

## Lending and BVI law : key considerations for lenders

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The British Virgin Islands (BVI) stand as a prominent player in the global financial services industry, offering a flexible and business-friendly legal framework that attracts a variety of international investors and financial activities. Among these activities, lending is a key component, serving as the backbone for many corporate and commercial transactions.

Determining whether lending activities in the BVI require regulation depends on a thorough understanding of an entity's activities and the circumstances involved. While the BVI offers a conducive environment for lending, it is paramount for entities to carefully assess their regulatory obligations to ensure compliance and avoid potential legal and financial repercussions.

In this article, we examine some key matters that should be considered by lenders, including relevant legislation, economic substance and compliance.

Please note, institutions and those looking to extend loans or other finance through or to BVI should seek appropriate advice.

### Will the lender or the transaction itself be subject to specific regulation in the BVI?

The principal regulatory legislation which could be applicable to a lending transaction involving BVI persons include:

- the Banks and Trust Companies Act, 1990 (as amended) (the **BTCA**) supplemented by the Banks and Trust Companies Regulations, 1991 (the **BVI Banking Regulations**)
- the Financing and Money Services Act, 2009 (as amended) (**FMSA**)
- the Securities and Investment Business Act, 2010 (as amended) (**SIBA**)

## **BVI Banks and Trust Companies Act**

The BTCA and BVI Banking Regulations outline the rules for banking business, including deposit-taking and lending activities. Pursuant to the BTCA, no person shall carry on any kind of banking business in or from within the BVI unless that person holds a valid licence.

For these purposes, "banking business" means:

"the business of accepting deposits of money which may be withdrawn or repaid on demand or after a fixed period or after notice, by cheque or otherwise and the employment of such deposits, either in whole or in part (i) in making or giving loans, advances, overdrafts, guarantees or similar facilities or (ii) the making of investments, for the account and at the risk of the person accepting such deposits".

Entities therefore need to consider whether their activities fall within the scope of "banking business". It is the nature of the activities undertaken, rather than the entity's description or title, that determines this and the need for regulation.

If a business could be seen as undertaking "banking business" for the purposes of the BTCA, it would only be required to hold a licence under the BTCA if it is carrying on, or holding itself out as carrying on, "banking business" in or from within the BVI.

What "in or from within" the BVI means for these purposes is the provision of banking business:

- by a BVI incorporated company either in or outside the BVI or
- by a foreign company in the BVI

For foreign entities, an analysis of its activities and where those are carried out would be needed in order to determine whether it is operating "in or from within" the BVI.

Typically then most BVI lending transactions are not caught by the BTCA as the lender (for example an onshore bank having its operations outside the BVI) is usually outside the geographic scope of the legislation, or, in the case of lending by BVI companies within a group structure, the critical "deposit taking" element of the definition is missing. However, application should always be considered nevertheless.

## **BVI Financing and Money Services Act**

A similar analysis also applies when considering whether a lending transaction or lender might be caught by the Financing and Money Services Act, 2009.

FMSA requires that a person obtain a license prior to conducting any "financing business" in the BVI.

For these purposes, a person carries on "financing business" if:

- he or she carries on, in the BVI, the business of providing credit under Financing Agreements to borrowers resident in the BVI
- he or she provides, as a business, credit, including pay day advances, or consumer finance loan, under a financing agreement to a borrower in the BVI
- he or she carries on, in the BVI, the business of leasing property to a person resident in the BVI under a financing lease
- he or she carries on such other business or activity as may be specified in regulations as financing business, or
- he or she carries on business in international financing and lending in relation to a Class F licence under FSMA

This definition, akin to the one for "banking business" under the BTCA, also mandates that the business must be operated from within the BVI. Consequently, a similar examination to determine if the activity takes place "in or from within" the BVI would be necessary. Under FMSA, a license would only be needed if a business is perceived as engaging in "financing business" in or from within the BVI.

## **BVI Securities and Investment Business Act**

Any regulatory analysis of a proposed lending transaction would also usually include a review of the SIBA which is the principle applicable law in the BVI in respect of the conduct of investment business.

There are various exceptions but, generally speaking, section 4(1) of SIBA prohibits a person from carrying on, or holding itself out as carrying on, investment business of any kind in or from within the BVI unless that person holds a licence authorising it to carry on that kind of investment business.

"Investments" includes shares, partnership interests, fund interests, debentures (debt instruments including loan notes), warrants and other instruments giving entitlement to shares, interests or debentures, certificates representing investments, options, futures, contracts for differences, long-term insurance contracts; and rights and interests in investments.

The heads of activities which constitute investment business are set forth in Schedule 2, Part A of SIBA and are: dealing in investments (whether as principal or agent); arranging deals in investments; managing investments; providing investment advice; providing custodial services with respect to investments; providing administration services with respect to investments; and

operating an investment exchange.

