

UPDATE

BVI legislative update for virtual asset service providers

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This Update considers recent legislative amendments to the British Virgin Islands (BVI) anti-money laundering regime (coming into effect on 1 December 2022) and a public consultation on the proposed Virtual Asset Service Providers Act, which together aim to regulate virtual asset service providers (VASPs) in the jurisdiction.

Introduction

Changes to the AML regime

The BVI has recently introduced changes to its anti-money laundering (AML) regime in order to maintain its compliance with international standards and obligations set by the Financial Action Task Force (FATF). In addition to clarifying existing provisions, the BVI AML regime has been updated to bring into scope virtual asset related businesses¹ and gaming businesses, reflecting the jurisdiction's continued commitment to abiding by FATF standards for AML and countering the financing of terrorism purposes.

The BVI's Anti-money Laundering (Amendment) Regulations, 2022 and the Anti-Money Laundering and Terrorist Financing (Amendment) Code of Practice, 2022 have amended the Anti-money Laundering Regulations, Revised Edition 2020 and the Anti-money Laundering and Terrorist Financing Code of Practice, Revised Edition 2020 respectively (together, as amended, the **AML Rules**).

The AML Rules legislate the requirements of certain BVI organisations which are conducting 'relevant business', in order to mitigate against the risk of involvement in criminal activities. These requirements include, among other things, adopting AML measures (eg, due diligence and record keeping measures) for initial and ongoing engagement with customers, clients and investors and for engaging in business relationships before offering services. Whilst gaming businesses have been brought into the scope of the AML Rules immediately, the provisions relating to virtual asset services businesses will be brought into force on **1 December 2022**.

Proposed new VASPs regime

The draft Virtual Asset Service Providers Act (**VASP Act**), which has undergone a short public consultation process but has not yet been gazetted, is expected to be introduced shortly. Broadly speaking, the VASP Act will introduce a new registration and supervisory framework for persons conducting certain virtual assets business activities in the BVI.

Once enacted, the VASP Act will:

- define the activities relating to virtual assets that will require registration;
- provide for the approval of virtual assets exchanges and the provision of virtual assets custody service;
- detail the ongoing requirements and obligations of a VASP;

¹ From 1 December 2022, the definition of 'relevant business' will include 'the business of carrying on or providing virtual assets service when a transaction involves virtual assets valued at US\$1,000 or more' (Regulation 2 of the Anti-money Laundering (Amendment) Regulations, 2022).

- assign specific powers to the BVI Financial Services Commission (the **FSC**) in relation to VASPs; and
- specify the penalties for offences and non-compliance.

The AML Rules – Virtual Assets Services

Broadly, a **virtual asset** is a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes.²

A **virtual assets service** for the purposes of the AML Rules and the VASP Act means the business of engaging, on behalf of another person, in any VASP activity or operation (as outlined in the definition of VASP below) and includes:

- hosting wallets or maintaining custody or control over another person's virtual asset, wallet or private key;
- providing financial services relating to the issuance, offer or sale of a virtual asset;
- providing kiosks (such as automatic teller machines, bitcoin teller machines or vending machines) for the purpose of facilitating virtual assets activities through electronic terminals to enable the owner or operator of the kiosk to actively facilitate the exchange of virtual assets for fiat currency or other virtual assets; or
- engaging in any other activity that, by enactment or guidelines, constitute the carrying on of the business of providing virtual asset service or issuing virtual assets or being involved in virtual asset activity.

A **VASP** for the purposes of the above is a person who provides, as a business, one or more of the following activities or operations for or on behalf of another person:

- exchange between virtual assets and fiat currencies;
- exchange between one or more forms of virtual assets;
- transfer of virtual assets, where the transfer relates to conducting a transaction on behalf of another person that moves a virtual asset from one virtual asset address or account to another;
- safekeeping or administration of virtual assets or instruments enabling control over virtual assets;
- participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset; or
- perform such other activity or operation as may be specified by enactment.

