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Global Legal Insights
Blockchain and cryptocurrency regulation 2022, fourth edition
CAREY OLSEN

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At Carey Olsen, we always look at the bigger picture. In the face of opportunities or challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with outstanding client service, technical excellence and commercial insight.

BIGGER PICTURE

Bermuda blockchain and cryptocurrency regulation 2022, fourth edition

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Government attitude and definition

Bermuda has been recognised as a global leader in the regulation of businesses using blockchain and cryptocurrencies. The Bermuda government has pioneered one of the world's first comprehensive regulatory and legislative frameworks specifically designed to provide legal and regulatory certainty to industry participants whilst ensuring that business in the sector is conducted in accordance with the highest international standards.

The framework is more particularly defined below, but in essence comprises two legislative arms that, subject to certain exemptions, treat all cryptocurrencies, digital coins and tokens as the same and use the term "Digital Assets" to identify them all. The Digital Asset Business Act ("**DABA**") introduced a licensing regime for businesses seeking to conduct "Digital Asset Business" (defined below) whilst the Digital Asset Issuance Act ("**DAIA**") introduced a regime to regulate persons seeking to carry on a "Digital Asset Issuance" (defined below).

The Bermuda government also introduced an insurtech sandbox that is an additional licensing regime designed to promote innovation in the use of technology across the insurance and reinsurance sectors, being industries in which Bermuda has been recognised as a world leader for decades. The government further announced its intention to widen the scope of the sandbox to encompass other industry sectors. Bermuda also introduced one of the world's first digital asset business bank licensing regimes that provides for a banking licence to be issued to persons seeking to provide traditional banking services to the digital asset sector.

At the Bermuda Tech Summit 2021, the Bermuda government announced that it will be launching a blockchain-based stimulus token for use in Bermuda's retail market and which will be a Bermuda dollar-backed stablecoin using technology developed by one of the first companies to be regulated under the DABA in Bermuda. The government has also been working on numerous other technology projects to further enhance the island's digital infrastructure, including the development of a digital ID system that meets internationally recognised standards of both privacy and anti-money laundering and anti-terrorist financing ("**AML/ATF**") regulation and the introduction of submarine cabling legislation to protect both the environment surrounding the island and the submarine cables themselves once installed.

Bermuda has developed a collaborative business culture that involves government and industry working together to create opportunity and commercial success with truly independent, actively engaged and globally recognised regulators maintaining the balance between the promotion of innovation and adherence to worldwide standards of regulation, compliance and transparency.

The Bermuda Monetary Authority ("**BMA**"), as Bermuda's financial sector regulator, is a member of the Global Financial Innovation Network ("**GFiN**") and also a member of the GFiN Coordination Group. GFiN was created to provide an efficient mechanism for innovators to interact with regulators and assist in navigating between jurisdictions as they look to scale and test new products and services. GFiN also provides a means for regulators to cooperate and share knowledge and experience in working with new and innovative product and service lines.

Cryptocurrency regulation

Digital Asset Business Act

The DABA came into force in September 2018. Since the DABA's enactment, the BMA has promulgated rules, regulations, codes of practice, statements of principles and guidance in order to supplement the DABA, with the result that the DABA operates in a similar manner to the regulatory frameworks in place for other financial services regulated by the BMA. In summary, the DABA specifies the digital asset-related activities to which it applies, imposes a licensing requirement on any person carrying on any of those activities, lays out the criteria a person must meet before it can obtain a licence, imposes (and permits the BMA to impose) certain continuing obligations on any holder of a licence, and grants to the BMA supervisory and enforcement powers over regulated digital asset businesses. The BMA and other industry stakeholders are constantly reviewing and monitoring the framework in order to ensure that it remains fit for purpose and meets with all international standards of regulation, compliance and transparency. Through consultation with industry, the BMA, together with the Bermuda government, has already updated and improved the provisions of the DABA to give greater clarity and to facilitate more effective administration of its provisions, evidencing an actively engaged and responsive regulator.

Scope of the DABA

The DABA applies to any entity incorporated or formed in Bermuda and carrying on digital asset business (irrespective of the location from which the activity is carried out) and to any entity incorporated or formed outside of Bermuda and carrying on digital asset business in or from within Bermuda.

A "digital asset" is defined as anything that exists in binary format and comes with the right to use it and includes a digital representation of value that is (a) 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) intended to represent assets such as debt or equity in the promoter, (c) otherwise intended to represent any assets or rights associated with such assets, or (d) intended to provide access to an application of service or product by means of distributed ledger technology.

