

Bermuda Virtual Currencies Chapter (Mondaq)

Briefing Summary: This guide to virtual currencies in Bermuda covers the legal and enforcement framework, market, technology, financial crime, taxation, data and cybersecurity.

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Legal and enforcement framework

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In broad terms, which legislative and regulatory provisions govern virtual currencies in your jurisdiction?

Bermuda has a digital asset sector with a specific legal and regulatory regime that governs both the issuance of digital assets and the carrying on of digital asset business activities in and from Bermuda. The Digital Asset Issuance Act 2020 (DAIA) requires any person seeking to offer digital assets to the public by way of a new issuance ('digital asset issuance') to obtain the permission of the Bermuda Monetary Authority (BMA), Bermuda's financial sector regulator. The Digital Asset Business Act 2018 (DABA) established a governing framework ('DAB Framework') that:

- regulates the conduct of digital asset business activities in and from Bermuda; and
- requires any person seeking to conduct digital asset business activities in or from Bermuda to obtain a licence from the BMA.

In broad terms, which legislative and regulatory provisions govern entities that provide services relating to virtual currencies? Must they be registered or licensed by a regulatory authority?

A 'digital asset' is defined as anything that:

- exists in binary format;
- 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;
 - is not legal tender, whether or not denominated in 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 distributed ledger technology.

The term does not include:

- a transaction in which a person grants value as part of an affinity or rewards programme, 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 game platform.

'Digital asset business activities' include:

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

- operating as a digital asset derivative exchange provider; and
- operating as a digital asset services vendor.

Although not currently in force, the Digital Asset Business Amendment Act 2023, which was tabled in the Bermuda House of Assembly in March 2023, proposes to insert “operating as a digital asset lending or digital asset repurchase transactions service provider” as another regulated digital asset business activity under the DABA.

Any entity conducting digital asset business activities in or from Bermuda must obtain a licence from the BMA to do so. There are three classes of licence available:

- Class F (full licence);
- Class M (modified licence ‘sandbox regime’); and
- Class T (test licence).

Which bodies are responsible for enforcing the applicable laws and regulations? What powers do they have?

The BMA is responsible for regulating and licensing digital asset issuances and digital asset business activities. The BMA has been granted wide-ranging powers of supervision and enforcement under the DABA and the DAIA. The BMA has the power to:

- compel production of information and documents;
- issue directions that safeguard the interests of the licensee’s clients; and
- impose restrictions and conditions on licences.

The BMA has issued numerous documents – including guidance notes, codes of conduct, statements of principles and information bulletins – which set out the basic principles on how a digital asset business is expected to conduct business.

If a digital asset business does not comply with the DAB Framework, including any specific BMA requests or directions, the BMA has the power and authority to impose fines of up to \$10 million, depending on the severity and type of infraction. In the most extreme cases, the BMA may also revoke a DABA licence. The BMA will use its enforcement powers in a manner consistent with the Statement of Principles and Guidance on the Exercise of Enforcement Powers.

What is the regulators’ general approach to virtual currencies?

The BMA welcomes and openly engages with persons seeking to use blockchain thanks to the sector-specific legislation and regulations in place in Bermuda. The BMA has established a FinTech Team, comprising individuals chosen for their experience in and knowledge of both the technology sector (blockchain specifically) and the application of financial services regulation, to oversee the application and implementation of the DAB Framework.

The BMA's general approach with respect to the regulation of virtual currencies is founded on the principle of proportionality, whereby when assessing the governance and risk management frameworks of digital asset businesses, the BMA will have regard to the nature, scale, complexity and risk profile of the business.

Has there been any notable enforcement action relating to virtual currencies?

No

Definitions

How are 'virtual currencies' defined in your jurisdiction? Have there been any judicial decisions which have helped to define virtual currencies or their interplay with the existing body of laws (eg, contracts law, property law)?

Bermuda has introduced an all-encompassing definition of 'digital asset' that includes cryptocurrencies and virtual currencies. The full definition is anything that:

- exists in binary format;
- 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;
 - is not legal tender, whether or not denominated in 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 distributed ledger technology.

The term does not include:

- a transaction in which a person grants value as part of an affinity or rewards programme, 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 game platform.

