



Bermuda Introduces Digital Asset Business Act 2018

The Digital Asset Business Act 2018 (**DABA**) is the next step in Bermuda's development and implementation of a globally recognised standard (commonly referred to as the "Bermuda Standard") for regulating the fintech sector in Bermuda. DABA has now been approved by both the House of Assembly and the Senate and only needs Royal Assent and a notice of the Minister of Finance.

What will DABA regulate?

DABA will regulate **digital asset business** carried on in or from within Bermuda 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 section 12(3) of DABA or falls within an exempt category as provided in an exemption order issued pursuant to section 11 of DABA.

What is "Digital Asset Business"?

Digital asset business, as defined in DABA, means the business of providing any or all of the following activities to the general public:

- issuing, selling or redeeming virtual coins, tokens or any other form of digital asset;
- operating as a payment service provider business utilising digital assets which includes the provision of services for the transfer of funds;
- operating an electronic exchange;
- providing custodial wallet services;
- operating as a digital asset services vendor.

An **exchange** means to assume control of digital assets from and on behalf of a client, to sell, trade or convert: (a) digital assets for fiat currency, bank credit or one or more forms of digital assets; or (b) fiat currency or bank credit for one or more forms of digital assets.

Custodial wallet service means the provision of the services of storing or maintaining digital assets or a virtual wallet on behalf of a client. Wallet means a software program that stores private and public keys and interacts with distributed ledger technology to enable users to send, receive and monitor their digital assets. Distributed ledger technology means a database system in which (a) information is recorded and consensually shared and synchronised across a network or multiple nodes; and (b) all copies of the database are regarded as equally authentic.

A **digital asset services vendor** means a person that: (a) under an agreement as part of its business – (i) can undertake a digital asset transaction on behalf of another person; (ii) has power of attorney over another person's digital assets; (b) operates as a market maker for digital assets. A market maker means a person conducting the business of trading in digital assets including, but not limited to, quoting buy and sell prices in furtherance of profit or gains on the bid offer spread.

It should be noted that the following activities do **not** constitute digital asset business for the purpose of DABA:

- contributing connectivity software or computing power to decentralised software or computing power to decentralised digital asset, or to protocol governing transfer of the digital representation of value;
- providing data storage or security services for a digital asset business, but is not otherwise engaged in digital asset business activity on behalf of other persons; and
- the provision of any digital asset business activity by an undertaking solely for the purpose of its business operations or the business operations of any subsidiary of it.

What are “Digital Assets”?

Digital assets, as defined by DABA, means anything that exists in binary format and comes with the right to use it and includes a digital representation of value that:

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

but does not include:

- 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
- 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 platform.

What constitutes carrying on digital asset business “in or from within Bermuda”?

A person carries on digital asset business in or from within Bermuda if the undertaking: (a) is incorporated or formed in Bermuda and carries on any digital asset business activity; or (b) is incorporated or formed outside of Bermuda and carries on any digital asset business activity in or from within Bermuda.

Application Process

Application for a digital asset business licence is made to the Bermuda Monetary Authority (**BMA**). There are two classes of digital asset business licence that may be applied for under DABA. These are:

- **class F licence**, under which the applicant shall be licensed to provide any or all of the digital asset business activities; or
- **class M licence**, under which the applicant shall be licensed to provide any or all of the digital asset business activities for a defined period determined by the BMA which may be extended upon application to the BMA.

The application shall be accompanied by the following:

- a business plan setting out the nature and scale of the digital asset business activity which is to be carried out by the applicant;
- particulars of the applicant’s arrangements for the management of the business;
- policies and procedures to be adopted by the applicant to meet the obligations of DABA and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008;
- such other information and documents as the BMA may reasonably require for the purpose of determining the application; and
- an application fee.

A licence issued under DABA 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 BMA may determine to be appropriate having regard to the nature and scale of the proposed business. The BMA shall publish on bma.bm a list of every licensed undertaking and the class of licence issued to it.

Minimum Criteria for Licensing

The BMA shall not grant a licence unless it is satisfied that the minimum criteria set out in Schedule 1 of DABA is fulfilled in respect of the application. This includes:

- having controllers and officers who are fit and proper persons.
- having policies and procedures including in relation to AML/ATF, sanctions and any codes of practice under DABA.
- maintaining minimum net assets of \$100,000 or such amounts as the BMA may determine taking into consideration, the nature, size and complexity of the licensed undertaking.
- maintaining adequate accounting or other records and adequate systems of control of its business and records.
- having insurance to cover the risks inherent in the operations of its business of an amount commensurate with the nature and scale of its digital asset business or has implemented such other risk mitigation measures as the BMA may agree.
- being effectively directed by at least two persons and under the oversight of the Board with such number of non-executive directors as the BMA considers appropriate given the nature, size, complexity and risk profile of the licensed company.

Statements of principles will be issued by the BMA to provide guidance to interpreting the minimum licensing criteria.

DABA also imposes a number of other continuing obligations including annual prudential filings and fees.

Head Office Requirement

A licensed undertaking is required to maintain a head office in Bermuda from which the digital asset business of the licensed undertaking must be directed and managed. In determining whether a licensed undertaking complies with this requirement the BMA shall consider, amongst others, the following factors:

- where the strategy, risk management and operational decision making of the licensed entity occurs;
- whether the senior executives who are responsible for, and involved in, the decision-making related to digital asset business of the licensed entity are located in Bermuda; and
- where meetings of the board of directors of the licensed undertaking occur.

Offences and Penalties under DABA

DABA contains a number of criminal offences or civil penalties for undertakings that breach the provisions of DABA and range in severity depending on the nature of the breach.

This News Alert is not intended to be a comprehensive review of DABA but seeks to provide details of the most pertinent provisions as well as other ancillary requirements. Should you have any queries, please reach out to one of our fintech experts.

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