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## Whether or not a token falls under Crypto-Asset

If a token (whether NFT or FT)<sup>1</sup> issued by an individual or a business operator on a blockchain falls under the category of a Crypto-Asset<sup>2</sup> as defined in Article 2 (5) of the Payment Services Act, the issuance and distribution of the token will be subject to the business regulations under the Payment Services Act, and specifically, the involvement of a Crypto-Asset Exchange Service Provider will be required for the handling of the token. Therefore, whether or not a token falls under the definition of Crypto-Asset is an extremely important issue for conducting business using a token, and it has been pointed out that when for determining whether a token falls under Crypto-Asset, the criteria "which can be used against unspecified persons for the purpose of paying consideration" which is one of the requirements for falling under Crypto-Asset, is unclear. In response to this, the Financial Services Agency (FSA) published a draft revision to the Administrative Guidelines to clarify the criteria in December last year, and submitted it for public comment. On March 24 this year, the FSA published its views on public comments and a revised version of the draft revision to the Administrative Guidelines based on public comments.

In this letter, we will summarize the content of the draft revision to the Administrative Guidelines (revised version) and the FSA's views on public comments, as well as explain some of the issues to be considered when determining whether NFT that have actually been issued falls under Crypto-Asset.

### **I. Summary of Revision of the Administrative Guidelines (Part 3: Matters Related to Financial Companies) (published on December 16, 2022), the FSA's view on public comments on the revision (published on March 24, 2023) (hereinafter referred to as the "Responses to Public Comments") and the revised version of the Administrative Guidelines based on the FSA's "view" (published on March 24, 2023) (hereinafter referred to as the "Revised Guidelines")**

#### **1. Criteria for determining whether or not a relevant asset "can be used against unspecified persons for the purpose of paying consideration" in relation to falling under a Crypto-Asset prescribed in Article 2, paragraph (5), item (I) of the Act ("Item 1 Crypto-Asset")**

##### (1) Provisions of the revised Guidelines

A. Safe harbor that is deemed not to fall under the requirement of "can be used for unspecified persons for the purpose of payment of consideration" ("Safe Harbor A")  
Those considered to be within the extent of Goods, etc. that can be purchased or sold using legal currencies or Crypto-Asset under socially accepted conventions.

B. Safe harbor ("Safe Harbor B") to be recognized as "Those considered to be within the extent of Goods, etc. that can be purchased or sold using legal currencies or Crypto-Asset under socially accepted conventions" (Safe Harbor A)

The following (a) and (b) shall be satisfied, and also there is no actual circumstance in which the token is used as payment of consideration for unspecified persons, such as being used for payment of consideration for the purchase of goods, etc. at the actual store, EC site, or application of the retailer.

(a) the intention has been made clear by the Issuer, etc. that it is not intended to be used for the payment of consideration for goods, etc. to unspecified persons;

Safe harbor to fall under above ("Safe Harbor B(a)")

(i) The use as a means of settlement is expressly prohibited in the rules of the issuer or the handling business operator or in the product explanation, etc., or

(ii) The specifications of the system does not allow use as a means of settlement.

(b) Factors indicating that it can be used for payment of the price of goods, etc. to unspecified persons are limited by taking into consideration the price and quantity of said property value, technical characteristics, specifications, etc. comprehensively;

<sup>1</sup> The term "token" as used herein refers to an electronic certificate issued by an individual or a business company using an existing blockchain (typically in accordance with the Ethereum blockchain token standard, such as ERC-20 for FT and ERC-721 for NFT), and is distinguished from electronic certificates generated from each unique blockchain, such as Bitcoin and Ethereum.

<sup>2</sup> Article 2 (5) of the Payment Services Act:

"The term "crypto-assets" as used in this Act means any of the following; provided, however, that those indicating electronically recorded transferable rights prescribed in Article 2, paragraph (3) of the Financial Instruments and Exchange Act (Act No. 25 of 1948) are excluded:

(i) property value (limited to that which is recorded on an electronic device or any other object by electronic means, and excluding the Japanese currency, foreign currencies, and currency-denominated assets; the same applies in the following item) which can be used in relation to unspecified persons for the purpose of paying consideration for the purchase or leasing of goods or the receipt of provision of services and can also be purchased from and sold to unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system; and

(ii) property value which can be mutually exchanged with what is set forth in the preceding item with unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system."