The Digital Asset Business Framework does not differentiate between utility tokens, non-fungible tokens, stablecoins, securities token or cryptocurrencies from the perspective of whether something is a digital asset. However, it does apply the principle of proportionality when assessing each type of digital asset as part of an application by a digital asset business to conduct either a digital asset issuance or digital asset business activities.

There are no decided cases in the Bermuda Supreme Court or Court of Appeal regarding digital assets. The Bermuda Courts will ordinarily be guided by pronouncements of the UK Supreme Court (formerly the House of Lords) on common law issues which are not materially impacted by local considerations, even though such decisions of the UK Supreme Court are not strictly binding. However, decisions of the Judicial Committee of the Privy Council are binding on the Bermudian courts, irrespective of the jurisdiction from which the appeal emanates, and any conflict between two Privy Council decisions should ordinarily be resolved in favour of the later decision.

Similarly, where the provisions of any act of the Bermuda legislature are derived from prior enacted statutes in England and Wales, or another Commonwealth jurisdiction, the Bermuda courts will generally regard pronouncements of the courts in the relevant jurisdiction from which the Bermuda statute was derived as persuasive authority as to the corresponding position under Bermuda law.

How are 'initial coin offerings' and 'security token offerings' defined in your jurisdiction?

The equivalent term under Bermuda law is a 'digital asset issuance', which under the Digital Asset Issuance Act (DAIA) means "an offer to the public to acquire digital assets or to enter into an agreement to acquire digital assets at a future date".

Are stablecoins treated as virtual currencies in your jurisdiction or do they fall under an existing category (eg, electronic money)?

Stablecoins constitute digital assets in Bermuda and are therefore regulated under the Digital Asset Business Act and the DAIA.

Virtual currencies market

Which virtual currencies have become most embedded in your jurisdiction? Does this vary depending on the specific use?

Bermuda is technology agnostic and supports innovation through the development of all available technologies, including blockchain applications and protocols. The Digital Asset Business Framework ('DAB Framework'), which governs and regulates digital asset issuances and the provision of digital asset business activities in and from Bermuda, is focused on:

- minimising fraud, money laundering and terrorist financing; and
- promoting the highest quality of good corporate governance and risk management across the digital asset sector.

It is the purpose and objectives of, as well as the individuals and organisations that develop, maintain and promote, blockchain projects that are important to the Bermuda Monetary Authority (BMA), not necessarily the particular technology or virtual currency being used.

What different products and services are offered?

To date, licences have been issued for the provision of all categories of digital asset business activities. This illustrates that Bermuda is the host to digital asset businesses offering a wide array of products and services, with even more licence applications being considered by the BMA.

How are virtual currency service providers generally structured?

How are they generally financed?

Digital asset service providers can be structured and financed in a wide array of manners. The most common structure is the formation of an exempted Bermuda company limited by shares, which is then financed by way of private equity, seed capital and/or friends and family investors.

Are virtual currency trading platforms subject to a specific regulatory regime in your jurisdiction? Must they be registered or licensed by a regulatory authority? Does this vary depending on whether the platform accepts legal currency or whether the platform is custodial? Are virtual currency trading platforms subject to any form of 'market abuse' regulation?

Yes, digital asset trading platforms must be licensed under the DAB Framework. Whether the platform accepts legal currency will not necessarily vary the licence required but it does carry bespoke considerations under the DAB Statement of Principles and the DAB Code of Practice. Similarly, where a digital asset platform provides custodial wallet services, it will have additional regulatory oversight, namely with respect to the Digital Asset Custody Code of Practice.

Crossover with banking

How are virtual currencies positioned within the broader banking landscape in your jurisdiction?

Bermuda does not have a central bank and as such does not utilise a central bank digital currency. The Bermuda government has, however, publicly announced that it proposes to introduce a Bermuda digital dollar token for use in the local economy, with both taxes and social support payable in the tokens. Bermuda currently has four traditional operating and licensed banks and one licensed digital asset bank. Some of the traditional banks will provide specific fiat banking services to regulated entities in the digital asset sector; while the digital asset bank, Jewel Bank (expected to be operational in 2023), will seek to offer both fiat and digital asset banking, as well as custodial services.

What impact could mainstream adoption of virtual currencies have on the ability to control inflation in your jurisdiction?

