CVM publishes Guidance Opinion No. 40 on crypto assets

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CVM recently published Guidance Opinion No. 40, which consolidates its understanding of the rules applicable to crypto assets.

According to the CVM, the Guidance Opinion is a recommendation and guideline, with the objective of ensuring greater predictability and safety to the market, protecting investors and popular savings and fostering an environment favorable to the development of cryptoeconomy, with integrity, transparency and adherence to constitutional and legal principles.

In the CVM's view, crypto assets are those represented digitally, protected by encryption, which can be the object of transactions executed and stored through Distributed Ledger Technologies and which are also usually represented (or whose property is represented) by intangible digital securities (tokens).

In its Guidance Opinion, CVM reinforces its understanding that tokenization itself is not a process subject to securities regulation. That is, the fact that a service or asset is digitally developed or offered is not in itself decisive for its classification as a security. However, issuers and the public offering of tokens that are securities will be subject to applicable regulations, including with respect to the issuance and trading of crypto assets in an organized market, contracting intermediation services, bookkeeping, custody, centralized deposit, registration, clearing and settlement of operations.

CVM reinforces that a crypto asset qualifies as a security when it digitally represents one of the securities expressly established by law, or when it qualifies as a collective investment agreement, according to the Howey Test, as internalized by CVM from the United States' experience.

Guidance Opinion No. 40 reiterates the requirements of the Howey Test considered for the classification of a particular asset as a collective investment contract, namely:

1. Investment: contribution of money or property;
2. Formalization: title or contract depicting the relationship between investor and offeror;
3. Collective nature of the investment;
4. Expectation of economic benefit: whether by participation, partnership or compensation;
5. Effort of entrepreneur or third party: economic benefit resulting from the predominant efforts of a third party; and
6. Public offer: fundraising effort with popular savings.

CVM also clarifies that it will adopt a functional approach to classify tokens by their different functions and, there after, determine their legal treatment. Initially, the tokens have been subdivided into 3 categories: (a) payment token or cryptocurrency, which seek to replicate currency functions, (b) utility token, used to acquire or access certain products or services, and (c) asset-backed token, which represent one or more tangible or intangible assets. It is noteworthy that the categories mentioned above are not exclusive or airtight, so that a single cryptoactive can fall into one or more of them.

The disclosure of the Guidance Opinion reinforces that CVM is attentive to the rapid evolution of the market and receptive to new technologies, but does not evade its regulatory duties, being able to regulate the crypto market within the limits of its competence.

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