*, blockchain). Each NFT has a unique token ID (which cryptocurrencies do not have) that can be used to track its individual transaction history and almost always links to a URL that contains NFT metadata (cryptocurrencies also do not have metadata). That metadata may also include one or more URLs to a digital file, such as an image, which typically is the “face” of the NFT when it is displayed by apps that assist users to explore NFTs. NFTs are most commonly associated with images and digital collectibles, but they have many use cases across a number of industries.

³ OpenSea filed comments on REG-122793-19 “Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions”. Available at: <https://www.regulations.gov/comment/IRS-2023-0041-28657>

representation[s] of value”; NFTs that are associated with collectibles, art, or domain names may *have* value, but it does not follow that they are *representations* of value. As further described in our Previous Comments, the better reading of the statutory definition of “digital assets” is that, while Congress meant to include those NFTs where the associated right or asset is a financial instrument (*e.g.*, cryptocurrency), it did *not* mean to include NFTs where the associated right or asset is merely a collectible (like so many of the NFTs on OpenSea’s marketplace) or similar non-financial assets. However, the Proposed Regulations look to expand the coverage of the definition of “digital asset” to include *all* NFTs, and thus would require Form 1099-DA reporting for *all* transactions involving an NFT—even collectibles, art, and similar assets. This would be inconsistent with the approach taken by the Treasury and the IRS in Notice 2023-27⁴, as well as other digital asset regulatory regimes.

- **“Broker” definition:** Currently, for digital assets, section 6045(c)(1) limits the universe of “brokers” to only those persons who “effectuate” digital asset transactions. However, the Proposed Regulations define the term “broker” far more expansively; they could treat any person who provides ancillary services, such as websites providing pricing information, as a “digital asset middleman” who would be required to report as a “broker.” This is overbroad and would likely result in duplicative reporting of the same transactions in Forms 1099-DA by multiple parties that may fall within the much broader definition of “broker.” Duplicative reporting may cause taxpayer confusion and double taxation or reporting mismatches—and would only add to the staggering eight billion Form 1099s that the IRS anticipates receiving following the finalization of the Proposed Regulations, which is more than twice the amount of all other 1099 forms combined.⁵ Moreover, Form 1099-DAs are ill-suited for NFTs; entities that provide certain services relating to NFTs, such as non-custodial NFT marketplaces like OpenSea, will generally not independently know the basis of NFTs.

Beyond the risk of duplicative reporting, if finalized in their current form, by requiring so many entities to collect and store highly sensitive personally identifiable information (“PII”) for transactions they are directly or indirectly involved in, the Proposed Regulations could create meaningful privacy and security risks that are unnecessary in light of alternative methods of increasing tax compliance.

We recommend that the final regulations draw more carefully circumscribed limits on what is a “digital asset” and who is a “broker,” following the specific approaches described in our Previous Comments. In particular, the final regulations should restrict the universe of NFTs that are “digital assets” to those where the associated right or asset is a financial instrument, as well as adapt the definition of “facilitative service” (embedded in the definition of “digital asset middleman,” treated by the Proposed

⁴ 2023-15 I.R.B. In Notice 2023-27, Treasury and the IRS considered whether to treat certain NFTs as collectibles under section 408(m). The Notice indicated that the IRS intended to apply a look-through analysis to determine whether an NFT constitutes a section 408(m) collectible “by analyzing whether the NFT’s associated right or asset is a section 408(m) collectible.” OpenSea filed comments on Notice 2023-27 expressing support for the look-through approach, available at: https://downloads.regulations.gov/IRS-2023-0011-0032/attachment_1.pdf.

⁵ Tax Notes, “IRS Prepping for at Least 8 Billion Crypto Information Returns”, October 26, 2023, <https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/irs-prepping-least-8-billion-crypto-information-returns/2023/10/26/7hhdhp>.



Rules as a “broker” for reporting purposes) to exclude ancillary services and include only services that *directly* effectuate a sale of digital assets.

We urge you to read our full Previous Comments and consider our amendments to the draft rule prior to the finalization of both the Proposed Regulations and the Draft Form. We appreciate your consideration of these comments and welcome the opportunity to discuss them further with you and your staff.

Sincerely,

A handwritten signature in black ink that reads "Adele Faure".

Adele Faure
General Counsel
OpenSea

A handwritten signature in black ink that reads "Jae Gnazzo".

Jae Gnazzo
Policy Lead
OpenSea