Cryptocurrency and token offerings in the British Virgin Islands

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Offerings of new cryptocurrencies, tokens and other virtual assets have raised billions of dollars in recent years. Leading offshore financial centres such as the British Virgin Islands (**BVI**) have become major parts of this new capital raising phenomenon and the BVI has emerged as a leading jurisdiction for the incorporation of virtual asset issuers.

The popularity of the BVI as a leading jurisdiction for virtual asset projects 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.

It should be noted that, under the VASP Act, the BVI does not distinguish between different colloquial classifications of virtual assets. That is, there is no legal distinction between governance tokens, payment tokens, non-fungible tokens, or any other type of virtual asset. The only distinction that must be kept in mind is whether a virtual asset would be regarded as a security or not.

Token offerings

Issuers may undertake a token offering for any number of reasons, such as raising capital, rewarding project backers, or promotion of a new protocol. In the context of raising 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 a token sale investors exchange cash for a new virtual asset on a blockchain network. In most cases this virtual 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, which may or may not have voting rights attached (or which may give access to voting tokens when staked, or through some other mechanism). However, rather than directly using these "tokens" within the application, most investors will hold the tokens in the hope that the success of the underlying enterprise (in which the new 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 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, token offerings can provide an efficient and cost-effective means of accessing capital for start-up or early stage enterprises or technology entrepreneurs which might not otherwise have access to capital markets.

In other situations, an issuer may do their offering, in whole or in part, as an airdrop or other free distribution. The same legal and regulatory considerations will apply in these situations.

Structuring

Similar to existing forms of special purpose vehicle capital raising, a typical token offering structure will feature a newly formed issuer vehicle (the **Issuer**), most likely incorporated as a BVI business company limited by shares under the BVI Business Companies Act 2004 (the **BCA**).

The Issuer will then issue tokens on a blockchain network in exchange for investor funds (which may be in the form of fiat currency, stablecoins or 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 Issuer has achieved its target fundraising goal, the funds raised will generally be deployed in the project described in the project's White Paper or Litepaper.

The manner in which the Issuer is held is often a significant point. For some projects, there are no issues with having the Issuer as a subsidiary of an existing corporate structure, or held directly by a founder. This is generally the case for any centralised project, or where a founder has and wishes to maintain a strong connection to the project. In other situations, such as in decentralised projects or those where a founder may prefer to maintain some distance from the Issuer to minimise potential liability, it is preferable that the Issuer should be orphaned. There are a number of ways in which an entity can be orphaned; please speak to us or see our note here for more information.

Token offerings in the BVI

The use of a BVI business company incorporated under the BCA as an Issuer brings with it all of the standing advantages associated with BVI business companies and the BVI as a business 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 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 token offering forms would generally 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 a jurisdiction for token offerings. For example, since everything in relation to the launch and conduct of the token offering will be done on an electronic platform, the utility of the provisions of the BVI's Electronic Transactions Act 2021 (**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 most kinds can be executed by electronic exchange.

Token offerings and Existing BVI Securities and Financial Services Regulation

While there is a clear consensus that a token offering 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 token offering 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 offering of, and subsequent dealings in, virtual assets would not be subject to the general prohibition unless it is determined that those virtual assets would 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 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 token offerings would not fall within the scope of SIBA, and therefore there should be no need for the BVI Issuer to hold an FSC investment business licence, there is still a danger that certain forms of token or virtual 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 virtual asset should be carefully considered.

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"). Offerings 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 Issuer involved is unlikely to be a "relevant person". Nevertheless, any

Issuer should be alive to the risks of their token offering 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" and as virtual assets and cryptocurrencies are not fiat currency, the general consensus is that these fall outside the scope of the definition of money services business. Token offerings and subsequent transactions in tokens or other cryptocurrencies, therefore, 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 confidential government-controlled 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 issuer of virtual assets. It should be noted that this may not be the case with security tokens, if those tokens are taken to be analogous to a share of the issuer – which may be the case if, for example, the token gives voting rights over the issuer itself (rather than any project supported by the issuer), or the right to receive income from the profits of the 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 issuer of virtual assets to record or disclose information on purchasers or holders of those virtual assets.

Conclusion

Existing BVI legislation, as supported by the Guidance, is sufficiently flexible to support offerings of all manner of tokens, including governance tokens, utility tokens, payment tokens and NFTs, 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 token offerings and it is expected that the number of token offerings 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 in this briefing.

About Ogier

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Regulatory information can be found under Legal Notice

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