

ADVISORY | INDUSTRY INFORMATION

Virtual asset services in the British Virgin Islands

The British Virgin Islands ("BVI") Virtual Assets Service Providers Act, 2022 ("**VASP Act**") came into force on 1 February 2023 and provides a registration regime for virtual asset service providers ("**VASPs**"). Associated guidance has also been published by way of the VASP Guide to the Prevention of Money Laundering, Terrorist Financing and Proliferation Financing ("**VASP AML Guide**") and the Financial Services Commission Guidance on Application for Registration of a VASP ("**VASP Registration Guidance**"). Updates to the BVI Regulatory Code, Revised Edition 2020 ("**Regulatory Code**") to take into account the VASP Act are expected during the course of 2023. This advisory provides an overview of the new BVI VASP regime.

Overview of the VASP Act

The VASP Act provides a registration regime for any person carrying on in or from within the BVI the business of providing a "virtual assets service", known as a VASP. VASPs are required to submit an application to register with the BVI Financial Services Commission ("**FSC**").

Virtual assets

In order to provide a "virtual assets service", there must be a "virtual asset" within the meaning of the VASP Act. "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. Digital representations of fiat currencies (essentially, legal tender) and digital records of a credit against a financial institution of fiat currency, securities or other financial assets that can be digitally transferred are specifically excluded, along with certain closed-loop items such as airline miles and credit card awards.

Virtual assets service

A "virtual assets service" means the business of engaging, on behalf of another person, in any VASP activity or operation (as outlined in the definition of VASP), 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 asset 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 constitutes the carrying on of the business of a virtual assets service, issuing virtual assets or being involved in a virtual assets activity, pursuant to the issuance of guidelines.

In addition, "VASP" is defined as including the conduct of 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
- any such activity or operation as may be specified in the VASP Act or prescribed by regulations.

Issuance of virtual assets

The sole act of issuing a virtual asset (including where a fund issues tokenized interests) is not a VASP activity under the VASP Act and does not require registration with the FSC as a VASP. However, providing services for other issuers, whether extra- or intra-group, could still constitute a virtual assets service.



Virtual assets exchanges

A "virtual assets exchange" is defined under the VASP Act to mean 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 any virtual asset at any point in time during its course of business. The way in which the definition is drafted means that, in reality, virtual assets exchanges will also have to be registered to provide virtual assets custody services. Note that accepting virtual assets as payment for goods and services does not constitute a VASP activity.

Generally, a provider of virtual assets custody services or a virtual assets exchange operator will need to be registered under the VASP Act. The VASP Registration Guidance also stipulates that VASPs operating exchanges or providing custody services are viewed as presenting a higher level of risk and therefore the required level of paid-up capitalisation for these businesses will need to be higher.

Virtual assets perimeter guidance

Depending on the type of virtual asset, an analysis may be needed to determine whether it falls within scope of the BVI Securities and Investment Business Act, Revised Edition 2020 ("**SIBA**"), the BVI Financing and Money Services Act, Revised Edition 2020 ("**FMSA**") and/or the VASP Act.

To be in the scope of the SIBA the relevant business would need to constitute "investment business", which hinges on whether the subject matter of the services offered includes "investments". In its Guidance on Regulation of Virtual Assets in the Virgin Islands ("**Virtual Asset Guidance**") issued in July 2020, the FSC observed in relation to the SIBA's perimeter that: "virtual assets and virtual assets-related products used as a means of payment for goods and services (for example, tokens) which provide the purchaser with an ability to only purchase goods and services (utility tokens) would not be captured by financial services legislation". However, the FSC also noted that: "where a virtual asset product or service provides a benefit or right beyond a medium of exchange, it may be captured under [the SIBA]". The reason is that, depending on the manner in which a token is used and the rights attaching to it, the token could be characterised as equity or debt and could therefore be an "investment" within the meaning of the SIBA. Similarly, the FSC confirmed that certain derivatives, in particular futures and contracts for differences that reference virtual assets, would be investments within the meaning of the SIBA.

