



Blockchain & Cryptocurrency Regulation

2020

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Contributing Editor
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Brazil

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Government attitude and definition

Brazilian authorities do not consider cryptocurrencies as legal tender nor do they afford them the same status as fiat currencies of other countries. They also do not specifically regulate the creation, use, trading or circulation of cryptocurrencies. The “Real” is the only legal tender recognised and accepted in Brazil. However, Brazilian authorities have not ignored cryptocurrencies.

The Brazilian Central Bank, through statements issued in 2014 and 2017, commented on the risks associated with the use of cryptocurrencies, pointing out, among other things, that cryptocurrencies were not issued nor backed by the Brazilian government, were not pegged to any fiat currency or asset nor had their conversion into “Real” or other fiat currencies guaranteed by the Brazilian government.

The Brazilian security and exchange commission – Comissão de Valores Mobiliários (CVM) – in several opinions issued during 2017 and 2018, expressed concerns about initial coin offerings (ICOs). According to CVM, ICOs could be subject to prior registration with CVM (as the securities offerings generally are) as many cryptocurrencies have features that could result in their characterisation as securities. In addition, in 2018, CVM banned the direct acquisition of cryptocurrencies by Brazilian investment funds. It is important to point out that CVM did not rule out investments in cryptocurrencies because it believes that cryptocurrencies are unlawful. CVM only prohibited direct acquisitions of cryptocurrencies by Brazilian investment funds because it understood that cryptocurrencies were not included in the classes of assets in which funds are allowed to invest under current regulations (funds are only allowed to invest in “financial assets” and CVM believes that cryptocurrencies do not meet the definition of financial assets under current regulations). However, Brazilian investment funds are still able to make indirect investments in cryptocurrencies (via cryptocurrency-based derivatives or third party vehicles directly investing in cryptocurrencies or their derivatives and which are incorporated in jurisdictions where they are allowed to hold cryptocurrencies or their derivatives).

Since 2016, the Brazilian federal tax authorities have required taxpayers to declare cryptocurrencies in their annual tax returns, as well as to pay income tax on capital gains derived from the use or disposition of cryptocurrencies. Furthermore, in May 2019, federal tax authorities created reporting obligations applicable to Brazilian-based exchanges, as well as on Brazilian legal entities and individuals holding cryptocurrencies. These reporting obligations are discussed in greater detail under “Reporting requirements” below.

Despite these statements, opinions and regulations, nothing currently prevents legal entities and individuals in Brazil from creating cryptocurrencies or from using them to purchase

goods or services. Cryptocurrencies can be exchanged for goods or services in Brazil if the parties involved in the transaction so agree.

Cryptocurrency regulation

The creation, use and trading of cryptocurrencies are not specifically regulated in Brazil. However, there are two bills of law currently under discussion in the House of Representatives that could change that landscape.

The first bill of law (PL 2,303, dated July 7, 2015) originally intended to include cryptocurrencies in the definition of “payment schemes”. The Brazilian Central Bank defines “payment schemes” as the set of rules and procedures that govern the provision of certain payment services to the public, such as credit and debit cards. The inclusion of cryptocurrencies in the definition of payment schemes would make it subject to the regulation and oversight of the Central Bank. A Special Commission in the House of Representatives was appointed to analyse the bill and, during discussions, such bill underwent substantial changes. At one point, the proposed changes ended up subverting the original bill and banned the issuance, circulation, and even the use or acceptance of cryptocurrencies as means of payment. Subsequently, new changes were proposed not only to generally allow cryptocurrencies to be issued and used, but also to prohibit regulatory bodies from creating rules that could ban or hinder the issuance, circulation and use of cryptocurrencies, or the activities of exchanges.

The second and more recent bill of law (PL 2,060, dated April 4, 2019) aims at defining cryptocurrencies, clarifying that they are not securities, and allowing cryptocurrencies to be freely issued, transferred and used.

Because both bills of law are somewhat overlapping, it is likely that they will be jointly vetted by the House of Representatives. However, both bills of law are still in their initial phases of discussion and no assurance can be given that they will be eventually approved by Congress and passed into law. Furthermore, the bills may be substantially amended during their review process.