"Digital asset business" is defined as the provision of the following activities to the general public as a business:

- Issuing, selling or redeeming virtual coins, tokens or any other form of digital asset: this is intended to regulate any person providing these services to other persons, whether such other person is situated in or outside Bermuda. It does not include a digital asset issuance to fund an issuer's or promoter's own business or project, which is regulated under the DAIA (see below).
- Operating as a payment service provider business utilising digital assets, which includes the provision of services for the transfer of funds: the term "payment service provider" is used globally in AML/ATF laws, regulations and guidance, and is defined in Bermuda's Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Amendment Regulations 2010 as "a person whose business includes the provision of services for the transfer of funds".
- Operating as a digital asset exchange: this means the operation of a centralised or decentralised electronic marketplace used for digital asset issuances, distributions, conversations and trades, including primary and secondary distributions, with or without payment.
- Carrying on digital asset trust services: this means the carrying on of the business of acting as a fiduciary agent, or trustee on behalf of another person for the purpose of administration and management of a digital asset.
- Providing custodial wallet services: this means the provision of services of storing or maintaining digital assets or a virtual wallet on behalf of a client.
- Operating as a digital asset derivative exchange provider: this means the operation of a centralised or decentralised marketplace used for digital asset derivative issuances, distributions and trades with or without payment and that provides the services of creating, selling or otherwise entering into digital asset derivatives contracts or clearing and settlement of the same.
- Operating as a digital asset services vendor: this includes a person that, under an agreement as part of its business, can undertake a digital asset transaction on behalf of another person or has power of attorney over another person's digital asset, or a person who operates as a market maker for digital assets, or a person who operates as a digital asset benchmark administrator. The definition is intended to be widely interpreted to include any other business providing specific digital asset-related services to the public.

In addition to the above categories, the DABA includes an option for the Minister of Finance, after consultation with the BMA, to be able to add new categories or to amend, suspend or delete any of the categories listed above by order. The DABA specifically provides that the following activities shall not constitute digital asset business:

- providing data storage or security services for a digital asset business, so long as the enterprise 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 of its subsidiaries.

Licensing requirement

The DABA requires persons carrying on digital asset business to obtain a licence before doing so, unless that person is subject to an exemption order issued by the Minister of Finance. At the time of writing, the Minister had not issued or proposed any exemption orders. Three classes of licence are available for applicants:

- a Class F licence is a full licence to conduct any or all digital asset business activities and is not subject to a specified period, although the BMA has discretion to make any licence subject to restrictions where it deems it appropriate in the circumstances;
- a Class M licence is the same as a Class F licence except with modified requirements and restrictions and will only be valid for a specified period of time determined by the BMA on a case-by-case basis. In advance of the expiry of a Class M licence, holders are expected to either apply for a Class F licence, cease carrying on digital asset business altogether or seek an extension to the Class M licence period, which may be granted at the BMA's discretion; and
- a Class T licence is for the sole purpose of carrying out pilot or beta testing in relation to the applicable digital asset business activities. In advance of the expiry of a Class T licence, holders are expected to either apply for a Class M or Class F licence, cease carrying on digital asset business altogether or seek an extension to the Class T licence period, which may be granted at the BMA's discretion.

The intention behind this tiered licensing regime is to allow start-ups engaging in digital asset business to do so in a properly supervised regulatory environment, and to engage in proof of concept and develop a track record before obtaining a modified or full licence. The modified licence allows for persons who have developed proof of concept and are seeking to launch their products and services into the market, but might not be able to meet all the requirements of a full licence. The restrictions to which a licensee will be subject will depend on the business model of the prospective licensee and the risks associated with it, but include an obligation to disclose to prospective customers the fact that the licensee holds either a Class T or Class M licence and certain limitations on the volume of business the licensee is permitted to conduct, along with other restrictions as the BMA may deem necessary or appropriate on a case-by-case basis.

A prospective licensee may not necessarily receive the licence for which it applies: an applicant for a Class F licence may receive a Class M licence, or an applicant for a Class M licence may receive a Class T licence, if the BMA decides that a Class F or Class M licence, respectively, would be inappropriate in the circumstances. A licence will further specify the category (or categories) of digital asset business in which the licensee is permitted to engage. Carrying on digital asset business without a licence is a criminal offence punishable by a fine of up to US$250,000, imprisonment for a term of up to five years, or both.

