

UPDATE

BVI issues guidance on regulation of virtual assets

Update prepared by Sara Galletly (Partner, BVI and Cayman Islands) and Vicci Lau (Knowledge Lawyer, Hong Kong)

The British Virgin Islands (BVI) Financial Services Commission (FSC) issued guidance (the **Guidance**) on 13 July 2020 clarifying the application of the existing regulatory framework to virtual assets. A six-month transition period is provided for virtual asset related entities to become compliant with the applicable legislation, should they need to do so.

What is the purpose of the Guidance?

The Financial Action Task Force's (FATF) Recommendations state that virtual asset service providers (VASPs) should be required to be licensed or registered. However, the Recommendations also note that a country need not impose a separate licensing or registration system with respect to regulated entities which may perform virtual asset related services, and which are already subject to the full range of applicable obligations to mitigate money laundering and terrorist financing risks emerging from virtual assets.

Accordingly, the FSC has issued the Guidance to clarify the extent to which virtual asset products and services are caught by the existing financial services regulatory regime.

Persons engaged in activities relating to virtual assets should review the Guidance and ensure that they are compliant with the FSC's requirements.

What is a virtual asset?

The Guidance adopts FATF's definition of **virtual asset**, which is a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes, but does not include digital representations of fiat currencies¹. In addition, in line with the FATF Recommendations, it is the FSC's position that virtual assets and their related products meet the definition of an intangible property as they have value and exhibit the attributes of property.

What is the scope of regulation?

The Guidance clarifies whether certain types of virtual asset product and their related activities are captured under the existing financial services legislation; in particular, the Securities and Investment Business Act, 2010 (as amended, **SIBA**). The Guidance notes that virtual asset products may be captured from a regulatory perspective in one of two ways: (i) when the products are initially issued; and (ii) when they are in the hands of a holder or the subject of an investment activity after issuance.

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.

¹ **Fiat currency** means currency that is issued by the relevant body in a country or by a government that is designated as legal tender in its country of issuance through, among other things, government decree or law.

Investment activities regulated under SIBA include:

- dealing in investments or arranging deals in investments;
- managing investments or providing investment advice;
- providing custodian services and administration services with respect to investments; and
- operating an investment exchange².

Therefore, it is important to first identify what types of virtual asset product constitute an 'investment' under SIBA.

Regulated activities – at initial issuance

The different types of assets or investment activities which constitute 'investments' 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. Some of those products are set out below:

Category of investment under SIBA	Virtual asset
Shares, interest in a partnership or fund interests	<p>Where a coin or token is issued in a manner that, or the right attached to the coin or token, would grant the holder a share or equity interest, the activity would be considered an 'investment'.</p> <p>The Guidance clarifies that coins, for example Bitcoin, do not typically grant the holder rights synonymous with shares, etc, and that careful analysis of the terms and features of any virtual asset product is crucial.</p>
Debentures	<p>A debenture is an instrument acknowledging or creating debt which may be secured or unsecured.</p> <p>The Guidance clarifies that there are instances where a token or coin issued creates or acknowledges a debt and may be deemed to be a debenture.</p>
Instruments giving title to shares, interests or debentures	<p>Instruments of this nature include warrants and typically enable a holder to purchase stock or shares, etc.</p> <p>The Guidance clarifies that if a virtual asset creates an entitlement and satisfies the definition of a warrant or other instrument entitling the holder to subscribe for shares, interests or debentures, then the activity would be considered to be an 'investment' under this category.</p>
Certificates representing investments	<p>As a virtual asset is classified as intangible property, a certificate or other instrument that confers a right to virtual assets would be considered an 'investment' under this category.</p>
Options, futures and contracts for differences	<p>The Guidance clarifies that virtual assets derivatives may fall under these categories of 'investments'. For example:</p> <p>Where a virtual asset product is deemed to be an 'investment' and that investment becomes subject to an option to acquire or dispose, it would be considered an 'option' (and therefore an 'investment') under SIBA.</p> <p>Where a virtual asset is the subject of a contract for differences or any other contract, the purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description, it will be captured by SIBA as a contract for differences.</p>

² See Schedule 2 of SIBA.

The Guidance also clarifies that the provisions of SIBA relating to mutual funds would apply where the virtual asset product (ie, digital coin or token) issued is an interest in a collective investment scheme which otherwise satisfies the definition of 'mutual fund'.

If a virtual asset product is not mentioned in the Guidance but exhibits a characteristic akin to a regulated activity under SIBA, industry participants should seek guidance from the FSC before proceeding in or from within the BVI.

Regulated activities – after issuance

If a virtual asset product constitutes an 'investment' under SIBA as discussed above, any person carrying on a regulated investment activity (subject to certain exclusions under SIBA) in respect of that product will require the applicable licence. See '*What is the scope of regulation?*' above for a discussion on investment activities.

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 Financing and Money Services Act, 2009. However, the Guidance does note that, considering the impending launch of the BVI's regulatory sandbox (which will be of interest to those industry participants looking to establish virtual asset businesses with the use of innovative technology), the views of the FSC should be sought prior to proceeding in this regard in or from within the BVI.

Activities outside the regulatory remit

The Guidance further clarifies that:

- virtual assets and their related products which are used as a means of payment for goods and services which provide the purchaser with an ability to only purchase goods and services (utility token), with no accompanying rights other than ownership of such product, would not be captured by the financial services legislation; and
- the focus of regulation is on exchanges and intermediaries conducting business activities, not on persons engaging in virtual asset or virtual asset products for personal use and benefit.

What are the next steps?

Any entity registered or incorporated within the BVI which acts as an intermediary or conducts a virtual asset related activity which is captured under existing legislation requires a licence or certificate, or will be operating in contravention of that legislation.

The FSC has provided a compliance period of six months from the publication date of the Guidance (13 July 2020) during which any relevant entity may submit an application for the applicable licence or certificate. The FSC may take enforcement action where an entity engaged in any regulated activity referred to in the Guidance fails to submit an application for licensing within that period.

Contacts



Rachael McDonald
Managing Partner, Mourant Ozannes
British Virgin Islands
+1 284 852 1722
rachael.mcdonald@mourant.com



Danielle Roman
Partner, Mourant Ozannes
Hong Kong
+852 3995 5705
danielle.roman@mourant.com



John Rochester
Partner, Mourant LP
Guernsey
+44 1481 739 359
john.rochester@mourant.com



Sara Galletly
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9233
sara.galletly@mourant.com



Simon Lawrenson
Partner, Mourant Ozannes
Hong Kong
+852 3995 5707
simon.lawrenson@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2020 MOURANT OZANNES ALL RIGHTS RESERVED