Sales regulation

There are no specific laws or regulations concerning the sale of cryptocurrencies in Brazil. However, cryptocurrencies, depending on their characteristics, could be classified as securities under Brazilian law. If that happens, the public offering of cryptocurrencies may be subject to prior registration with CVM, the Brazilian security and exchange commission. In this regard, CVM has already expressed concerns about initial coin offerings (ICOs). Although CVM has not specifically regulated ICOs, it has understood that such offers may be subject to the rules currently applicable to traditional securities offerings.

In CVM’s opinion, many cryptocurrencies offered through ICOs could be “securities” or, more specifically, “collective investment agreements”, which are securities that generate participation, partnership or remuneration rights (including those resulting from the rendering of services) whose income originates from the efforts of an entrepreneur or a third party. The characterisation of a cryptocurrency as a security means that its public offering to investors in Brazil, even by means of the Internet or from abroad, must be preceded by registration with CVM (except when registration exemptions apply). In addition, such characterisation also requires that the distribution of cryptocurrencies be carried out by entities duly authorised to operate by CVM.

Taxation

Federal tax authorities understand that cryptocurrencies are financial assets and should be taxed accordingly. In this regard, cryptocurrencies must be declared in income tax returns as “other assets”. Furthermore, individuals are obliged to pay income tax on any capital gains obtained with the disposition of cryptocurrencies, provided that the total value of cryptocurrencies disposed of during any given month exceeds BRL 35,000.00. Tax rates vary from 15% to 22.5%.

Money transmission laws and anti-money laundering requirements

Brazilian anti-money laundering laws and regulations establish a series of obligations applicable to individuals or legal entities that operate in various markets, such as real estate, luxury or high value goods, financial services, broker-dealers, and credit card companies. Such persons are required to keep detailed records of their operations and to report suspicious transactions and other transactions that meet certain pre-defined criteria to the Financial Activities Control Council (COAF), a federal government agency in charge of enforcing anti-money laundering laws and regulations.

Even though Brazilian authorities have already expressed concerns about the use of cryptocurrencies for money laundering purposes, they have not yet amended existing regulations nor enacted new regulations to deal specifically with cryptocurrencies. Nonetheless, in spite of the non-existence of anti-money laundering laws and regulations dealing particularly with cryptocurrencies, existing anti-money laundering laws will apply to transactions involving the use of cryptocurrencies whenever they have been entered into for money laundering purposes.

Furthermore, reporting obligations recently created by federal tax authorities (discussed in greater detail under “Cryptocurrency regulation” above) will enable Brazilian authorities to have access to information that may allow them to identify suspicious transactions from a money laundering perspective.

There are no specific laws or regulations concerning money transmission laws in Brazil applicable to cryptocurrencies.

Promotion and testing

No government-sponsored promotion and testing programmes regarding cryptocurrencies are currently in place in Brazil. However, the Brazilian Central Bank has been studying the use of distributed ledger technology in the financial system by analysing potential use cases and developing working prototypes.

In addition, in May 2019, the Central Bank launched an initiative called the “Financial and Technological Innovation Lab (Lift)”, which provides incentives to projects that may bring technological innovations to the finance arena. Out of 12 projects selected by the Central Bank, one third relies on blockchain technology.

Ownership and licensing requirements

The only restriction on the ownership of cryptocurrencies is set by Circular Notice No. 1/2018/CVM/SIN, issued by CVM, the Brazilian securities and exchange commission. The aforementioned Circular Notice bans the direct acquisition of cryptocurrencies by Brazilian investment funds as, according to CVM, cryptocurrencies are not qualified as financial assets under current regulations. There is no restriction on the ownership of cryptocurrencies by any other persons or entities.

Legal entities, including exchanges, and individuals are not subject to any licensing requirements in Brazil in order to issue, own or transact with cryptocurrencies. However, as explained under “Sales regulation” above, if any person offers cryptocurrencies that are classified as securities under Brazilian law, such person may have to obtain a proper licence from CVM to act as a securities broker/dealer.

Mining

The mining of cryptocurrencies is not prohibited in Brazil and has not been the subject-matter of any specific statement, warning, opinion or regulation by any Brazilian authority.

