

Crypto-currency and ICOs in the British Virgin Islands

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Offerings of new cryptocurrencies, tokens and other virtual assets (collectively, **ICOs** [\[1\]](#)) have raised billions of dollars in recent years. Leading offshore financial centres such as the British Virgin Islands (**BVI**) have sought to become a major part of this new capital raising phenomenon and there is now extensive use of BVI companies as virtual asset issuers. While other offshore jurisdictions have experienced similar interest, the relative advantages of using a BVI company to create and offer new cryptocurrencies have now made the BVI a leading ICO base.

The popularity of the BVI as a leading origination jurisdiction for crypto and other virtual assets is not expected to be diminished by the passage of the BVI's Virtual Assets Service Providers Act, 2022 (the **VASP Act**, our note on which can be found [here](#)) which came into force in February 2023. While the VASP Act will regulate certain activities relating to virtual assets when undertaken by a BVI entity, for the present the actual issuance of virtual assets is not included as a regulated activity under the legislation and is, therefore, still subject to existing 'TradFi' securities laws. In our note below, we will consider the application of these laws to the issuance of virtual assets.

ICOs

ICOs are, in essence, just another means of accessing third-party capital. Rather than receiving a security whose return is dependent on the performance of the business of the issuer or its group, as in a traditional IPO, in an ICO investors exchange cash for a new virtual asset on a blockchain network. In most cases this virtual asset, or crypto asset, takes the form of a token for use in the application or platform developed by the founders of the project to which the virtual asset relates. However, rather than directly using these "utility tokens" within the application, most investors will hold the tokens in the hope that the success of the underlying enterprise (in which the new utility token will be the sole or principal unit of exchange) will cause the relative cash value of the token to increase as demand for those tokens for use within the

application increases and their potential being accepted as wider means of exchange increases.

As the value of a token is determined by the demand for the token itself rather than returns or repayments from some underlying business operated by the issuer (albeit that there may be an indirect link between token value and business performance), then most types of utility token are not regarded as "investments" or "securities" by regulators and are therefore not subject to many of the regulations and restrictions that might apply to a public debt or equity issue by a company. As a result, ICOs offer an efficient and cost effective means of accessing mass capital for start-up or early stage enterprises or technology entrepreneurs which might not otherwise have access to capital markets.

Structuring

Similar to existing forms of special purpose vehicle capital raising, a typical ICO structure will feature a newly formed issuer vehicle (the **ICO Issuer**) established and managed by a group of ICO sponsors (the **sponsors** or **founders**) for the purpose of investing in a particular project which will be detailed in the ICO business plan or white paper. The ICO Issuer will then raise funds by issuing cryptocurrency tokens on a blockchain network in exchange for investor cash (which may be in the form of conventional fiat currency or, in some cases, other cryptocurrencies). The new tokens may be used within the project being developed by the founders or held for potential capital gains as demand grows. Once the ICO Issuer has achieved its target fundraising goal, the funds raised will generally be invested in the project described in the white paper.

Most BVI ICOs are structured through an ICO Issuer incorporated as a BVI business company under the BVI Business Companies Act, 2004 (the **BCA**).

ICOs in the BVI

The use of a BVI business company incorporated under the BCA as an ICO Issuer brings with it all of the standing advantages associated with BVI business companies and the BVI as a capital friendly jurisdiction. These advantages include:

- corporate flexibility and efficiency enshrined in the modern and commercially minded BCA and other BVI corporate legislation;
- the absence of capital control and maintenance rules, allowing for the free flow of funds in and out of a BVI ICO Issuer;
- tax neutrality;
- low incorporation and annual company maintenance costs relative to similar jurisdictions such as Cayman and Bermuda;
- efficient company maintenance;

- continuing obligations for BVI companies and their officers and owners are commercially progressive and non-onerous, and, for the present at least, most traditional ICO forms would not be subject to additional securities or public offering regulations under BVI law; and
- "transaction fluency" - as the largest offshore corporate domicile the BVI enjoys the presence of a strong professional services community of lawyers, accountants and corporate services providers. Transactions are professionally handled and transaction fluency is optimised.

It is also worth noting that, in addition to those general advantages of BVI law set out above, there are particular aspects of BVI legislation which have specific application to ensuring the success and attractiveness of the BVI as an ICO jurisdiction. For example, since everything in relation to the launch and conduct of the ICO will be done on an electronic platform, the utility of the provisions of the BVI's Electronic Transactions Act 2001 (**ETA**) relating to electronic signatures and record keeping requirements is of fundamental importance. In very general terms the ETA underscores that electronic contracts and records will not be denied legal validity in the BVI simply because they are maintained in electronic, as opposed to paper, format and that transactions of all kinds can be executed by electronic exchange.

ICOs and Existing BVI Securities and Financial Services Regulation

While there is a clear consensus that an ICO in its customary form would not be restricted or subject to more onerous regulation under existing BVI financial services legislation, it is still important and necessary to consider any proposed ICO against such legislation so as to ensure that it is appropriately structured, to avoid tripping any restriction or obstacle that otherwise would not apply.

