

British Virgin Islands Financial Services Commission

Guidance on Regulation of Virtual Assets in the Virgin Islands (BVI)



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Contents

Introduction	2
Regulated Activities - At Initial Issue	3
Regulated Activities - After Issuance.....	11
Activities Outside the Regulatory Remit.....	14
Compliance Period	15
Conclusion	15

INTRODUCTION

Licensing, authorisation or approval is required for any activity stipulated under existing financial services legislation, unless specifically excluded. Adopting the FATF's definition, 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. Virtual assets do not include digital representations of fiat currencies. It is the Commission's position that virtual assets and its related products have value, exhibit the attributes of property and meet the definition of intangible property.

When determining whether licensing is required for virtual asset related activities, an assessment of the following factors is relevant -

- i. The way the virtual asset (cryptoasset) is being utilised;
- ii. The types of business activities being proposed or conducted;
- iii. Whether the business activities are analogous with those conducted through traditional businesses; and
- iv. The characteristics and business activities (economic substance) relating to an offering/issuance.

Where an intermediary or activity is caught and requires a licence or certificate under the definition of "relevant business" in regulation 2 of the Anti-money Laundering Regulations, 2008, the regulated person must ensure its on-going compliance with those Regulations, including the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008; the Regulatory Code; and the Financial Services Commission Act, 2001 would be applicable.

Virtual asset products may be captured from a regulatory perspective in one of two ways. Firstly, when they are initially issued and secondly when they are in the hands of a holder or the subject of an investment activity.

REGULATED ACTIVITIES – AT INITIAL ISSUE

INVESTMENTS – SECURITIES AND INVESTMENT BUSINESS ACT, 2010

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.

Where a virtual asset product or service provides a benefit or right beyond a medium of exchange, it may be captured under the Securities and Investment Business Act, 2010 (“SIBA”). The following table provides a guide to the applicable laws, the types of product involved and whether the product falls to be regulated by the Commission.

Item	SIBA	Virtual Assets related Product	Regulation is required in accordance with SIBA
1.	<p>Section 40</p> <p>“Mutual fund” means a company or any other body, a partnership or a unit trust that is incorporated, formed or organised, whether under the laws of the Virgin Islands or the laws of any other country, which –</p> <p>(a) collects and pools investor funds for the purpose of collective investment, and</p> <p>(b) issues fund interests that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company or other body,</p>	Mutual Funds	Part III of SIBA governs Mutual Funds and is applicable where the virtual asset product (digital coin and/or digital token) issued is an interest in a collective investment scheme and satisfies the definition of a mutual fund.

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	<p>partnership or unit trust, as the case may be, and includes –</p> <p>(i) an umbrella fund whose fund interests are split into a number of different class funds or sub-funds, and</p> <p>(ii) a fund which has a single investor which is a mutual fund not registered or recognised under this Act, but excludes any company or other body, partnership or unit trust which is of a type or description designated by the Mutual Fund Regulations as not being a mutual fund.</p>		
2.	<p>Paragraph 1, Schedule 1 defines shares, interests in a partnership or fund interests, etc. as any of the following -</p> <p>(a) shares in, and stock in the share capital of, a company;</p> <p>(b) interests in a partnership;</p> <p>(c) a fund interest in a mutual fund that does not fall within paragraph (a) or (b).</p>	Initial Coin or Token Offering	<p>Coins, for example Bitcoin, do not in of themselves typically grant the holder rights synonymous with shares.</p> <p>However, there have been instances where the manner in which the coin or token is used, and the rights attached thereto would grant the holder a share or equity interest. Where a token is therefore issued in this manner and confers such rights, the activity would be considered an investment as prescribed by schedule 1 of SIBA.</p> <p>Careful analysis of the terms and features of any virtual asset product is critical. An</p>

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			assessment of the characteristics of the token and token holder’s rights, for example, whether there is a right to vote and determine the manner in which the proceeds raised will be utilised or a right to receive dividends declared or a share of the profit, would aid in determining whether paragraph 1, schedule 1 is applicable.
3.	<p>Paragraph 2, Schedule 1 defines debentures, etc. as -</p> <p>Debentures, debenture stock, loan stock, bonds, certificates of deposit and any other instruments creating or acknowledging indebtedness, other than –</p> <p>(a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services;</p> <p>(b) a cheque or other bill of exchange, a bankers draft or a letter of credit;</p> <p>(c) a banknote or a statement showing a balance in a current, deposit or savings account;</p>	Tokens/ Coins	<p>A debenture is an instrument acknowledging or creating debt by a company. It may be secured or unsecured.</p> <p>There are instances where a token or coin issued creates or acknowledges a debt and may be deemed a debenture.</p> <p>Where the manner in which the token or coin issued creates a debt or liability instrument for the issuer and satisfies the definition of debentures, etc., the instrument would be considered an investment as prescribed by paragraph 2, Schedule 1 of SIBA.</p>