The Bermuda Monetary Authority (BMA) controls the issuance and circulation of Bermuda's native currency, the Bermuda dollar, which is pegged 1:1 to the US dollar. With the lack of a central bank and the nexus with the US dollar, mainstream adoption of 'virtual currencies' in Bermuda will have little effect on the ability to control inflation. If the government succeeds in introducing its own 'virtual currency', it may then have the ability to contribute towards controlling or influencing inflation.

What other implications could the mainstream adoption of virtual currencies have for the banking system in your jurisdiction (eg, with respect to payment services)?

Pursuant to the Banks and Deposit Companies Act 1999, any person carrying on a 'deposit-taking business' in or from Bermuda must first obtain a licence from BMA thereunder. For the purposes of the foregoing, 'deposit-taking business' means the business of lending money received by way of deposit to others or financing any other activity of the business wholly or to any material extent, out of the capital of or the interest on money received by way of deposit.

Although there is no clear authority on the extent to which the foregoing would be seen to include such transactions in cryptocurrency or other digital assets, a cautious and substantive reading of the statute may, in some cases, warrant it. In particular, if the digital assets in question are primarily used to facilitate the transfer of fiat currency from one party to another or the conversion between fiat currencies, the legislation may well apply. Consequently, persons wishing to establish such businesses are encouraged to consider closely the application of the Banks and Deposit Companies Act 1999 and consult appropriate advisers.

Regarding decentralised finance, do the banking regulations in your jurisdiction apply to loans of virtual currencies or interest-bearing deposits of virtual currencies? Does this vary depending on whether stablecoins are loaned or deposited?

The banking regulations in Bermuda do not apply to loans of virtual currencies or interest-bearing deposits of virtual currencies – only the Digital Asset Business Framework regulates such activities. The licensing requirements under the framework will not vary depending on the use of stablecoins, but this may affect the assessment of proportionate risk when considering regulatory oversight.

Technology

Is blockchain technology in itself regulated in your jurisdiction and what specific legal issues are associated with its use?

No, the technology is not regulated, but the provision of digital asset business activities (eg, custody, exchange, payment services, issuance and redemption of tokens) and the offering of digital assets to the public are regulated activities.

What other implications could the mainstream adoption of virtual currencies have from a technological perspective?

Mainstream adoption of virtual currencies would reduce the cost of conducting business in several ways. It would also improve the speed of transactions and settling payments, not to mention the ability to facilitate micro-payments.

Bermuda currently benefits from the same technological payment systems as most other jurisdictions, so a change in the way in which people conduct business would not be immediately noticeable – but the cost would be, particularly for international value transfers.

Data security and cybersecurity

What is the applicable data protection regime in your jurisdiction and what specific implications does this have for virtual currencies?

Bermuda has introduced legislation to provide for the protection of personal and sensitive personal information. While not yet fully enacted, the Personal Information Protection Act (PIPA) sets out the standards required of all organisations in Bermuda that use personal or sensitive personal information. It also introduced a regulatory and oversight function administered by the Office of the Privacy Commissioner for Bermuda.

Given blockchain's immutable nature, a particular challenge that may arise will be in respect of an individual's right to have his or her personal information erased by an organisation in certain circumstances under PIPA, since an individual could find his or her personal data recorded on a blockchain forever.

What is the applicable cybersecurity regime in your jurisdiction and what specific implications does this have for virtual currencies?

Digital asset businesses are susceptible to cyber threats and systems failures. However, these concerns are mitigated as a digital asset business must have a comprehensive cybersecurity programme which is governed by the Digital Asset Business (Cybersecurity) Rules 2018 ('Cybersecurity Rules') and the Digital Asset Business Act Code of Practice. The DAB must have a comprehensive security programme that is proportionate to the nature, scale, complexity and risk profile of the business. They must also implement a written cybersecurity policy which must address the following:

- information security;
- data governance and classification;
- access controls;
- business continuity and disaster recovery planning and resources;
- capacity and performance planning;
- systems operations and availability concerns;
- systems and network security;
- systems and application development and quality assurance;
- physical security and environmental controls;
- customer data privacy;
- vendor and third-party service provider management;
- monitoring and implementation of changes to core protocols not directly controlled by the digital asset business; and
- incident response.

Financial crime

What provisions govern money laundering and other forms of financial crime in your jurisdiction and what specific implications do these have for virtual currencies?