Safe harbor to fall under above ("Safe Harbor B(b)")

- (i) The price per minimum transaction unit is high for use as an ordinary means of settlement, or
  - (ii) The quantity obtained by dividing the issuance quantity by the minimum transaction unit (issuance quantity considering the possibility of split) is limited.
- C. When Safe Harbor A is recognized even if Safe Harbor B is not recognized  
Failure to satisfy Requirements of Safe Harbor B(a) and (b) "does not immediately mean it will fall under the category of a Crypto-Asset, and as a result of individual and specific determination, there may be cases where it does not fall under the category of a Crypto-Asset."<sup>3</sup>
- (2) Explanation of the provisions of the revised Guidelines based on the Responses to Public Comments  
Regarding (1) A "may be used for unspecified persons for the purpose of payment of consideration" above
- (i) In cases where a token is used as a means of exchange for another token (for example, cases where an NFT for an item in a game is exchanged for another NFT in the game, cases where an NFT is exchanged for another NFT in order to obtain a specific limited NFT, cases where an NFT is exchanged for another NFT in a marketplace, etc.), whether or not it falls under the category of "payment of consideration for goods" shall be substantially determined for each individual case based on the actual circumstances. (No. 32) (\*Numbers indicated in this letter are the numbers assigned to each response in the Responses to Public Comments.)
  - (ii) Even if the holder of the token receives the provision of goods or services, if the holder does not lose the token in connection with the provision of goods or services, the token is not used for "payment of consideration." (No. 39)

Regarding the above (1) B. "The following (a) and (b) are satisfied, and also there is no actual circumstance in which it is used for payment of consideration for the purchase of goods, etc. at the actual store, EC site, or application of the retailer."

- (i) If Safe Harbor B is met, even if the token is handled at a domestic or foreign crypto-asset exchange or NFT exchange (including DEX), it is not precluded from being deemed to be "goods, etc. that are considered to remain as goods, etc. that can be purchased or sold by using a legal currency or a crypto-asset in light of socially accepted conventions." (No. 6)
- (ii) There is a possibility that a token that does not fall under the category of a Crypto-Asset at the time of issuance may fall under the category of a Crypto-Asset after a certain point of time due to actual usage conditions or temporal factors after issuance. (No. 10)
- (iii) In cases where it is actually used as a means of payment in real stores, etc. of retailers or in applications, there are cases where the requirement that "it can be used for unspecified persons for the payment of consideration" is satisfied regardless of whether there are many retailers or not. (No. 11)

Regarding the above (1) B. (a) (i) "Prohibition of use as a means of settlement is clearly indicated in the rules of the issuer or the handling business operator or in the product explanation"

- (i) It is required to take reasonable measures not to use the token for payment of consideration, such as issuing a warning to users who are using the token for payment of consideration. (No. 1)
- (ii) It is necessary for the issuer or the product handler to make it clear at the time of secondary distribution as well as at the time of new issuance that it is intended not to be used for payment of consideration for goods, etc. to unspecified persons. (No. 15)
- (iii) In the case where a token is intended to be used only for a specific service of an issuer, and is prohibited under the terms of service from being used for the payment of consideration for a service other than the service in question, and the specifications and system of the token are such that the token is not transferred to any person other than those registered as users of the service in question (any violation of the terms of service shall result in the forfeiture of the user status), the Safe Harbor B (a) shall be satisfied, but whether or not the Safe Harbor B (b) shall be satisfied shall be determined in light of the substance for each individual case based on the actual circumstances. (No. 22)

Regarding the above (1) B. (a) (ii) "The specifications of the system does not allow use as a means of settlement"

Examples include, but are not limited to, specifications that cannot be transferred to a third party on the blockchain and specifications that can be transferred only within a limited community consisting of people who are acquainted with each other. (No. 13)

<sup>3</sup> The wording of the Guidelines is cited in the parentheses, but it can be understood as follows: "If it does not fall under Safe Harbor B due to the failure to satisfy Requirement (a) or (b), it does not immediately mean that Safe Harbor A is not recognized, but Safe Harbor A may be recognized as a result of specific judgment on an individual basis, and as a result, it may not fall under the category of a Crypto-Asset."

Regarding (1) B. (b) (i) "the price per minimum transaction unit is too high to be used as an ordinary means of settlement" above

- (i) If the price per minimum transaction unit is 1000 yen or more, it is considered to be "a high price for an ordinary means of settlement." (No. 16)
- (ii) A situation in which a token is traded at less than 1000 yen later does not immediately fall under the category of a Crypto-Asset. However, for example, if a token is traded at less than 1000 yen for a certain period of time, it does not satisfy the requirement that the token is "at a high price as an ordinary means of settlement." (No. 16)
- (iii) The price of a token shall be determined in principle on the basis of the price at which the token is traded on the service platform on which it is provided or on a secondary market. (No. 19)
- (iv) When a token is newly provided, the price that serves as a criterion for determining whether the token is a Crypto-Asset shall be the selling price of the token that is issued and sold for a consideration, and 0 yen for the token that is issued and delivered free of charge. (No. 23)
- (v) In the case where each token has different properties and functions and thus it cannot be said to be of the same type, and also the tokens are traded at different prices on exchanges, etc. due to their individuality, the price per minimum transaction unit for each token traded on an exchange, etc. will be the "price per minimum transaction unit." (No. 26)
- (vi) Whether or not a token is provided free of charge as a so-called free gift shall be substantially determined for each individual case based on the actual circumstances, such as whether or not actually there is consideration for the delivery of the token. (No. 34)