However, the FSC also cautions that the views and guidance of the FSC should first be secured before proceeding with virtual money services activity in or from within the BVI.

Application of BVI anti-money laundering regime

The BVI Anti-Money Laundering Regulations, Revised Edition 2020 ("**AML Regulations**") and the BVI Anti-Money Laundering and Terrorist Financing Code of Practice, Revised Edition 2020 ("**AML/CFT Code of Practice**") were amended with effect from 1 December 2022 to require compliance by entities conducting "relevant business", which includes the business of carrying on or providing a virtual assets service when a transaction involves virtual assets valued at \$1,000 or more.

The updates to the AML Regulations and the AML/CFT Code of Practice should be read together with the VASP AML Guide, which sets out guidelines on specific anti-money laundering, counter terrorist financing and counter proliferation financing ("**AML/CFT/CPF**") obligations for VASPs under BVI law. These include requirements for robust customer due diligence and enhanced customer due diligence procedures, proper recordkeeping measures, frameworks to fulfil statutory reporting obligations, and the monitoring and assessment of risks that are present in the use and exchange of virtual assets and in the operation of VASPs themselves.

Regulatory sandbox

The FSC introduced a regulatory sandbox through the Financial Services (Regulatory Sandbox) Regulations, 2020, which has been open to applications since the beginning of October 2020. The objectives of the BVI's regulatory sandbox are to align regulation and innovation by providing a defined test environment and to offer a tailored and focused supervisory framework, while protecting market participants. The goal is to permit the development of new and innovative business models within the BVI.

The sandbox is open to institutional applicants (companies and limited partnerships) that intend to offer an "innovative fintech" business model, defined as the "development or implementation of a new system, mechanism, idea, method or other arrangement through the use of technology to create, enhance or promote a product or service with respect to the conduct or provision of a financial services business". To date, there has been one participant in the sandbox.

The VASP Act permits VASPs to participate in the regulatory sandbox under the innovative fintech business model. Participants in the sandbox that are proposing to carry on VASP activities are still required to comply with the aspects of the VASP Act relevant to their proposed VASP activities.

To be in the scope of the FMSA, the financing, money transmission, currency exchange, electronic money, or other money service in question would need to concern legal tender, that is, fiat money. The FSC confirmed in its Virtual Asset Guidance that: "the transmission of virtual assets or virtual asset related products would not require a money services business licence".

Compliance requirements for VASPs

Once registered, a VASP will be subject to a number of ongoing compliance requirements, including:

- **Fit and proper criteria** – the VASP, its directors, senior officers and persons with a significant interest or controlling interest (usually 10 per cent or more) meet the fit and proper criteria in the Regulatory Code;
- **Adequate resources, policies and procedures** – maintaining adequate resources (human and technological) and appropriate policies, procedures and mechanisms for its business;
- **Employee screening** – proportionate measures must be in place to assess the competence and probity of employees intermittently after recruitment, along with any conflicts of interest (particularly where there has been a role or function change);
- **Financial soundness and liquidity** – maintaining its business in a financially sound condition, having in place an adequate level of paid-up capitalisation for the VASP's operations and ensuring that there is a continuous assessment of liquidity needs and commensurate levels of liquidity made available;
- **Required appointments** – have appointed at all times:
 - a minimum of two individual directors (the FSC may require one to be physically resident in the BVI);
 - a compliance officer (unless exempt);
 - a money laundering reporting officer notified to the FSC;
 - an authorised representative approved by the FSC with knowledge of virtual assets services; and
 - an auditor approved by the FSC with sufficient experience and competence to audit the financial statements of a VASP;
- **FSC reporting** – a duty to report to the FSC information within such timeframe as the FSC may prescribe, on:
 - level of compliance with the VASP Act;
 - client exposure and geographical location;
 - the VASP's financial position;
 - risks encountered and how they have been or are being resolved, including whether there has been any financial or other loss;
 - the VASP's key performance indicators, achievements and any relevant statistical information; and
 - any significant client complaints and their resolution or proposed resolution;
- **Change in control** – obtaining prior approval from the FSC for changes in significant or controlling interests in the VASP;
- **Record-keeping** – keeping sufficient records for at least 5 years:
 - on the VASP's transactions, financial position, client complaints and the steps taken to prevent money laundering, terrorism financing and proliferation financing (including customer due diligence information and the VASP's institutional risk assessment); and
 - to enable the VASP to prepare audited financial statements and make such returns as required under the VASP Act and any other financial services legislation;
- **Client assets** – ensuring client assets are identified, appropriately segregated and protected;
- **Financial promotions** - not issuing, causing or permitting to be issued, any false or misleading advertisements or statements;
- **AML/CFT/CPF compliance** – taking appropriate steps to comply with applicable AML/CFT/CPF requirements, including the VASP travel rule in the AML/CFT Code of Practice, and having in place appropriate systems, procedures and staff training;
- **FSC notification obligations** – notifying the FSC in the event of certain circumstances arising, including where the VASP becomes registered, licensed or opens another office in another jurisdiction, any enforcement action is taken or criminal proceedings brought (in the BVI or elsewhere), a significant interest or controlling interest is held or acquired by the VASP in another virtual assets business (in the BVI or elsewhere), or no longer meets the registration approval requirements under the VASP Act;
- **Safeguarding of custody assets** – where virtual assets custody services are being provided, certain obligations and restrictions must be complied with to safeguard the virtual assets and related instruments against theft and loss; and
- **Exchange restrictions** – where operating a virtual assets exchange, compliance with certain restrictions on its activities and services.