Persons seeking either to conduct a digital asset issuance or provide digital asset business activities to the public in or from Bermuda must establish anti-money laundering and anti-terrorist financing policies and procedures in accordance with:

- the Digital Asset Business Act;
- the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008;
- the Proceeds of Crime Act 1997; and
- the Anti-Terrorism (Financial and Other Measures) Act 2004.

These policies and procedures must include:

- customer due diligence;
- ongoing monitoring;
- reporting of suspicious transactions;
- record-keeping;
- internal controls;
- risk assessment and management; and

- the monitoring and management of compliance with, and internal communication of, these policies and procedures.

Consumer protection

What consumer protection provisions apply to virtual currencies in your jurisdiction?

Safeguarding client assets by preventing fraud or misappropriation is a primary concern of the Bermuda Monetary Authority (BMA). Consumer protection provisions are contained in multiple pieces of legislation and related regulations and codes of conduct. The Digital Asset Business Act (DABA) prescribes requirements relating to safeguarding client assets; while the DAB Code of Practice sets out the requirement to ensure that client assets are segregated from those of the digital asset business. The Digital Asset Custody Code of Conduct builds on these principles and provides greater clarity over the standards in relation to the level of care expected by the BMA in relation to safeguarding client assets. The DABA also contains provisions that require the establishments of formal customer complaints policies and procedures.

What other implications could the mainstream adoption of virtual currencies have from a consumer perspective?

Mainstream adoption of 'virtual currencies' would reduce the cost of conducting business in several ways. It would also improve the speed of transactions and settling payments, not to mention the ability to facilitate micro-payments.

Competition

Do virtual currencies present any specific challenges or concerns from a competition perspective?

There is an understood threat to the banking sector by this technology, as it can and does undermine the revenue-generating activities of regulated banks. This does not raise general competition concerns, but is something that can and will have a wider economic impact on the residents and economy of Bermuda.

Taxation

How are transactions in virtual currencies treated from a tax perspective in your jurisdiction?

Bermuda imposes no tax on the issuance, acquisition, purchase, subscription, sale or maintenance of digital assets or on transactions involving digital assets, unless they form part of an existing taxable activity.

Trends and predictions

How would you describe the current landscape and prevailing trends in your jurisdiction as regards virtual currencies? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Bermuda has proven itself to have a robust regulatory regime that has helped to protect both the jurisdiction and its licensed digital asset businesses from recent turmoil in the sector. Ongoing open dialogue between the Bermuda government, the Bermuda Monetary Authority and industry has facilitated continual improvements to the Digital Asset Business Act (DABA) and Digital Asset Issuance Act (DAIA) regimes which has kept the Bermuda regulations fit for purpose. As the world settles in to understanding the true potential of the underlying technology and the risks it brings, we expect to see increased interest in the DABA and DAIA regimes from credible and legitimate projects seeking certainty and legitimacy through compliance with the standards set by Bermuda. There is also likely to be more focus on consumer protection and, through collaboration with Bermuda's insurance and reinsurance sectors, the availability of insurance for licensed businesses.

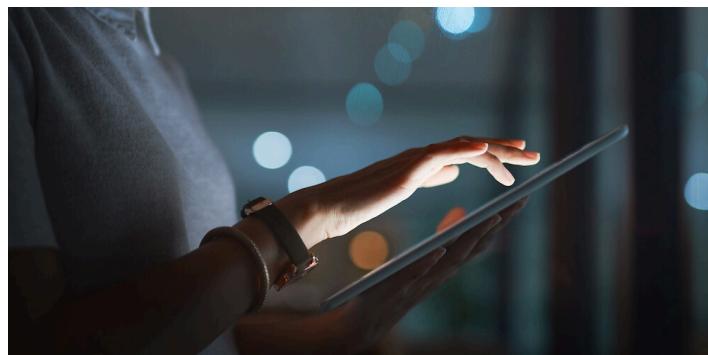
Tips and traps

What are your top tips for virtual currency providers seeking to enter your jurisdiction and what potential sticking points would you highlight?

The most important factor when considering offering digital asset services or using blockchain technology in or from Bermuda is to understand the potential impact of the Digital Asset Business Act and the Digital Asset Issuance Act. We would always recommend obtaining product and service-specific advice as a first step to understanding the regulatory implications of the products or services before undertaking such activities. There is also a growing and developing focus on how to structure and regulate decentralised finance products and services.

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