General AML Requirements

From 1 December 2022, a VASP conducting virtual asset services will be responsible for complying with the provisions of the AML Rules, which include:

- establishing and maintaining written identification, record keeping and internal reporting procedures and controls in connection with new and continuing business;
- maintaining a register of money laundering reports and inquiries;
- a duty to appoint a money laundering reporting officer and to notify the FSC or the Financial Investigation Agency (as applicable) of the appointment of such officer;
- establishing internal reporting procedures in relation to reporting knowledge or suspicion of money laundering; and
- taking appropriate measures to educate and train staff, including on how to recognise and effectively deal with transactions involving money laundering, internal procedures and control systems which have been established in compliance with the AML Rules, as well as their personal obligations to comply with the AML Rules.

² A **virtual asset**, for the purpose of the AML Rules and the VASP Act, does not include (a) digital representations of fiat currencies and other assets or matters specified by enactment or guidelines; or (b) a digital record of a credit against a financial institution of fiat currency, securities or other financial assets that can be transferred digitally.

Transfer of virtual assets

The new AML Rules also specifically deal with virtual assets transfers in respect of VASPs which conduct a transfer of virtual assets on behalf of an 'originator'³ (the **Originating VASP**), those which receive a transfer of virtual assets on behalf of a 'beneficiary'⁴ (the **Beneficiary VASP**) and those which participate in the execution of a transfer of virtual assets and are situated in the BVI but are not the Originating VASP or the Beneficiary VASP (the **Intermediary VASP**). From 1 December 2022, the relevant requirements will apply to the transfer of virtual assets (ie, any transaction carried out on or behalf of an originator with a view to making the virtual asset available to a beneficiary) of a value of US\$1,000 or more which is sent or received by a VASP that is established in the BVI.

The new provisions, which will increase transparency and facilitate the tracking of transactions, impose obligations on a VASP in relation to every transfer, to obtain and maintain information⁵ on the originator and the beneficiary of a transfer of virtual assets. The obligations, subject to certain exceptions, also include:

- **Originating VASP**
 - must submit complete originator information (which it has previously verified) and beneficiary information to the Beneficiary VASP (or 'obliged entity'⁶ receiving the transfer or virtual assets on behalf of a beneficiary) simultaneously with the transfer of virtual asset.;
- **Beneficiary VASP**
 - must have systems in place to verify the beneficiary information provided by the originator and maintain effective procedures to detect gaps in the information provided to it; and
 - must have risk-based policies and procedures to determine the appropriate action to take where the information provided is incomplete (eg, to reject or suspend the transfer or take appropriate follow-up action).
- **Intermediary VASP**
 - must keep any information it receives on the originator and the beneficiary accompanying a transfer of virtual assets with that transfer;
 - must maintain effective procedures to detect missing originator or beneficiary information; and
 - must have risk-based policies and procedures to determine the appropriate action to take where the information provided is incomplete (eg, to reject or suspend the transfer or take appropriate follow-up action).

Where the same VASP holds or controls both the originator and beneficiary sides of a transfer of virtual assets, that VASP will need to consider the information from both sides of the transfer to determine if there are any AML concerns and a suspicious activity report should be filed in relation to the transfer in any country affected by a suspicious transfer of virtual assets.

The Originating VASP, Intermediary VASP and Beneficiary VASP will be required to keep records of the originator/beneficiary information for a period of at least 5 years from the date of the transfer, if not made from/to an account or, if made from/to an account, from the date the business relationship ended. In addition, the Beneficiary VASP and any Intermediary VASP will be obliged to provide complete originator or beneficiary information relating to a transfer of virtual assets to the Financial Investigation Agency or the FSC within 3 working days of receiving such a request.

Fines and offences

Any person who commits an offence in contravention of the AML Regulations will be liable on conviction (whether summary or indictment) to a fine of up to US\$150,000.

³ **Originator** means (a) a person that places an order with the virtual asset service provider for the virtual asset transfer; or (b) where the transfer is carried out by a virtual asset service provider on behalf of a client or other third party, the client or third party who owned the virtual asset immediately before the transfer.

⁴ **Beneficiary** means the natural or legal person or the legal arrangement that will own the virtual asset on completion of a transfer.

⁵ For the originator, this information includes its name and address, place of birth or identity number and account number, or unique identifier, used to process the transaction. For the beneficiary, this information includes its name and account number, or unique identifier, used to process the transaction.

