British Virgin Islands blockchain and cryptocurrency regulation 2019, first edition

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Government attitude and definition

The British Virgin Islands ("BVI") regulator, the Financial Services Commission ("FSC"), recognises Bitcoin- and Ether-focused funds. This has resulted in leading fintech companies such as Bitfinex, Finamatrix and Football Coin being incorporated in the BVI. The primary focus of the service providers in the jurisdiction relates to initial coin offerings ("ICOs") and initial token offerings ("ITOs"). The challenge for the BVI, along with all other jurisdictions, is how to regulate the fundraising for such offerings. Most ICOs and ITOs established in the BVI use the structure of a business company incorporated under the BVI Business Companies Act 2004 (the "BCA"). This provides corporate flexibility, relative free-flow of funds, and low comparative establishment costs associated with a BVI company.

At the present time neither the FSC nor the BVI Government have given any form of regulatory advice or guidance in respect of ICOs or ITOs, nor have they issued any guidance for cryptocurrencies, blockchain or financial technology more generally. The BVI Government has indicated its intention to establish a legal framework that is supportive of the cryptocurrency and financial technology sectors in the BVI, but no draft legislation or consultations have been announced. In the meantime, the consensus view is that the BVI are following a 'wait and see' approach to the development of how ICOs and ITOs will be regulated.

Some ICOs and ITOs have been promoted as an unregulated form of investment, relying on the argument that tokens do not constitute a security for the purposes of the different investor protection laws around the world. As a result, some token issuers have used ICOs and ITOs as a means of avoiding regulation. However, depending on the nature of an investor's rights that attach to a token, it is possible that a token may represent a form of security, particularly if those rights entitle the investor to a share of the profits of the token issuer and the investor is not involved in the day-to-day management and control of the token issuer. Tokens that give investors other rights, such as licences to products and services, could fall outside the scope of being classed as a security. However, token issuers and investors still need to proceed with caution because it is possible that those types of tokens could be classed as a security, depending on the facts and circumstances of each case and the investor protection laws that apply to the tokens. Further, how the gains on tokens are taxed in different countries may also influence how they are recognised for regulatory purposes.

While the consensus is that ICOs and ITOs will not be subject to securities legislation in the BVI, whether or not the legislation applies will be fact-specific and driven by the nature of the underlying assets of the respective offering. In particular, if a company wishes to: (a) collect and pool investor funds for the purpose of collective investment; and (b) issue fund interests that entitle the holder to receive, on demand or within a specified period after demand, an amount calculated by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, then it will be deemed open-ended and need to be licensed. There are a number of fund options in the BVI, including public funds, professional funds, private funds, approved funds and incubator funds.

With regard to cryptocurrencies, these are not treated as money in the BVI and do not enjoy equal dignity with domestic or foreign fiat currencies. Pursuant to the Legal Tender (Adoption of the United States Currency) Act 1959 and the Coinage and Legal Tender Act 1973, the US dollar is the legal tender of the BVI. BVI legislation is silent regarding the definition of what is money and currency and the existing regulatory framework does not contemplate cryptocurrencies.

There are no government-backed cryptocurrencies and the BVI's constitutional and currency system means it does not have a central bank.

Cryptocurrency regulation

As discussed above, there is no current regulatory framework for cryptocurrencies in the BVI; similarly there is no express prohibition. The government has indicated a willingness to establish a supportive legal framework, but the industry is still in its early stages in the BVI. The regulation of cryptocurrencies, ICOs and ITOs will be determined by how the framework for such transactions fits into the existing regulatory framework in the BVI which, as noted, above was drafted without contemplating cryptocurrencies.

Sales regulation

The Securities and Investment Business Act 2010 ("SIBA") regulates, amongst others, the provision of investment services from within the BVI. SIBA provides that any person carrying on, or presenting themselves as carrying on, investment business of any kind in or from within the BVI must do so through an entity regulated and licensed by the FSC (subject to the safe harbours in SIBA). Investment business is widely defined and covers: (i) dealing in investments; (ii) arranging deals in investments; (iii) investment management; (iv) investment advice; (v) custody of investments; (vi) administration of investments; and (vii) operating an investment exchange.

"Investments" is also widely defined and may include: (i) shares, interests in a partnership or fund interests; (ii) debentures; (iii) instruments giving entitlements to shares interests or debentures; (iv) certificates representing investments; (v) options; (vi) futures; (vii) contracts for difference; and (viii) long-term insurance contracts.

Cryptocurrencies in general, and tokens under an ICO or ITO, do not fall immediately within any of the above criteria and therefore do not fall under the SIBA regime. Where they may fall under the SIBA regime is where the token that is subject to the ICO or ITO is viewed as security or derivative. This will be fact-specific to the relevant ICO or ITO that is being undertaken and would require a level of detailed analysis in each case.

Anti-money laundering

BVI AML legislation must be carefully considered with respect to an ICO or ITO. AML legislation primarily focuses on regulated entities in the BVI and requires certain policies and procedures to be established by "relevant persons" conducting "relevant business". Both the terms "relevant persons" and "relevant business" are strictly defined terms. The requirements seek generally to provide for regulatory rules to minimise and eliminate any form of money laundering or terrorist financing through the BVI. If the company is deemed to carry out "relevant business" (e.g. it is a fund, provides money transmission services, advises on money brokering, etc.) then it has to obtain and maintain client KYC and have internal systems and controls and provide the FSC with a copy of such internal policies for approval.

ICOs of standard utility tokens would not be caught within the definition of "relevant business", and therefore the company is unlikely to be a "relevant person". However, the company and its directors should nevertheless be aware of the BVI AML obligations as a way of future-proofing the business.