When examining the lending activities typically conducted by institutional or other lenders, it is observed that these activities generally do not involve dealing, managing, or offering services related to assets classified as "Investments" under SIBA (such as shares, debentures, futures and fund and partnership interests). Therefore, the majority of lending transactions in the BVI fall outside the scope of SIBA, as the lender is not usually deemed to be engaging in investment business. In contrast to the BTCA and FMSA, Section 4(2) of SIBA provides that a person is deemed to be carrying on investment business in the BVI if that person:

- occupies premises in or for the purposes of carrying on investment business, or
- solicits a person in the BVI for the purpose of offering to provide a product or service that constitutes investment business

While this could be viewed as relatively broad, SIBA does qualify the meaning of "soliciting persons in the BVI" so as to exclude solicitations or offers to persons who are not members of the public.

## Economic substance in the BVI

Lenders operating within the BVI must also consider whether they may fall under the classification of conducting "finance and leasing business" as outlined by the Economic Substance (Companies and Limited Partnerships) Act, 2018, the Economic Substance (Companies and Limited Partnership) (Amendment) Act, 2021 and the Rules on Economic Substance in the Virgin Islands, updated on 2 April 2024 (together the **Economic Substance Act**).

"Finance and leasing business" is a "relevant activity" under the Economic Substance Act and means the business of providing credit facilities of any kind for consideration, which would include any form of interest.

Entities that are carrying on one or more "relevant activity" (with, in this case, finance and leasing being the most applicable) are required to have adequate substance in the BVI. For lenders, the implications could include being required to have sufficient physical or human presence in the BVI to demonstrate that the activity can be effectively managed and / or undertaken in the BVI.

It is worth noting that the Economic Substance Act only applies to BVI companies and limited partnerships or foreign companies and limited partnerships registered in the BVI, which are not tax resident in a jurisdiction outside of the BVI. Foreign entities would not become subject to the Economic Substance Act merely by dealing with BVI companies.

Application of the Economic Substance Act should always be considered and lenders are encouraged to seek appropriate advice.

## Taking security

In the BVI, lenders taking and registering security over assets need to consider the legal and regulatory landscape to ensure their interests are adequately protected. The BVI Business Companies Act, 2004 (the **BCA**) provides the framework for the registration of security interests, ensuring transparency and priority of claims for secured parties.

It is important to note that a security document does not need to be filed or recorded with any governmental or regulatory authority, agency or court in the BVI in order to ensure the legality, validity or enforceability of such security document creating the security interest.

However, in order to ensure the preservation of the priority of such security interest, particulars of such security interest should be registered in the public Register of Registered Charges of the BVI company granting such security interest, by submitting an application in the approved form to the Registrar of Corporate Affairs in BVI in accordance with Section 163 of the BCA. The effect of such a Section 163 filing is to create priority of that security interest over any subsequently registered or unregistered security interest.

In addition, if the security has been granted by a BVI company, the BVI company granting such security interest is also required to enter the particulars on an internal register of relevant charges in accordance with Section 162 of the BCA and to keep a copy of that register at its registered office or the office of its registered agent.

Where security is created over shares in a BVI company, the BVI company whose shares are being charged may voluntarily make a notation of the security interest in its register of members. Although the notation has no statutory effect per se, it could, potentially, give notice to any party reviewing the register of members of the security interest. It is also possible for the BVI company whose shares are being charged to voluntarily file a copy of its annotated register of members with the Registrar of Corporate Affairs in the BVI. Although a filed annotated register of members in itself has no statutory effect for priority purposes, it could, potentially, give notice of the security interest to any party carrying out a search against such BVI company.

## Navigating compliance

For entities that do fall within the regulated category, obtaining the necessary license and adhering to the ongoing regulatory requirements is essential. The process involves submitting an application to the BVI Financial Services Commission, which will contain the required documentation and information about the entity and the proposed activities.

Compliance with anti-money laundering (**AML**) and counter-financing of terrorism (**CFT**) regulations is also an important aspect of the regulatory framework for lenders in the BVI. Regulated entities must implement robust systems and controls to prevent and detect financial crimes, regardless of

the scale or nature of their lending activities.

## How can Ogier help?

We can assist in determining whether lending activities in the BVI require regulation by reviewing an entity's activities and the circumstances involved. It is essential to carefully assess entities' regulatory obligations to ensure compliance and avoid potential legal and financial repercussions.

If you would like to discuss an entity's lending activities and how they fit into the current regulatory landscape, please do not hesitate to speak to a member of our corporate and finance team using the contact details provided below.

### About Ogier

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Regulatory information can be found under [Legal Notice](#)

## Key Contacts



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