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	<p>(d) by reason of any financial obligation contained in it -</p> <p>(i) a lease or other disposition of property;</p> <p>(ii) a mortgage or any other charge; or</p> <p>(iii) an insurance policy.</p>		
4.	<p>Paragraph 3, Schedule 1 defines instruments giving entitlement to shares, interests or debentures as -</p> <p>(1) Subject to sub-paragraph (2), warrants or other instruments entitling the holder to subscribe for investments falling within paragraph 1 or 2.</p> <p>(2) For the purposes of sub-paragraph (1) -</p> <p>(a) it is immaterial whether the investments are for the time being in existence or identifiable; and</p> <p>(b) an investment falling within sub-paragraph (1) shall not be regarded as falling within paragraph 5, 6 or 7.</p>	Tokens/ Coins	<p>Instruments of this nature include warrants and are a type of security that enables the holder to purchase a proportionate amount of stock at a specified price.</p> <p>Where the manner in which the virtual asset is issued creates an entitlement and satisfies the definition of a warrant or other instrument entitling the holder to subscribe for investments falling within paragraphs 1 or 2 of SIBA (outlined above), the activity would be considered an investment as prescribed by paragraph 3, Schedule 1 of SIBA.</p>

Item	SIBA	Virtual Assets related Product	Regulation is required in accordance with SIBA
5.	<p>Paragraph 4, Schedule 1 of SIBA defines certificates representing investments as -</p> <p>Certificates or other instruments which confer contractual or property rights –</p> <p>(a) in respect of any investment falling within paragraph 1, 2 or 3, being an investment held by a person other than the person on whom the rights are conferred by the certificate or instrument; and</p> <p>(b) the transfer of which may be effected without the consent of that person.</p>		<p>Considering the classification of virtual assets as intangible property, a certificate or other instrument that confers a right to virtual assets would be considered an investment as prescribed by paragraph 4, Schedule 1 of SIBA.</p>
6.	<p>Paragraph 5, Schedule 1 defines options as -</p> <p>Options to acquire or dispose of –</p> <p>(a) an investment falling within any other paragraph of this Schedule;</p> <p>(b) any currency;</p> <p>(c) palladium, platinum, gold or silver; or</p>	Virtual Assets Derivatives	<p>Where a virtual asset product is deemed an investment under any other paragraph within schedule 1 of SIBA, and that investment becomes the subject of an option to acquire or dispose, it would be considered an option as prescribed by paragraph 5, Schedule 1 of SIBA.</p>

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	(d) an option to acquire or dispose of an investment falling within subparagraph (a), (b) or (c) of this paragraph.		
7.	<p>Paragraph 6, Schedule 1 of SIBA defines futures as:</p> <p>(1) Rights under a contract for the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed upon when the contract is made, other than a contract made for commercial and not investment purposes.</p> <p>(2) A contract shall be regarded as made for investment purposes if it is made or traded on an investment exchange, or made otherwise than on such an exchange but expressed to be as traded on such an exchange or on the same terms as those on which an equivalent contract would be made on such an exchange.</p> <p>(3) A contract not falling within subparagraph (2) shall be regarded as made for commercial purposes if, under the terms of the contract, delivery is to be made within seven days.</p>	Virtual Assets Derivatives	A futures contract involving a virtual asset or virtual assets product will be captured by paragraph 6, Schedule 1 of SIBA.

Item	SIBA	Virtual Assets related Product	Regulation is required in accordance with SIBA
8.	<p>Paragraph 7, Schedule 1 of SIBA defines “contracts for differences” as -</p> <p>(1) Rights under –</p> <p>(a) a contract for differences; or</p> <p>(b) any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in –</p> <p>(i) the value or price of property of any description; or</p> <p>(ii) an index or other factor designated for that purpose in the contract, other than a contract where the parties intend that the profit is to be obtained or the loss avoided by taking delivery of any property to which the contract relates.</p> <p>(2) This paragraph does not apply to rights under a contract under which money is received by way of deposit on terms that any interest or other return to be paid on the sum deposited will be calculated by reference to fluctuations in an index or other factor.</p>	Virtual Assets Derivatives	Where a virtual asset or a related product is the subject of a contract for differences or any other contract the purpose or intended 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 paragraph 7, Schedule 1 of SIBA.