Regarding (1) B. (b) (ii) above: "The quantity obtained by dividing the issue quantity by the minimum transaction unit (issue quantity in consideration of the possibility of split) is limited"

- (i) When the quantity obtained by dividing the issuance quantity by the minimum transaction unit (issuance quantity taking into account the possibility of split) is one million units or less, it can be said to be "limited." (No. 20)
- (ii) Whether or not a token can be divided is considered to be determined by its nature, specifications, etc. However, in general, if it is possible to reduce the minimum transaction unit by dividing the token, such as in the case of a Crypto-Asset, the token can be divided. (No. 24)
- (iii) If the type of token differs depending on the content of the provided service, the issuance quantity is calculated for each different type of token. (No. 36)
- (iv) Tokens with different associated content, such as different parts of associated illustrations, are basically deemed to be different tokens rather than the same type, and the requirements for the number of issued tokens are determined for each token. However, even if the associated content is different, in the secondary market, etc., if the tokens are treated as the same type from the viewpoint of the handling method, price, etc., the total number of tokens treated as the same type is used as the criteria for judgment. (No. 35)

Regarding (1) C. "Failure to satisfy requirement (a) or (b) of Safe Harbor B does not immediately fall under a Crypto-Asset, and as a result of individual and specific judgment, there are cases where it does not fall under a Crypto-Asset."

In cases where assets are actually used for the payment of consideration for the purchase, etc. of goods, they fall under the category of Crypto-Asset because they can be "used for unspecified persons for the payment of consideration." (No. 25)

**2. Criteria for determining whether the assets fall under the category of Crypto-Asset prescribed in Article 2, paragraph (5), item (ii) of the Act (Item 2 Crypto-Asset) "may be exchanged with those listed in the preceding item with unspecified parties"**

(1) Provisions of the revised Guidelines

Criterion explained in paragraph 1 above applies to judging whether "products and rights, etc. which not only can be purchased or sold using Item 1 Crypto-Asset but also have economic functions equivalent to those of the relevant Crypto-Asset" which was one of the criteria in the previous Administrative Guidelines.

→Even if a token can be exchanged with Item 1 Crypto-Asset, if the token "is considered to remain as an article, etc. that can be purchased or sold by using a legal currency or Crypto-Asset in general societal terms," it cannot be said that the token "has an economic function equivalent to that of Item 1 Crypto-Asset" and the criteria for determining whether or not the token "is considered to remain as an article, etc. that can be purchased or sold by using a legal currency or Crypto-Asset under socially accepted conventions" is subject to the same criteria for determination discussed in 1B and C above.

- (2) Explanation of the provisions of the Revised Guidelines based on the Responses to the Public Comments  
No special requirement.

## II. Issues to be considered regarding NFT

### 1. Tokens "of the same kind" and "NFT"

In NFT, while information with a certain level of individuality that indicates certain content is recorded, the specific benefits that the NFT holder can enjoy in relation to the content are determined by an agreement with the issuer. The NFT holder receives benefits related to the content through the issuer in accordance with an agreement with the issuer, and does not necessarily automatically receive the benefits as a function of the information itself associated with the recorded content. The property value of the NFT may be based on the rarity of the token that indicates the content, but it is often based on the value of the benefits related to the content (for example, the use of a specific item in a game) that the NFT holder receives.

In general, NFT is referred to as "non-fungible" because the information itself that indicates the content is unique, not because it is linked to a specific content or benefit. Any number of non-fungible tokens that are linked to a specific content and can receive the same benefit for the content can be issued, and these are categorized as "tokens of the same type" in the Guidelines and Responses to Public Comments. The Guidelines and Responses to Public Comments do not deny the applicability of the requirement of "tokens that can be used for payment to unspecified persons" due to their uniqueness as NFT, but take the position of judging whether or not it "can be used for payment to unspecified persons" based on factors such as "price per minimum transaction unit" and "quantity obtained by dividing the issued quantity by the minimum transaction unit" per "tokens of the same type" regardless of whether it is an NFT or an FT.

It is worth noting that whenever the public comments use the term "NFT" in the question, the Responses to Public Comments states that "the meaning of NFT is not always clear, and it is difficult to give a general answer," and responds to such question as an issue regarding "token" rather than "NFT." It seems that the Responses to Public Comments deliberately avoids answering after endorsing a certain meaning of "NFT."