Application process

An application for a digital asset business licence is made to the BMA and must specify the class of licence being sought and be accompanied by (a) a business plan setting out the nature and scale of the digital asset activities to be conducted, (b) particulars of the applicant's arrangements for the management of the business, (c) policies and procedures to be adopted by the applicant to meet the obligations under the DABA and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, (d) such other information and documents as the BMA may reasonably require for the purpose of determining the application, and (e) the applicable application fee.

Criteria to be met by licensees

The DABA provides that the BMA may not issue any licence unless it is satisfied that the applicant fulfils certain minimum criteria addressing the fitness and propriety of directors and officer ensuring business is conducted in a prudent manner, the integrity and skill of the business's management, and standards of corporate governance observed by the (prospective) licensee. This is consistent with the position under other regulatory laws applicable to other sectors and is intended to ensure that the BMA maintains high standards for the conduct of regulated business. The BMA has also published a code of practice detailing requirements as to, *inter alia*, governance, risk management and internal controls applicable to licensees. The BMA recognises, however, that licensees have varying risk profiles arising from the nature, scale and complexity of the business, so assesses a licensee's compliance with this code in a proportionate manner relative to the business's nature, scale and complexity.

The DABA requires licensees to notify the BMA upon changes in directors or officer and the BMA has powers to, *inter alia*, object to and prevent new or increased ownership of shareholder controllers and the power to remove controllers, directors and officers who are no longer fit and proper to carry on their role.

Continuing obligations of licence holders

Persons holding a licence issued under the DABA are subject to several ongoing obligations.

Client disclosure rules: the BMA has used powers conferred to it under the DABA to promulgate the Digital Asset Business (Client Disclosure) Rules 2018 in order to mitigate the high degree of risk for consumers owing to the highly speculative and volatile nature of digital assets. These rules require licensees, before entering into any business relationship with a customer, to disclose to that customer: the class of licence it holds; a schedule of its fees and the manner in which fees will be calculated if not set in advance; whether it has insurance against loss of customer assets arising from being hacked or otherwise stolen; the extent to which a transfer or exchange of digital assets is irrevocable and any exceptions; governance or voting rights regarding client assets if the licensee is to hold client assets; the extent to which it will be liable for an unauthorised, mistaken or accidental transfer or exchange; and sundry other matters. The rules also oblige licensees to confirm certain information regarding transactions with clients at the conclusion of each such transaction.

Cybersecurity rules: alongside the client disclosure rules described above, the BMA has promulgated the Digital Asset Business (Cybersecurity) Rules 2018, which require licensees to file an annual cybersecurity report prepared by its chief information security officer assessing the availability, functionality and integrity of its electronic systems, any identified cyber-risk arising from any digital asset business activity carried on or to be carried on by the licensee, and the cybersecurity program implemented and proposals for steps to remediate any inadequacies identified

The cybersecurity program itself must include (but is not limited to) the following audit functions:

- penetration testing of its electronic systems and vulnerability assessment of those systems conducted at least on a quarterly basis; and
- audit trail systems that:
  a. track and maintain data that allows for the complete and accurate reconstruction of all financial transactions and accounting;
  b. protect the integrity of data stored and maintained as part of the audit trail from alteration or tampering;

c. 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;

d. log system events including but not limited to access and alterations made to the audit trail systems, and cybersecurity events; and

e. maintain records produced as part of the audit trail.

Custody and protection of consumer assets: licensees holding client assets are required to have in place and maintain a surety bond, trust account or indemnity insurance for the benefit of their customers, in such form and amount as the BMA deems acceptable or such other arrangements as the BMA may approve. Any such trust account must be maintained with a qualified custodian appropriate for the type of asset held. A licensee is, in addition, required to maintain books of account and other records sufficient to ensure that customer assets are kept segregated from those of the licensee and can be identified at any time. All customer funds must be held in a dedicated separate account and clearly identified as such.

Senior representative: the DABA imposes an obligation on licensees to appoint a senior representative, to be approved by the BMA, who must maintain an office in Bermuda (except where such representative is approved by the BMA for purposes of a Class T licence) and who is sufficiently knowledgeable about both the licensee itself and the industry in general. This senior representative will himself be under a duty to report to the BMA certain significant matters, including: a likelihood of the licensee becoming insolvent; breaches by the licensee of any conditions imposed by the BMA; involvement of the licensee in criminal proceedings, whether in Bermuda or elsewhere; and other material developments.