⁶ Such person must be licensed or registered and supervised for the provision of virtual asset services outside the Virgin Islands.

The VASP Act

The VASP Act, when in force, will provide the framework for the conduct of virtual asset business in the BVI and for the registration of persons who are providing virtual asset services. A summary of some key elements of the VASP Act is set out below.

What will the VASP Act apply to?

As described above, a **virtual asset** is defined as 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 a digital representation of fiat currencies⁷. **Virtual asset services** means the business of engaging, on behalf of another person, in any VASP activity or operation (as outlined in the definition of VASP above). This includes the exchange, transfer and safekeeping of virtual assets, as well as the provision of financial services relating to a sale, offer or issuance of virtual assets.

Who will the VASP Act apply to?

The VASP Act will apply to all persons operating in or from within the BVI that qualify and are registered as a VASP in order to provide a virtual asset service as a business. Subject to any exclusion, BVI companies carrying on a virtual assets service outside the BVI will fall within scope of the VASP Act. In addition, a person will be deemed to carry on virtual assets service in the BVI if they occupy premises in the BVI for the purposes of carrying on a virtual assets service.

An application to the FSC for registration as a VASP to undertake such business may be made in one or more of the following categories:

- to carry on the business of providing a virtual assets service;
- to engage in the business of providing a virtual assets custody service; and
- to operate a virtual assets exchange.

Key requirements

VASPs will be required, among other things, to:

- have at least two individual directors. The FSC will have the power to require one of those directors to be physically resident in the BVI, having considered the nature and risk associated with the VASP;
- ensure that directors, senior officers and persons holding a significant or controlling interest are fit and proper persons⁸;
- have an appointed authorised representative to act as the main intermediary between the VASP and the FSC;
- appoint an auditor (unless exempted by the FSC);
- prepare financial statements and submit a copy of the auditor's report within six months of the end of their financial year;
- maintain their business in a financially sound condition and be in a position to meet their liabilities as they fall due;
- comply with the requirements of the BVI AML regime⁹;
- unless an exemption applies, appoint a compliance officer and establish and maintain adequate systems and controls to ensure compliance with the requirements of the VASP Act;
- comply with relevant parts of the Regulatory Code, Revised Edition 2020;
- have arrangements for the proper protection of client assets (including appropriate identification and segregation); and
- adopt measures to assist in tracing and collecting IP addresses of their customers and collect such information relating to their customers consistent with the BVI Data Protection Act, 2021.

⁷ **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.

⁸ Such persons should meet the criteria outlined in Schedule 1A of the Regulatory Code, Revised Edition 2020.

⁹ See General AML Requirements above, as provided for by the Anti-money Laundering (Amendment) Regulations, 2022 and the Anti-Money Laundering and Terrorist Financing (Amendment) Code of Practice, 2022.

Additional requirements may be imposed in relation to the provision of virtual assets custody services or the operation of a virtual assets exchange. In addition, the prior approval of the FSC will be required in relation to:

- the appointment of a director or senior officer of a VASP;
- other than where the VASP is listed on a recognised exchange:
 - before a person owning or holding a significant¹⁰ or controlling interest¹¹ in the VASP (directly or indirectly) sells, transfers, charges or disposes of that, or any part of that, interest or a significant or controlling interest in the VASP (directly or indirectly) is acquired; and
 - before issuing shares or permitting a reorganisation of its shares that results in a person acquiring a significant or controlling interest in the VASP or where a person already owning or holding such an interest in the VASP increases or decreases the size of their interest.

A VASP will also be under an obligation to report certain information to the FSC as it may prescribe in writing. Such information includes:

- the VASP's level of compliance with the VASP Act;
- a summary of the VASP's clients by geographical location;
- the financial position of the VASP;
- risks encountered by the VASP, including how they were resolved and associated loss;
- the VASP's key performance indicators, including achievements and statistics evidencing the same; and
- any significant complaints by clients.

Regulatory sandbox participants

A VASP may apply to the FSC for approval to participate in the BVI's regulatory sandbox in accordance with the Financial Services (Regulatory Sandbox) Regulations, 2020 (the **Sandbox Regulations**). For more information on the Sandbox Regulations please see our guide, [BVI regulatory sandbox comes into play](#).