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9.	<p>Paragraph 8, Schedule 1 of SIBA defines “long-term insurance contracts” as:</p> <p>(1) Rights under a contract the effecting and carrying out of which constitutes Class 1 or Class 2 long-term business within the meaning of the Insurance Act, 2008.</p> <p>(2) This paragraph does not apply to rights under a reinsurance contract.</p> <p>(3) Rights falling within this paragraph shall not be regarded as falling within paragraph 7.</p>	N/A	<p>At the point of writing, there were no virtual assets investment vehicles or intermediaries with considerations which may be applicable under paragraph 8, Schedule 1 of SIBA. However, where this position changes in due course, these Guidelines may be amended accordingly.</p>
10.	<p>Paragraph 9, Schedule 1 of SIBA defines “rights and interests in investments” as -</p> <p>Rights to and interests in any investment falling within any of the preceding paragraphs of this Schedule.</p>		<p>Where a virtual asset is deemed an investment under any other paragraph within Schedule 1 of SIBA, it will fall within the definition of paragraph 9, Schedule 1 of SIBA.</p>

The guidelines are not necessarily meant to be exhaustive. Consequently, where a virtual asset product is not mentioned but exhibits a characteristic akin to a regulated activity under SIBA, the views and guidance of the Commission should first be secured before proceeding with the activity in or from within the Territory.

REGULATED ACTIVITIES - AFTER ISSUANCE

After issuance; activities involving virtual assets and virtual assets-related products that may be considered regulated activities and therefore require licensing will be treated in accordance with the following Tables:

Item	Securities and Investment Business Act, 2010	Regulation required in accordance with SIBA
1.	<p>Schedule 2 – Investment Activities</p> <p>Included activities (Part A) involve –</p> <ul style="list-style-type: none"> i. Dealing in Investments; ii. Arranging Deals in Investments; iii. Managing Investments iv. Providing Investment Advice; v. Providing Custodian Services with Respect to Investments; vi. Providing Administration Services with Respect to Investments; and vii. Operating an Investment Exchange. <p>The following two conditions must be satisfied to determine whether a licence is required –</p> <p>Firstly, whether the product satisfies the definition of an investment as outlined above under “initial Issue”;</p>	<p>When a virtual asset product fits the definition of an investment, persons carrying on an investment business activity pursuant to Schedule 2 of SIBA will require a licence. Licensing categories are outlined in Schedule 3 of SIBA.</p> <p>Thus, where a person provides an investment activity in respect of any defined investment involving a virtual asset, virtual asset product or digital token, a licence will be required.</p> <p>For example:</p> <ul style="list-style-type: none"> i. After a virtual asset is issued, it is stored in a wallet. A wallet provider stores, holds or maintains the virtual asset in a virtual wallet or otherwise for the user. This activity is synonymous to custodian services. <p>A custodian is a person to whom fund property, or any other type of property or asset is entrusted for safe keeping.</p> <p>Where a person acts as custodian or depository of assets belonging to another person, and that asset has been defined as an investment, that person is providing Custodial Services. For the avoidance of doubt, this includes virtual assets, derivatives and any other similarly styled product offering that meets the definition of investments.</p>

Item	Securities and Investment Business Act, 2010	Regulation required in accordance with SIBA
	<p>Secondly, provided the definition of “investment” is met, an assessment is required to determine whether the investment activity is captured pursuant to Part A of Schedule 2 of SIBA, and is not an excluded activity pursuant to Part B of Schedule 2 of SIBA or the person is not an excluded person pursuant to Part C of Schedule 2 of SIBA.</p>	<p>ii. Operating an exchange would involve the buying and selling of virtual assets or digital tokens deemed investments using fiat currency or other virtual assets; or a listing of investments which involve virtual assets and/or virtual assets related products.</p> <p>Where a virtual asset or virtual asset related product is deemed an investment, persons operating an exchange will require licensing.</p>