Border restrictions and declaration

There are no border restrictions or declarations specifically applicable to cryptocurrencies in Brazil. However, Brazil does have foreign currency exchange controls in place, which require conversions of Brazilian currency – the Real – into other currencies, and *vice versa*, to be carried out with the involvement of authorised financial institutions (including traditional banks) and reported to or registered with the Brazilian Central Bank, as the case may be. In certain cases (such as capital contributions made by foreign investors into Brazilian legal entities and foreign loans granted by foreign lenders to Brazilian legal entities or individuals), prior registration with the Central Bank is required.

These foreign currency exchange controls require international transfers of funds in connection with a wide variety of transactions to be carried out only as specified in Central Bank regulations, which normally require such transfers regarding foreign currency exchange contracts to be with authorised financial institutions and the presentation to such financial institutions of supporting documentation regarding the transfers to be made, including information on the nature/purpose of the transfers, and on the beneficiaries.

Even though there are no laws or regulations expressly addressing the use of cryptocurrencies to effect international transfers of funds to or from Brazil and despite the fact that one could find a reasonable legal basis to support the use of cryptocurrencies for that purpose, the Brazilian Central Bank has already stated (in a brief statement that has not discussed the issue in depth) that it sees the use of cryptocurrencies to effect international transfers of funds as not permissible since such use would circumvent existing foreign currency controls.

Reporting requirements

Since 2016, federal tax authorities have required taxpayers to report their cryptocurrencies in their income tax returns as “other assets”, regardless of the number of cryptocurrencies owned and their respective value.

In May 2019, federal tax authorities enacted Normative Instruction No. 1,888/19, which created specific reporting obligations for Brazilian-based exchanges, as well as for Brazilian legal entities and individuals transacting with cryptocurrencies through exchanges located outside Brazil or transacting with cryptocurrencies without using any exchange.

Brazilian-based exchanges are legal entities organised under Brazilian law that offer services related to cryptocurrency transactions, such as brokerage, trading or custodial account services, and that are authorised to accept any means of payment, including other cryptocurrencies, as consideration for their services. Reportable transactions include purchases, sales, donations, issuances and any other transfers of cryptocurrencies (including transfers to and from exchanges). The regulations broadly define cryptocurrencies to include

any digital representation of value that does not qualify as legal tender, is electronically transacted with the use of cryptography and distributed ledger technologies, and is used as an investment (store of value) or an instrument to transfer value or to access services.

The specific reporting obligations set forth in Normative Instruction No. 1,888/19 consist of the following:

- Legal entities and individuals must report, on a monthly basis, data concerning any transactions carried out by them whenever the monthly value of such transactions exceed BRL 30,000.00 (in a single transaction or in a series of transactions).
- Exchanges, on the other hand, must report, also on a monthly basis, all transactions carried out in their platforms in the relevant month, regardless of their amount.

In each case, reportable information includes the dates and types of transaction (purchase, sale, donation, etc.), name of exchanges involved (when the information is not being reported by an exchange), names of the parties, types and characteristics of the cryptocurrencies transacted, transactions amount, and wallet addresses (if any). Parties must be identified by their full names, addresses, tax residency information and taxpayer identification numbers.

In addition to these monthly reporting obligations, Normative Instruction No. 1,888/19 requires exchanges to provide to federal tax authorities annually the following information about their clients: (a) total amount, in Brazilian Reals, of the cryptocurrencies held; (b) the quantity of each cryptocurrency held; and (c) the cost, in Brazilian Reals, of each cryptocurrency held (when that information is reported to the exchange by the relevant client).

Failure to timely comply with these reporting obligations will subject exchanges, entities or individuals, as the case may be, to fines of between BRL 100.00 and BRL 1,500.00 per month of delay. The submission of incomplete, inaccurate or incorrect information will carry fines ranging between 1.5% and 3% of the respective transaction amount.

Estate planning and testamentary succession

There are no special estate and succession rules applicable to cryptocurrencies in Brazil. As long as the private keys that ensure control of the cryptocurrencies remain accessible after death, cryptocurrencies, like any other assets, will become part of the estate and will have the destination provided under general estate and succession laws.

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