Recent offshore regulatory updates in the fintech and digital/ virtual assets sector

Service area / Corporate

Legal jurisdictions / Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Jersey

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Introduction

Carey Olsen, recently ranked in the FinTech sector by Chambers & Partners across each of its Bermuda, British Virgin Islands (BVI), Cayman Islands and Jersey offices (with a number of notable practitioners), continues to be a leader in the Fintech and digital/virtual asset sector, advising clients on the most novel and innovative crypto and blockchain projects. From this vantage point we get to see new trends and market developments in real time and, with all of the recent high profile failures, it is perhaps no surprise to see an increase in regulation as the industry continues to mature. Governments and regulators across the globe are focused on introducing regulation which protects end users and consumers whilst at the same time promoting innovation. This is true for the jurisdictions in which Carey Olsen operates and in this update we highlight some of the regulatory developments across Bermuda, BVI, Cayman, Guernsey and Jersey.

Bermuda

In 2022 we saw the number of digital asset business licenses issued by the Bermuda Monetary Authority (BMA) increase to 16 with companies now offering digital asset business services across six of the seven licensable business activities. We also saw the first digital asset business banking license issued to Jewel Bank, with an expected launch of operations sometime in 2023.

The BMA has openly welcomed enquiries and discussion around projects that are related to or involved in Decentralised Autonomous Organisations (DAO) and as a consequence is now reviewing applications from companies that are seeking regulatory approval for licensed services to support a DAO.

Both the regulators and industry advisors have developed a deeper understanding of how such arrangements are legally formulated and operationally structured which has allowed for a productive dialogue around how Bermuda should be approaching truly decentralised projects.

British Virgin Islands (BVI)

The BVI has recently passed the Virtual Asset Service Providers Act, 2022 (BVI VASP Act), which came into force on 1 February 2023. See our detailed guide to the BVI VASP Act here. It is worth noting that any businesses providing virtual asset services as defined in the BVI VASP Act in or from within the BVI will have until 31 July 2023 within which to apply for registration or to cease activities. Anyone planning to provide virtual asset services after the VASP Act comes into force will need to seek approval of the BVI Commission before doing so.

In addition to the BVI VASP Act, recent changes to the BVI AML Regulations mean that from 1 December 2022 virtual asset service providers (such as exchanges and custodians) currently operating from the BVI may already be subject to strict AML and KYC obligations. Any BVI company currently providing virtual asset services as defined in the AML Regulations, will need to undertake AML and KYC need to be mindful of any AML/KYC compliance processes for any transaction or series of transactions over $1,000. Any BVI companies operating in the crypto space should therefore take steps to ensure that they are either outside of the AML Regulations or if they are that they are aware of and comply with their AML/KYC obligations.

Cayman Islands

We have seen an uptick in Cayman Virtual Asset (Service Provider) Act (Cayman VASP Act) applications being approved with 5 approved in Q1 2022 and 8 approved in Q2 bringing the total number of registered persons under the Cayman VASP Act to 18.

Readers will be aware that the Cayman VASP Act is being introduced in phases with registration first and licensing second. The registration phase is in place but the licensing framework is still to be formally introduced meaning that those businesses that might be subject to licensing such as centralised exchanges and custodians for now simply need to apply for registration.

Similarly, the process for making an issuance request in respect of a public token sale and the ability to apply for an exemption where regulated under another registration/licensing regime (such as the Securities Investment Business Act) are also still to be implemented.

Guernsey

Guernsey has recently passed The Credit, Lending and Finance (Bailiwick of Guernsey) Law, 2022 (LCF Law). We have prepared extensive briefing notes, the main landing page can be viewed here. The LCF Law comes into force on 1 July 2023, but applications for licences should be submitted as soon as possible. Due to the expected rush for applications, the Guernsey Financial Services Commission (GFSC) cannot guarantee that applications received after 31 March 2023 will be processed in time; activities currently being undertaken without the need for a licence may therefore become illegal if a licence is not or cannot be obtained by 1 July 2023.

The LCF Law covers four principal areas: consumer credit and finance, "financial firm business", virtual asset service providers and financial platforms.

As regards virtual asset services providers (VASPs), the LCF Law regulates the following activities (where performed by a Guernsey body anywhere, or any body performing them in Guernsey):

- exchange between virtual assets and fiat currencies;
- exchange between one or more forms of virtual asset;
- transfer of virtual assets;
- safe-keeping and/or administration of virtual assets or instruments enabling control over virtual assets; and
- participation in and provision of financial services relating to an issuer's offer and/or sale of a virtual asset (including, without limitation and by way of example, an initial coin offering).

Carrying out any of these VASP activities without a licence or an applicable exemption is a criminal offence.

VASPs will need to go into GFSC's "soundbox" for an agreed period of time following licensing to be monitored by the GFSC. Following a satisfactory initial period of licensing, the GFSC will decide whether to renew the licence.

For financial platforms, the LCF Law regulates the operation of a peer to peer platform; the operation of a crowdfunding platform; and the provision of alternative non-bank credit or finance intermediation (i.e. intermediation or brokerage services).

Although likely to apply primarily to digital platforms, this does not have to be the case.

Jersey

On 1 February 2023, Jersey brought VASPs within the Island's AML/CFT perimeter by making a VASP another class of business which is required to be registered with the Island's regulator, the Jersey Financial Services Commission (JFSC), under the Proceeds of Crime (Jersey) Law 1999. The deadline for registration with the JFSC is 30 June 2023.

The JFSC have introduced grandfathering provisions for any business previously registered as a "virtual currency exchange" (i.e. a business which exchanges crypto to fiat or vice versa) such that VASP registration for an existing VCE will be on a "notification only" basis.

Jersey has also seen an inflow of funds with Singapore managers which invest into digital assets, and much use is made of the Jersey Private Fund regime (max. 50 investors). Digital assets do not fall within the definition of a "designated investment" for the purposes of Singapore tax legislation, such that a Singapore domiciled fund will be subject to tax in Singapore, and such tax leakage is hugely unattractive to investors. By contrast, funds that are structured as Jersey companies, and which are Jersey tax resident, are subject to tax at a 0% rate on income derived from their investments. Coupled with the fact there are no withholding or capital taxes in Jersey and that Jersey and Singapore have entered into a double-taxation agreement that provides Jersey domiciled (and tax resident) digital assets funds with potential relief or exemption from exposure to taxes on any gains of a revenue nature that arise from the disposal of cryptocurrencies in Singapore.

More generally, Jersey continues to welcome credible digital asset businesses; however, Jersey is not a crypto "free-for-all" and the JFSC scrutinises any digital asset business venture to ensure that the business's promoter, structure and operation are credible.

Conclusion

As the digital/virtual assets market matures we expect the trend towards regulated business to continue, with each of our jurisdictions offering something different for a wide range of businesses. Do reach out to discuss any of our jurisdictions in particular or to consider how they might differ.

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