



BERMUDA'S DIGITAL ASSET BUSINESS REGULATORY REGIME

Bermuda successfully launched the Digital Asset Business Act (**DABA**) in 2018 which established the foundation for a comprehensive legislative and regulatory framework designed to support and facilitate growth in the financial technology (**Fintech**) sector.

The digital asset business regulatory regime also encompasses prudential rules (including the Digital Asset Business (Client Disclosure) Rules 2018, the Digital Asset Business (Cybersecurity) Rules 2018, and the Digital Asset Business (Prudential Standards) (Annual Return) Rules 2018) which help to ensure that Bermuda is a leading jurisdiction in the regulation of digital assets and the regulatory regime is fit for purpose.

Digital Asset Business

DABA regulates digital asset business carried on in or from within Bermuda and protects the interests of clients or potential clients of persons carrying on the business of digital asset business.

DABA defines 'digital asset business' as the business of providing any or all of the following digital asset business activities to the general public:

- (a) issuing, selling or redeeming virtual coins, tokens or any other form of digital asset;
- (b) operating as a payment service provider business utilising digital assets which includes the provision of services for the transfer of funds;
- (c) operating as a digital asset exchange (a centralized or decentralized electronic marketplace used for digital asset issuances, distributions, conversions and trades, including primary and secondary distributions, with or without payment);
- (d) carrying on digital asset trust services (acting as a fiduciary, agent, or trustee on behalf of another person for the purpose of administration and management of a digital asset);
- (e) providing custodial wallet services (storing or maintaining digital assets or a virtual wallet on behalf of a client);

- (f) operating as a digital asset derivative exchange provider (a person operating a digital asset derivative exchange providing the services of creating, selling or otherwise entering into digital asset derivatives contracts or clearing and settlement of digital asset derivatives); or
- (g) operating as a digital asset services vendor (a person that under an agreement as part of its business can undertake a digital asset transaction on behalf of another person, has power of attorney over another person's digital asset, operates as a market maker for digital assets or operates as a digital asset benchmark administrator).
 - (i) A 'market maker' includes any operator who is (i) fulfilling digital asset trade orders initiated by, or in response to, clients' requests for trades, or (ii) hedging positions arising from quoting trade prices or fulfilling trade orders of digital assets.
 - (ii) A 'digital asset benchmark administrator' includes any person that has control over the provision of a digital asset benchmark including administering the arrangements for determining a benchmark, collecting, analysing or processing input data for the purpose of determining a benchmark, and determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose.

A 'digital asset' under DABA means anything that exists in binary format and comes with the right to use it and includes a digital representation of value that:

- (a) is used as a medium of exchange, unit of account, or store of value and is not legal tender, whether or not denominated in legal tender;
- (b) is intended to represent assets such as debt or equity in the promoter;
- (c) is otherwise intended to represent any assets or rights associated with such assets; or
- (d) is intended to provide access to an application or service or product by means of distributed ledger technology;

but does not include—

- (e) a transaction in which a person grants value as part of an affinity or rewards program, which value cannot be taken from or exchanged with the person for legal tender, bank credit or any digital asset; or
- (f) a digital representation of value issued by or on behalf of the publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform.

There are substantial penalties under DABA for anyone who fails to comply with any requirement or contravenes any prohibition imposed by or under the legislation, including potential fines of up to \$10,000,000.

Application

DABA makes digital asset business a regulated industry, and provides that a person cannot carry on digital asset business in or from within Bermuda unless the person is a licensed undertaking in one of the classes specified in DABA or falls within an exempt category as provided in an exemption order issued pursuant to DABA.

This means that any company wishing to carry out digital asset business will require the consent of the Bermuda Monetary Authority (**Authority**) and the grant of a licence by the Authority pursuant to DABA. A detailed comprehensive digital asset business application must be submitted to the Authority in the appropriate form and must state the class of digital asset business licence required. There are two classes of digital asset business licences which may be applied for as follows:

- (a) class F licence under which a person shall be licensed to provide any or all of the digital asset business activities under the definition of digital asset business; or
- (b) class M licence, under which a person shall be licensed to provide any or all of the digital asset business activities under the definition of digital asset business for a defined period determined by the Authority.

Any company submitting a digital asset business application must include the following documentation which must be provided to the Authority in English:

- a cover letter providing an executive summary of the application, and highlighting how the minimum licensing criteria for the relevant class or category of digital asset business being applied for is satisfied; and in cases where required documentation has not been provided by the applicant within its application, a written explanation for the said omission(s) is required;
- copies of the Memorandum of Association, Certificate of Incorporation or Registration Permit (if available);
- a business plan dealing with key items, such as:
 - (i) ownership of the applicant, including identification of its ultimate parent and other relevant details of its group organisational structure;
 - (ii) information, including curriculum vitae, on the applicant's board of directors, and senior management;
 - (iii) description of the applicant's business purpose for licensing in Bermuda, outlining the rationale for Bermuda as the chosen jurisdiction;
 - (iv) business strategy and risk appetites;
 - (v) insurance details and description of mitigation;

- (vi) financial assessment;
- (vii) explanation of how the applicant plans to meet head office requirements;
- (viii) projections of staffing requirements; and
- (ix) description of risk management, internal audit and compliance functions;
- a copy of its Anti-Money Laundering and Anti-Terrorism Financing policies and procedures;
- information in respect of the applicant's corporate shareholders and ultimate beneficial owners;
- information in respect of individual shareholders and ultimate beneficial owners;
- a copy of the applicant's proposed cybersecurity programme, including policies and procedures related to hot and cold customer private key storage;
- description of the steps that either have been taken (or will be and associated timing) to ensure that the Authority has access to a node or other arrangement to allow the Authority to monitor both the client and the applicant's own digital asset transaction records with online or automated real-time read-only access, and provision of wallet public addresses (hot wallet addresses (if used) and customer deposit addresses);
- acceptance letters indicating unconditional acceptance from the applicant's approved auditor and senior representative(s);
- curriculum vitae of applicant's senior representative(s);
- address of the applicant's head office; and
- a declaration from an officer of the applicant that the applicant is aware of and will abide by the Code of Practice as required pursuant to DABA.