The BVI financial services legislation relevant for consideration in respect of an ICO includes the following:-

Securities and Investment Business Act 2010 (SIBA)

Investment business activity in the BVI is regulated by the provisions of SIBA which prohibits a person from carrying on, or holding themselves out as carrying on, investment business of any kind in or from within the BVI unless that person holds a licence from the BVI Financial Services Commission (**FSC**) or is within one of the exemptions or safe harbours offered by SIBA. However, an ICO of, and subsequent dealings in, standard utility tokens should not be subject to the general prohibition as utility tokens would not come within the definition of an "investment" for the purposes of SIBA. Indeed, the pre-VASP Act Guidance on the Regulation of Virtual Assets in the Virgin Islands (the **Guidance**) issued by the FSC in July 2020, which covered the relationship between crypto and virtual assets and SIBA, made clear that the FSC will not look to interpret SIBA to cover any token that would not otherwise have already been within the regulatory ambit of SIBA.

While most ICO issues would not fall within the scope of SIBA, and therefore there should be no need for the BVI ICO Issuer to hold an FSC investment business licence, there is still a danger that certain forms of token or crypto asset might come within the definition of investment if their value or return is determined by reference to the performance of some other asset or business (such that it becomes a form of derivative). Therefore the terms of any proposed token or crypto asset should be carefully considered.

Similarly, most ICOs should fall outside the public offer rules at Part II of SIBA for the same reason as set out above (because standard utility tokens would not be considered "investments") – if such rules were presently in force. Part II of SIBA requires that a formal offering prospectus be produced and registered when an offer of securities is made to the public and deals generally with "public issue of securities", however none of Part II is presently in force and therefore consideration of its application still remains academic.

BVI AML Law

The BVI's present anti-money laundering laws are codified in the form of the Proceeds of Criminal Conduct Act 1997, the Anti-Money Laundering Regulations 2008 and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (together the **AML Law**). As in other responsible jurisdictions, the requirements of the AML Law are intended to provide a comprehensive set of rules and safeguards aimed eliminating or at least minimising money laundering or terrorist financing through the BVI.

The identification, record keeping and reporting obligations imposed by the AML Law are however only applicable to persons ("relevant persons") involved in certain types of regulated business ("relevant business"). ICOs of standard utility tokens would not be caught within the definition of relevant business for these purposes (as issuance of virtual assets are not covered by the VASP Act) and therefore the BVI ICO Issuer involved is unlikely to be a "relevant person". Nevertheless, any ICO Issuer should be alive to the risks of their ICO being used for the purposes of concealing the proceeds of crime and take appropriate measures to safeguard against this possibility.

The Financing and Money Services Act 2009 (FMSA)

FMSA regulates "money services business" in the BVI which includes, *inter alia*, such activities as dispensing money, transmitting money, cheque encashment, currency exchange, and dealing in travellers' cheques. The types of services listed either expressly or self-evidently contemplate transactions in "fiat currency", i.e. currency which is legal tender. As tokens and cryptocurrencies generally are not fiat currency, then the general view is that these fall outside the scope of the definition of money services business and therefore ICOs and subsequent transactions in tokens or other cryptocurrencies would not be subject to FMSA.

Beneficial Ownership Secure Search System Act 2017 (the BOSS Act)

The BOSS Act requires BVI companies and their registered agents to record information as to the beneficial ownership of the company on a central government controlled, but confidential, database. Beneficial ownership for the purposes of the BOSS Act 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. Given that any disclosure here is driven by reference to "control" of the entity, it should be relatively straightforward to ensure that the identity of token holders will not need to be recorded in any beneficial ownership register of an ICO Issuer.

Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS)

At present, the terms of FATCA and CRS as implemented into BVI law would not require an ICO Issuer to record or disclose information on mere token holders (or holders of other crypto assets issued by the ICO Issuer).

Conclusion

Existing BVI legislation, as supported by the Guidance, is sufficiently flexible to support ICOs of utility tokens without these being subject to any additional licensing, disclosure or record keeping obligations under existing BVI financial services legislation. This, coupled with those generally advantageous aspects of BVI law, make the BVI an attractive locale for ICOs and it is expected that the number of ICOs involving BVI companies will continue to increase.

Ogier's BVI-based experts are recognised as leading legal and regulatory experts in all aspects of crypto, blockchain, Web3 and virtual assets services, having worked on many of the BVI's major and most ground-breaking crypto and VASP-related projects and cases over recent years. If you require further information, feel free to get in touch with the key contacts listed on the right of this briefing.

[1] We use "ICO" as a convenient collective shorthand for all forms of crypto, token (including NFT) and other virtual assets offerings, including private, public and subsequent offerings and issuances for nil or negligible consideration – including giveaways and airdrops.

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