Enforcement

As much of the crypto sector has only recently fallen within scope of regulation by way of the VASP Act, the FSC has taken very little enforcement action against participants. However, the FSC has general powers under the VASP Act to require a VASP to provide a report in relation to its obligations, operations and business activities with respect to the provision of a virtual assets service.



The FSC is also permitted to take enforcement action under the VASP Act, including revoking a VASP registration, adding conditions to a registration or imposing civil (up to \$100,000) and / or criminal (up to 5 years' imprisonment) penalties on body corporates/unincorporated bodies and individuals for breaches of the VASP Act.

In addition, the FSC can exercise any of its powers under the FSC Act, Revised Edition 2020 against a VASP, its directors, shareholders and senior officers, including the ability to inspect any entity falling under its supervisory remit, remove directors and other persons, make public statements and appoint examiners and qualified persons.

The FSC and the Financial Investigation Agency also have powers under the BVI AML/CFT/CPF regime in relation to virtual assets and VASPs. The VASP AML Guide provides further detail in this regard.

Next steps

The new BVI virtual assets regime has changed the regulatory landscape for VASPs operating in or from within the BVI. For new entrants, it is important to perform a perimeter analysis to determine whether activities are in scope of the VASP Act – this is not a simple question and different jurisdictions are taking different approaches, with some gold-plating the Financial Action Task Force virtual assets guidance on which many regimes are based. Those new entrants in scope will need to apply for registration approval from the FSC before commencing operations.

Market players who were operational as of 1 February 2023 are able to continue with their business operations, as long as an application for registration is submitted by 31 July 2023 and subsequently approved by the FSC.

On receipt of a complete application (together with the relevant application fee), the FSC will endeavour to process it and provide initial comments within 6 weeks. The FSC's service standard requires the application process to be concluded within 6 months from the date of initial submission, although timelines for review and approval will be dependent on the quality of the application and information submitted in response to any FSC requests. The VASP Registration Guidance goes into detail on the information and supporting documentation required to be submitted as part of the application, and links to a dedicated VASP application for registration form.

Walkers' Regulatory & Risk Advisory practice group comprises a team of dedicated specialist lawyers who are able to advise on all aspects of the BVI virtual assets regime, including regulatory perimeter considerations, strategic cross-border structuring, on-going compliance requirements and VASP applications.

Further information

Walkers practices six laws from an international network of ten offices across the Americas, Asia and Europe. For more information, please get in touch with your usual contact at Walkers or any of the contacts in your region listed below:

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