Applicants for a continuation of an overseas operation from a foreign jurisdiction into Bermuda must additionally provide:

- a certificate of good standing from the relevant regulatory authority in the foreign jurisdiction;
- contact information for the regulatory authority in the relevant foreign jurisdiction, including contact person name/title, organisation name/address, e-mail address and telephone contact details; and
- copies of the most recent statutory financial statements and/or any other relevant financial information evidencing compliance of the applicant with the capital, solvency and liquidity requirements of the foreign jurisdiction.

There are additional requirements for Class M applications which include the provision of details of the entity's roadmap to deploy services and delivery mechanisms on a broader scale once the modified class licence has expired.

The Authority's Assessment and Licensing Committee (**ALC**) consists of senior management from the supervisory, policy and information technology departments within the Authority. The ALC generally convenes once a week to review the applications presented for consideration in order to reach consensus on whether to approve, defer or decline the applications for licensing. Applicants will be informed of the ALC decision as soon as possible subsequent to the meeting, followed by a formal letter from the Authority confirming the same.

Minimum Criteria

The Authority will not grant a digital asset business licence unless it is satisfied that the minimum criteria set out in DABA are fulfilled with respect to the applicant. The minimum criteria for licensing include:

- controllers and officers to be fit and proper persons;
- business to be conducted in a prudent manner;
- integrity and skill;
- corporate governance; and
- consolidated supervision.

Any licence issued by the Authority may be subject to such limitations on the scope of the digital asset business activity or the manner of operating the digital asset business as the Authority may determine to be appropriate having regard to the nature and scale of the proposed business. Further, a licence may be revoked by the Authority if any of the minimum criteria is not (or has not been) fulfilled in respect of a licensed undertaking.

Compliance

Companies conducting digital asset business must employ a risk-based approach to determine the appropriate levels of customer due diligence (**CDD**) measures for different customer types, proportionate risk-mitigation measures and measures for monitoring, detecting and reporting suspicious activity to the appropriate authorities, as well as monitoring for activity that may increase a customer's risk profile.

Using the risk-based approach, each company conducting digital asset business should determine the amount of money laundering (**ML**)/terrorist financing (**TF**) risk it will accept in pursuit of its business goals. The digital asset business sector is often considered as posing a high risk of ML/TF, but not all digital asset businesses are inherently high-risk for ML/TF. Therefore, the business's risk assessment should identify categories of customers and transactions that are higher or lower risk within a particular product or service.

Digital asset businesses must carry out CDD on their customers as well as on the customers' beneficial owners. Companies must be vigilant and ensure they obtain sufficient information on each customer at account opening, as well as establish appropriate transaction monitoring rules in their systems to flag unexpected activity or activity that does not appear commensurate with a customer entity type or a customer's nature of business or occupation.

Every licenced undertaking is required to file an annual cyber security report prepared by its chief information security officer on an annual basis setting out the availability, functionality and integrity of its electronic systems, and identifying cyber risk arising from any of its digital asset business as well as the cyber security program implemented and proposals for steps for the redress of any inadequacies identified.

The cyber security program of a licensed undertaking shall include, but is not limited to, the audit functions set forth below:

- (a) penetration testing of its electronic systems and vulnerability assessment of those systems conducted at least on a quarterly basis; and
- (b) audit trail systems that—
 - (i) track and maintain data that allows for the complete and accurate reconstruction of all financial transactions and accounting;
 - (ii) protect the integrity of data stored and maintained as a part of the audit trail from alteration or tampering;
 - (iii) protect the integrity of hardware from alteration or tampering, including by limiting electronic and physical access permissions to hardware and maintaining logs of physical access to hardware that allows for event reconstruction;
 - (iv) log system events including but not limited to access and alterations made to the audit trail systems, and Cyber Security Events; and
 - (v) maintain records produced as part of the audit trail.

In addition to these compliance measures, every licenced entity must prepare and deliver to the Authority a certificate of compliance within four months from the end of its financial year which must be signed by two directors, or one director and an officer of the undertaking, certifying that to the best of their knowledge the entity has complied with the minimum criteria as set out in DABA and codes of practice.

Summary

Bermuda continues to demonstrate its commitment to encouraging innovation in the Fintech sector as well as its ability to adapt to international industry standards and market expectations.

As the Fintech space continues to evolve, BeesMont's dedicated Technology & Innovation Team remains actively engaged with relevant Government parties and the Authority and is advising clients who operate or intend to operate in Bermuda's Fintech environment.

At BeesMont Law Limited we strive to provide the highest standard of legal service for our clients through our responsive, thorough and innovative approach. We have a friendly and dynamic team who are approachable and sensitive to the commercial and practical needs of our clients, for whom we seek to provide tailored solutions. BeesMont Law Limited is a professional company incorporated with limited liability in Bermuda.

This article is intended for general informational purposes only and is not a substitute for legal advice. Please do not hesitate to contact Stephanie P. Sanderson, Head of Technology & Innovation, spsanderson@beesmont.bm, or your usual contact at BeesMont Law Limited to discuss your legal needs.



Stephanie Paiva Sanderson

Partner, Corporate

Head of Technology & Innovation

spsanderson@beesmont.bm