### 2. Applicability of Safe Harbor B in light of the structure and status of the currently issued NFT

#### (1) Regarding B (a)

B (a) (i) "The prohibition of the use as a means of settlement shall be clearly indicated in the rules of the issuer or the handling business operator or in the product explanation."

<Issues to be considered>

- Is it possible to take "reasonable measures to prevent the relevant token from being used for the payment of consideration, such as issuing a warning to users who are using the token for the payment of consideration" that No. 1 in the Responses to Public Comments requests as a requirement to satisfy B (a) (i)?  
→In cases where the issuing company prohibits the use as a means of payment pursuant to the terms of use, etc. and finds out that it is actually used as a means of payment, it may be possible to issue a warning about it (on the website, etc.), but it is not clear whether that is sufficient.
- Is it possible to "clarify that it is intended not to be used for payment of the price of goods, etc. to unspecified persons not only at the time of new issuance but also at the time of secondary distribution" which is required as a requirement to satisfy B (a) (i) in Responses to Public Comments No. 15?  
→It is not clear whether it is sufficient to clearly indicate in the rules of the issuing company that the use of secondary distribution as a means of settlement is prohibited.
- According to Responses to Public Comments No. 22, in the case where "a token is intended to be used only for a specific service of an issuer, and it is prohibited under the terms of service to be used for payment of consideration for a service other than the relevant service," B (a) is satisfied "if the specifications and systems are such that transfer to a person other than a person registered as a user of the service is not allowed." In this case, is it possible to achieve to "specify that transfer to a person other than a person registered as a user of the service is not allowed"?

B (a) (ii) "It is designed not to be used as a means of settlement in the system"

<Issues to be considered>

- Is it possible to adopt the "specifications that can only be transferred within a limited community consisting of persons who are acquainted with each other" mentioned as an example in Responses to Public Comments No. 13?  
→It is possible to establish a specification of the system to limit the transfer only within the private chain established by the issuer, but whether it can be regarded as "transfer within a limited community consisting of people who are acquainted with each other" seems to be judged on a case-by-case basis.

Comments on satisfying the requirement of B (a)

It is difficult to judge whether requirement of B (a) (ii) is satisfied only from the Responses to Public Comments. However, it seems possible to satisfy B (a) (i) if it is sufficient to take measures such as issuing a warning when the issuer finds out that the token is used for the payment of consideration to satisfy the requirement of "reasonable measures not to be used for the payment of consideration," and also if it is sufficient to clearly indicate in the rules of the issuing company that it prohibits the use as a means of settlement even at the time of secondary distribution to satisfy the requirement of "express intention not to be used for the payment of consideration even at the time of secondary distribution".

If B (a) (i) is satisfied, then B (a) is satisfied.

(2) Regarding B (b)

B (b) (ii) "The quantity obtained by dividing the issuance quantity by the minimum transaction unit (issuance quantity considering the possibility of split) is limited"

<Issues to be considered>

- Is it possible to make specifications so that a token cannot be divided?

Comments on how to satisfy B (b)

B (b) (i) may not be satisfied in some cases because the price after distribution cannot be controlled. However, it may be achievable to satisfy B (b) (ii) if it is possible to establish the specifications which do not allow division of the token.

If B (b) (ii) is satisfied, then B (b) is satisfied.

(3) B "There is no actual fact that it is used as payment of consideration to unspecified persons"

<Issues to be considered>

- In cases where a certain token is used as a means of exchange for another token (for example, in cases where NFTs of items in the game are exchanged within the game, in cases where NFTs are exchanged with another NFT in order to obtain a specific limited NFT, in cases where NFTs are exchanged with each other in a marketplace, etc.), can it be deemed that there is "actual use as payment of consideration to unspecified persons"? If it can be deemed that there is "actual use as payment of consideration to unspecified persons," then what requirements are necessary to be met, in order not to be deemed that there is no "actual use as payment of consideration to unspecified persons"?

→Responses to Public Comments (No. 32) states that in such cases, "It will be substantially determined for each individual case in accordance with the actual situation." It does not indicate that they consider exchange between NFTs itself does not fall under "use as payment of consideration." It does not provide any criteria that can be used as a clue as to what kind of situation is deemed to be "actual use as payment of consideration." Therefore, if there is a situation where exchange between NFTs is actively conducted with unspecified persons, whether or not such situation is deemed to be "actual use as payment of consideration" will be determined on a case-by-case basis.

According to Responses to Public Comments No. 25, if Safe Harbor B is not satisfied because it is deemed to be "actually used as payment of consideration," Safe Harbor A cannot be satisfied at all even if there are other circumstances, and it falls under the category of a Crypto-Asset. Therefore, when NFTs are expected to exchange with each other, it is necessary to confirm in advance what kind of exchange is considered to be "actually used as payment of consideration."

End.

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