	Financing and Money Services Act, 2009 ("FMSA")	Virtual Assets Related Product	Regulation required in accordance FMSA
1.	<p>Section 6</p> <p>A person carries on money services business if that person carries on the business of –</p> <p>(a) providing any of the following services:</p> <ul style="list-style-type: none"> (i) the dispensing of money, the facilitation of deposits, payments, transfer of money or the reporting of account information via automated teller machines; (ii) transmission of money in any form, including electronic money, mobile money or payments of money; (iii) cheque cashing services; (iv) currency exchange services; (v) the issuance, sale or redemption of money orders or traveller's cheques; or (vi) other services as may be specified in the Regulations; or <p>(b) operating as an agent or franchise holder of a person carrying on a business specified in paragraph (a).</p>	<p>Money Transmission Services</p>	<p>"Money" is defined in the Regulatory Code, 2009 as including notes and coins; postal orders; cheques of any kind, including travellers' cheques; bankers' drafts and other payable orders; and money deposited in an account; in each case, in any currency.</p> <p>"Coin" is defined to mean any coin that is legally current in the Territory (see section 2 (1) of the Interpretation Act, (CAP. 136))</p> <p>Given the definitions outlined above, the transmission of virtual assets or virtual asset related products would not require a money services business licence.</p> <p>However, considering the impending launch of the Regulatory Sandbox, the views and guidance of the Commission should first be secured before proceeding with the activity in or from within the Territory</p>

ACTIVITIES OUTSIDE THE REGULATORY REMIT

These activities are currently outside the Commission’s regulatory remit and would therefore not require any specific licensing or approval:

Item	Virtual Asset Activities	Implications for the Regulatory Regime
1.	<p>A virtual asset or other digital intangible property issuance with no accompanying rights other than ownership of the coin. For example, offering -</p> <ul style="list-style-type: none"> i. a prepayment voucher for future services; ii. a right of access to the future technology developed by the issuer; iii. no discernable value. For instance, an issuance where the purchaser acquires a thing with little or no value attributed to it, particularly in comparison to its cost. 	<p>This would not be deemed to be an investment.</p>
2.	<p>An intermediary whose business is to assist with the launch of an ICO on behalf of a third party and/or design of the virtual asset or other digital intangible property and/or provide investment activities pursuant to schedule 2 of SIBA where the virtual asset or other digital intangible property is used as means of payment for goods and services or as a utility token which provides the purchaser with an ability to purchase goods and/or services and nothing more.</p>	<p>In line with item one above the intermediary would not be captured under financial services legislation.</p>
3.	<p>A person that passively uses software, for example an app, to hold virtual assets only for their benefit or other digital intangible property without the aid of a third-party wallet provider.</p>	<p>The focus of regulation is on exchanges and intermediaries conducting business activities, not persons engaging in virtual asset or virtual asset products for personal use.</p>
4.	<p>Miner</p>	<p>Where the virtual asset earned is used solely for their own purposes in a manner outlined in item one above.</p>

COMPLIANCE PERIOD

Every entity registered or incorporated within the Territory which acts as an intermediary or conducts a virtual asset related activity captured under any existing legislation outlined above requires a licence or certificate. Consequentially, any entity operating without a licence or certificate is conducting unauthorised financial services business and is immediately in contravention of financial services legislation.

A compliance period of six months from the publication date of this Guidance (the “**Compliance Period**”) is being provided for virtual asset related entities which

- i. under any existing legislation outlined above is conducting a regulated activity;
- ii. failed to submit an application in accordance with applicable legislation; and
- iii. submits an application within six months of this Guidance’s publication.

The Commission reserves the right to take enforcement action where an entity is engaged in any regulated activity referred to in this Guidance and fails to submit an application for licensing within the Compliance Period.

CONCLUSION

It is important that these Guidelines are followed to ensure against any violation of financial services laws as they relate to use of or trading in virtual assets in or from within the Virgin Islands. The aim of the Financial Services Commission is to ensure the proper regulation of this regime within the context of the applicable laws and, in that vein, to guard against any reputational damage to the financial services industry and the Territory. As this regime evolves over time, the Commission envisages that the need may arise to revise these Guidelines and to make recommendations to Cabinet regarding amendments or revisions to the relevant financial services legislation where this is considered to be necessary. Where such action is taken, appropriate notification will be issued accordingly.

It should also be borne in mind that while every effort has been made to facilitate the regulation of the business of virtual assets in applicable areas, these Guidelines are not designed to be exhaustive.