

Virtual Assets in the British Virgin Islands: Compliance Period to Expire in January 2021

Introduction

The BVI Financial Services Commission (the “**Commission**”) recently published new virtual asset guidance (the “**Guidance**”). The purpose of the Guidance is to clarify the applicability of the BVI’s existing regulatory regime to virtual assets and virtual asset-related activities.

The Financial Action Task Force’s (“**FATF**”) Recommendations provide that virtual asset service providers (“**VASPs**”) should be required to be licensed or registered. However, the Recommendations also stipulate that it is not necessary for a country to impose a separate licensing or registration system with respect to entities which perform virtual asset-related services but are already regulated (and therefore subject to anti-money laundering and terrorist financing obligations designed to mitigate the risks associated with the performance of VASP services).

What is a Virtual Asset?

Adopting the FATF’s definition, a “virtual asset” is defined in the Guidance as a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes, and is intangible property. Digital representations of fiat currencies are excluded from the definition.

Accordingly, when determining whether licensing is required for virtual asset-related activities in the BVI, an assessment of the following factors is relevant:

1. the way the virtual asset is being utilised;
2. the types of business activities being proposed or conducted;
3. whether the business activities are analogous with those conducted through traditional businesses; and
4. the characteristics and business activities (economic substance) relating to an offering / issuance.

Scope of the Regulation

Virtual asset products may be captured by the BVI regulatory regime when they are initially issued, or when they

are in the hands of a holder or the subject of an investment activity.

The Guidance provides that virtual assets and virtual asset-related products which are used as a means of payment for goods and services (for example tokens), and which provide the purchaser with an ability to only purchase goods and services (utility tokens) are not captured by the BVI's regulatory regime.

However, where a virtual asset or virtual asset-related product or service provides a benefit or right beyond being a mere medium of exchange, it may be captured by the BVI Securities and Investment Business Act, 2010 ("SIBA").

In general, under SIBA, no person may carry on an investment business by engaging in any regulated investment activity in or from within the BVI unless that person holds the applicable investment business licence.

Investment activities regulated under SIBA include:

1. dealing in investments or arranging deals in investments;
2. managing investments or providing investment advice;
3. providing custodian services and administration services with respect to investments; and
4. operating an investment exchange.

Therefore, it is necessary to identify what types of virtual asset product constitute "investments" under SIBA.

Regulated Activities – Initial Issuance

The different types of assets or investment activities which constitute "investment" under SIBA are set out in Schedule 1 of SIBA.

The Guidance clarifies when virtual asset products may fall within the different categories of "investment" under SIBA.

The Guidance is not meant to be exhaustive and where a virtual asset product is not mentioned in the Guidance, but exhibits a characteristic akin to a regulated activity under SIBA, the views and guidance of the Commission should first be secured before proceeding.

Regulated Activities – After Issuance

If a virtual asset product constitutes an "investment" under SIBA, any person carrying on a regulated investment activity (subject to certain exclusions under SIBA) in respect of that product will require the applicable licence. For example, where the manner in which a coin or token is used, and the rights attached thereto, grant the holder a share or equity interest, that coin or token would be considered an "investment".

The Guidance clarifies that the transmission of virtual assets or virtual asset-related products would not

currently require a money services business licence under the BVI Financing and Money Services Act, 2009 but that, in light of the launch of the BVI's regulatory sandbox, the views of the FSC should be sought prior to proceeding with such transmission in or from within the BVI, or by or through a BVI company.

Next Steps

Every entity registered or incorporated within the BVI which acts as an intermediary for, or itself conducts, any virtual asset or virtual asset-related activity should therefore consult with BVI legal counsel in order to determine whether its activities require a licence or certificate.

A compliance period is currently in force, until 12 January 2021, during which any entity which requires a licence or certificate, but which has not yet submitted an application, may make such an application and thereby avoid violation of financial services laws, and related enforcement action and penalties.



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