

Crypto-currency and ICOs in the British Virgin Islands

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Initial currency offerings (**ICOs**) of crypto-currencies, tokens and other block chain based assets raised over US\$ 3.5 billion in 2017. 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 increasing interest in the use of BVI companies as ICO issuer vehicles. While other offshore jurisdictions have experienced similar interest, structuring an ICO through a BVI company offers a number of advantages which have made the BVI an attractive ICO base. As a result the jurisdiction has seen a number of highly successful launches during the last 12 months.

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 crypto-currency on a blockchain network. In most cases this crypto asset takes the form of a credit or token for use in purchasing goods or services in the application or enterprise into which the ICO proceeds will be invested. However, rather than using these "utility tokens" for making purchases 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 utility 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 - known as the "white paper". The white paper will also set out the fundraising target which the ICO Issuer expects to achieve. The ICO Issuer will then raise funds by issuing crypto-currency 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 crypto-currencies). 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 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.

Although neither the BVI government nor the BVI's financial services regulator, the BVI Financial Services Commission (**FSC**), has issued any ICO or blockchain specific rules or guidance as yet –the FSC's current attitude towards blockchain is mostly constructive and the impulse to impose new restrictions in the area has been resisted. The current official approach is for the BVI to take a 'wait and see' approach to ICO regulation, however, for the present, the consensus view is that an ICO in its customary form would not be restricted or subject to more onerous regulation under the existing financial services regulatory framework in the BVI.

While there is no legislation or regulation specific to ICOs or blockchain in the BVI, it is 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 BVI's Electronic Transactions Act 2001 (**ETA**) provisions on 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 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.

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 and therefore the BVI ICO Issuer involved is unlikely to be a "relevant person". Sponsors though should nevertheless be aware of the provisions of the AML Law and obligations thereunder should any aspect ever be brought to apply to a BVI ICO or BVI ICO Issuer – albeit that we are not aware of any intention to modify any aspect of the AML Law in this respect.

- **The Financing and Money Services Act 2009 (FMSA)**

The FMSA regulates "money services business" in the BVI which is defined as "money transmission services, cheque exchange services, currency exchange services, the issuance, sale

or redemption of money orders or traveller's cheques or other such services". These types of services either expressly or self-evidently contemplate transactions in "fiat currency", i.e. currency which is legal tender. As tokens and crypto-currencies 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 crypto-currencies 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 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.

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