Taxation

There are no specific taxes levied against cryptocurrencies in the BVI. The BVI is a tax-neutral jurisdiction and does not have any withholding tax, capital gains taxes, income tax or corporate taxes at the time of writing. In the unlikely event that a BVI entity owns BVI situate land, the entity may be responsible for stamp duties.

Where there is an ICO or ITO, the exchange operators will need to be cognisant of the impact of the Foreign Account Tax Compliance Act ("FATCA") and Common Reporting Standards, which will be relevant to determining the ultimate beneficial ownership of the BVI entity issuing the ICO or ITO. While these pieces of legislation will not be immediately relevant at the launch of the ICO or ITO, they will need to be considered as the BVI business company acting as the issuer starts to conduct business more generally.

Money transmission laws and anti-money laundering requirements

The relevant money transmittal law in the BVI is the Financing and Money Services Act, 2009 ("FMSA") which regulates money services business. FMSA defines money services as including:

- money transmission services;
- cheque exchange services;
- currency exchange services; and
- the issuance, sale or redemption of money orders or travelers' cheques or other such services.

The regime under FMSA is broadly equivalent to the Payment Services Directive. As set out above, the consensus is that for the purposes of BVI legislation, "money" and "currency" refer to fiat currencies rather than cryptocurrencies. It is therefore unlikely that ICO or ITO transactions solely involving cryptocurrency or digital tokens would be viewed as falling with the definition of money services and the FMSA regime. Where a cryptocurrency transaction is used to facilitate currency exchange services, then this may be viewed as the provision of money services and therefore fall within the remit of FMSA.

Promotion and testing

There are no "sandbox" or other programmes intended to promote research and investment in cryptocurrency in the jurisdiction at present.

Ownership and licensing requirements

As discussed above, there are no specific regulatory requirements in respect of cryptocurrencies; set out below is the framework for the approved financial manager regime under BVI law.

For persons wishing to act as an investment manager or investment advisor in the BVI, regulatory approval from the FSC may be obtained under: (1) SIBA; or (2) the Investment Business (Approved Managers) Regulations, 2012 (the "Approved Manager Regulations"). The Approved Manager Regulations were implemented in 2012 with a view to offering a significantly simplified approval process and a lighter regulatory framework than that provided under SIBA.

An Approved Manager's licence authorises you to act as manager or advisor to: (1) BVI incubator funds; (2) BVI approved funds; (3) BVI private funds; (4) BVI professional funds; (5) funds domiciled in certain recognised jurisdictions; and (6) closed-ended funds domiciled in the BVI or in certain recognised jurisdictions, if they have the key characteristics of a private or professional fund. However, an Approved Manager cannot offer services to public funds.

The Approved Manager can be set up as a BVI company or a BVI partnership. The Approved Manager licence is fairly easy to obtain, provided that the directors of the Approved Manager can demonstrate expertise and experience in the area of investment business. The main restriction is that an Approved Manager must not manage assets exceeding US$400m if managing regulated investment funds (such as professional and private funds) or US$1bn if managing unregulated funds. The Approved Manager licence can also be used for the provision of asset management to individuals. The limit on assets under management for the provision of asset-management services depends on the type of asset management to be provided, but will not be below US$400m.

There are no capital requirements for the Approved Manager and there is no need to appoint a compliance officer. In contrast, a holder of a licence under SIBA will have to submit audited financial statements, appoint a compliance officer, provide employees with compliance training, etc. That said, the advantage of having a licence under SIBA is that there is no limitation on the value of assets under management. For eligible investment managers or investment advisors, the advantage of becoming licensed as an Approved Manager, as opposed to becoming licensed under SIBA, is that the ongoing obligations owed by an Approved Manager are less onerous than those owed by an investment business licensee under SIBA, namely:

An Approved Manager must:

- at all times have at least two directors, one of which must be an individual. However, directors can be resident in any jurisdiction;
- have an authorised representative appointed;
- submit financial statements annually, which need not be audited; and
- submit an annual return which has to contain certain prescribed information such as that the directors continue to be fit and proper, details of the persons to whom the manager provides service, complaints received, etc.

Mining

Mining Bitcoin in the BVI is permitted and there are no current regulations in respect of mining activity.

Border restrictions and declaration

Further to the earlier distinction between cryptocurrency holdings and fiat currency, there are no border restrictions or obligations currently in place in the BVI in respect of cryptocurrencies.

Reporting requirements

There are no reporting requirements or thresholds for payments made by cryptocurrency currently in place in the BVI. The Beneficial Ownership Secure Search System Act 2017 ("BOSS") requires BVI companies and their registered agents to record information about the beneficial ownership of a BVI company on a central government-controlled, but confidential, database. Beneficial ownership is determined by reference to control tests, i.e. share ownership, voting rights, the right to remove a majority of the board of directors, and the exercise of significant influence and control over a company.

Estate planning and testamentary succession

Cryptocurrencies have not been widely used for the purposes of estate planning and testamentary succession under BVI law. If, in the unlikely event that the cryptocurrency is regarded as an asset actually situated in the BVI, then a deceased's cryptocurrency could not be validly transmitted to his/her heirs or beneficiaries until an application is made to the BVI High Court Probate Registry (the "Registry"). To deal with the deceased's cryptocurrency, a person would need to be appointed as legal personal representative of the deceased, by obtaining the appropriate grant from the BVI Probate Registry. There are two types of grant that may be obtained: (1) Grant of Probate (where the deceased left a will which expressly deals with the BVI cryptocurrency); and (2) Grant of Letters of Administration (where the deceased did not leave a will expressly covering the BVI cryptocurrency). In respect of the latter, the deceased would be deemed to have died "intestate" in relation to the BVI cryptocurrency – even if they had a valid will covering assets in other jurisdictions.

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PLEASE NOTE

This guide is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen 2019

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