

# Tips and traps for BVI, Cayman Islands cryptocurrency trading vehicles



Loeb Smith

The British Virgin Islands (BVI) and the Cayman Islands remain among the most popular jurisdictions for incorporating cryptocurrency trading vehicles. For example, the bankrupt cryptocurrency exchange FTX Trading identified that 22% of its customer base is located in the Cayman Islands, with 11% in the BVI. This is unsurprising, given the considerable benefits of trading cryptocurrencies through offshore vehicles, including tax neutrality, high levels of confidentiality, and low incorporation and annual maintenance costs.

This article considers some tips and traps related to cryptocurrency trading vehicles incorporated in the BVI and the Cayman Islands.

## Selecting jurisdiction

Cost-sensitive clients typically opt to incorporate a company in the BVI because the annual government maintenance fees are lower. Provision of a non-PO Box address, which is required by many cryptocurrency exchanges, usually also escalates costs in the Cayman Islands, whereas most BVI-registered agents offer this service as standard.

The constitutional documents of a Cayman Islands company are confidential, while the memorandum of association and articles of association of a BVI company are a matter of public record. Therefore, those needing to include commercially sensitive provisions in their constitutional documents, such as pursuant to a shareholders' agreement, may prefer to incorporate a Cayman Islands company.

## Selecting exchange

Clients are advised to carefully review the terms of service of their preferred exchange. In the case of the bankrupt cryptocurrency lending platform Celsius Network, the US Bankruptcy Court, Southern District of New York, held that certain customers transferred ownership of coin deposits in their "earn accounts" to Celsius, rendering the assets presumptively property of the Celsius bankruptcy estate. Recovery by these depositors is, therefore, most likely limited to cents on the dollar.

It is worth noting that the court's ruling was fact-sensitive and largely based on an ordinary construction of Celsius' terms of service, pursuant to which ownership of cryptocurrencies is purportedly transferred. This leaves open the possibility that cryptocurrency depositors could – in the absence of any terms to the contrary – assert a proprietary claim over their assets on a cryptocurrency exchange, thereby taking the assets outside of the exchange's insolvent estate.

This same issue arises in the chapter 11 bankruptcy proceedings of FTX, as its latest version of the terms of service specifically states that "title to ... digital assets shall at all times remain with [the customer] and shall not transfer to FTX Trading".

Certain cryptocurrency exchanges have established a practice of offering lines of credit to eligible depositors. These facilities are often secured with debenture-style security as part of the standard terms. Importantly, this may inhibit the company's corporate flexibility depending on the agreed covenants, and will at least necessitate the insertion of an entry in the company's security register to comply with applicable law.

## Licensing, registration

Cryptocurrency trading companies incorporated in the BVI or the Cayman Islands should carefully consider licensing, registration and other regulatory requirements. Compliance may be necessary under legislation regulating virtual asset service providers, mainstream financial services legislation, and provisions regulating anti-money laundering. Increasingly, the author sees banks and other service providers requesting a legal opinion to confirm that the relevant cryptocurrency trading company has complied with all applicable local law as part of its onboarding requirements.

## Economic substance

Cryptocurrency trading vehicles should carry out an economic substance analysis to ensure no "relevant activities" are inadvertently being conducted, and that all economic substance filings are accurate and complete. In some instances, offshore companies trading cryptocurrencies have appointed C-level personnel theoretically giving rise to "headquarters business". This could, in turn, oblige compliance with the economic substance test. The author has also seen filings by companies declaring they are conducting "holding company business", while no relevant activities are being performed. This may give rise to penalties.

## Corporate governance

BVI and Cayman Islands companies must maintain records and underlying documentation in a form that is sufficient to show and explain its transactions, and enable its financial position to be determined with reasonable accuracy. In some cases, board and shareholder resolutions are also required to ensure due authorisation in accordance with the constitutional documents of the company.

## LOEB SMITH ATTORNEYS

Room 306, 3/F, Printing House  
6 Duddell Street, Central  
Hong Kong  
[www.loebsmith.com](http://www.loebsmith.com)

## Contact details:

T: +852 5225 4920, +852 3583 5110  
E: [peter.vas@loebsmith.com](mailto:peter.vas@loebsmith.com)

PETER VAS is a partner  
at *Loeb Smith Attorneys* in  
Hong Kong