A person approved as a sandbox participant will be required to comply with the requirements and restrictions of the Sandbox Regulations for such time as it remains in the regulatory sandbox and, subject to any exemption granted by the FSC, will be required to comply with the requirements and restrictions under the VASP Act, when in force, in relation to virtual assets.

Virtual assets custody and exchange

Under the VASP Act, a **virtual assets custody service** means the acceptance of virtual assets or instruments for safekeeping that enables a VASP to exercise control over those virtual assets or instruments. A **virtual assets exchange** means a trading platform that is operated for the purpose of allowing an offer or invitation to be made to buy or sell any virtual asset in exchange for money or any virtual asset and which comes into custody, control, power or possession of, or over, any money or virtual asset at any point in time during its course of business.

A VASP that wishes to provide a virtual assets custody service or to operate a virtual assets exchange will be required to include additional information in its application for registration with the FSC. For a virtual assets custody service, such information includes the:

- facilities and security measures the VASP has in place to enable the safekeeping of virtual assets and related instruments;
- measures in place to ensure proper segregation of client assets;
- risks associated with its safekeeping arrangements;

¹⁰ **Significant interest** in relation to an entity means a holding or interest in the entity or any holding company of the entity held or owned by a person, either alone or with any other person and whether legally or equitably, that entitles or enable the person, directly or indirectly to (a) control ten percent or more of the voting rights of that entity at a meeting of the entity or of its members; (b) a share of ten percent or more in any distribution (if applicable) made by the entity; (c) a share of ten percent or more in any distribution (if applicable) of the surplus assets of the entity; or (d) appoint or remove one or more directors of the entity.

¹¹ **Controlling interest** means interest in the entity whereby the person holding the interest (a) has an influence over the activities of any undertaking of the entity without having a significant interest in the undertaking; or (b) a director or senior officer of the entity is accustomed to acting on the instructions of the person.

- methods of access to clients' virtual assets held; and
- insurance arrangements in place to properly safeguard clients' virtual assets.

For a virtual assets exchange, such information will include the measures for the facilitation and protection of virtual assets trading on the exchange.

Register of VASPs

The FSC will keep a register of VASPs which are:

- registered to carry on the business of providing virtual assets service;
- registered to provide virtual assets custody service;
- registered to operate virtual assets exchange; and
- approved to participate in the regulatory sandbox described in the Sandbox Regulations.

Subject to payment of a fee, any person will be able to inspect the register or request a copy of the certificate of registration of a VASP.

Enforcement provisions

The VASP Act contains enforcement provisions, including those which empower the FSC to:

- revoke or cancel a registration;
- impose conditions on a registered VASP's registration;
- require the removal of director and other persons of a VASP; and
- impose a range of financial penalties (from US\$15,000 to US\$100,000 per offence) for offences under the VASP Act where a provision of the VASP Act has not been complied with.

It will be an offence to carry on virtual asset services for which a registration is required without being registered. Such an offence will lead, on conviction, to a penalty of up to US\$100,000 or 5 years imprisonment or both for a body corporate (or up to US\$75,000 or 5 years imprisonment or both for an individual). It will also be an offence for an individual to carry on or hold itself out as carrying on virtual assets service. Again, on conviction, there is a penalty of up to US\$75,000 or 5 years imprisonment or both.

Transitional provisions for existing virtual assets service providers

A person that is already providing virtual assets services business in and from the BVI, and intends to continue to do so, will need to apply for registration under the VASP Act within six months of the VASP Act coming into force. If the FSC receives the application within that timeframe, the person may continue to provide such service until they receive notification from the FSC that their application is refused or approved.

Next steps

As the amendments to the AML Rules relating to virtual asset services will come into force on 1 December 2022 and given the anticipated introduction of the VASP Act by the end of this year, we would recommend and encourage businesses located in the BVI or operating a BVI entity in the virtual assets sector to take legal advice as to whether they are likely to constitute a VASP and the steps that they will be required to take in order to comply with the AML Rules and the VASP Act.

We will provide a further update once the VASP Act has been adopted and when any regulations or guidelines in relation to the VASP Act are issued by the FSC.

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