Head office: the DABA also requires licensees, other than those issued a Class T licence, to maintain a head office in Bermuda and to direct and manage their digital asset business from Bermuda. The relevant section goes on to list a number of factors the BMA shall consider in determining whether a licensee satisfies this requirement, together with a number of additional factors to which the BMA may (but need not) have regard.

Annual prudential return: a licensee is obliged to file with the BMA an annual prudential return, with the BMA being granted the power to require more frequent filings or additions to a filing if required in the interest of consumer protection. The annual prudential return should be accompanied by a copy of the licensee's audited financial statements and business plan for the following year, and include information relating to, *inter alia*, business strategy and risk appetite, products and services, the number, risk rating and geographical profile of customer accounts, information on risk and cybersecurity (including a risk self-assessment and policies in these areas), AML/ATF controls, corporate governance, audited financial statements and details on any outsourcing to third parties.

BMA's supervision and enforcement powers

The DABA grants the BMA wide-ranging powers of supervision and enforcement. It will have the power to compel production of information and documents (with criminal sanctions for non-production or for making false or misleading statements), the power to issue such directions as appear to be desirable to it for safeguarding the interests of a licensee's clients where a licensee is in breach of the DABA or regulations or rules applicable to it, and the power to impose conditions and restrictions on licences. For example, the BMA may:

- require a licensee to take certain steps or to refrain from adopting or pursuing a particular course of action, or to restrict the scope of its business activities in a particular way;
- impose limitations on the acceptance of business;
- prohibit a licensee from soliciting business, either generally or from prospective clients;
- prohibit a licensee from entering into any other transactions or class of transactions;
- require the removal of any officer or controller; and/or
- specify requirements to be fulfilled otherwise than by action taken by the licensee.

In more extreme cases, the BMA may revoke a licence altogether and, if it so elects, subsequently petition the court for the entity whose licence it has revoked to be wound up. In the event a licensee fails to comply with a condition, restriction or direction imposed by the BMA or with certain requirements of the DABA, the BMA has the power to impose fines of up to US$10,000,000. Alternatively, it may issue a public censure ("naming and shaming"), issue a prohibition order banning a person from performing certain functions for a Bermuda regulated entity, or obtain an injunction from the court. The BMA will use these enforcement powers in a manner consistent with the Statement of Principles and Guidance on the Exercise of Enforcement Powers it published in September 2018, which contains general guidance applicable to all regulated sectors on the BMA's approach to the use of its enforcement powers and the factors it will consider in assessing whether to exercise those powers.

Digital Asset Issuance Act

The DAIA came into force in May 2020, superseding legislation that had been introduced in 2018 to initially regulate persons carrying on an offering of digital assets via a digital asset issuance in or from within Bermuda and to protect the interests of persons acquiring digital assets through such issuances. Since the DAIA's enactment, the BMA has promulgated rules and a statement of principles in order to supplement the DAIA. In summary, the DAIA specifies swhat activities amount to a digital asset issuance, prohibits such activities other than by authorised undertakings, lays out the criteria a person must meet before it can become an authorised undertaking, imposes (and permits the BMA to impose) certain continuing obligations on any authorised undertaking, and grants to the BMA supervisory and enforcement powers over the issuers and/or promoters of digital asset issuances. The BMA and other industry stakeholders are constantly reviewing and

monitoring the framework in order to ensure that it remains fit for purpose and meets with all international standards of regulation, compliance and transparency. Through consultation with industry, the BMA, together with the Bermuda government, has already updated and improved the provisions of the DAIA to give greater clarity and to facilitate more effective administration of its provisions, evidencing an actively engaged and responsive regulator.

Scope of DAIA

The DAIA applies to any undertaking incorporated or formed in or outside Bermuda and that conducts any digital asset issuance in or from within Bermuda. A "digital asset issuance" is defined as an offer to the public, or any section of the public, to acquire digital assets or to enter into an agreement to acquire digital assets at a future date. The DAIA requires any undertaking seeking to conduct a digital asset issuance to obtain prior authorisation from the BMA.

If the digital asset issuance would not result in the digital assets becoming available to more than 150 persons or was to persons whose ordinary business involves the acquisition, disposal or holding of digital assets or was an offer to qualified acquirers, then the undertaking conducting such digital asset issuance would not be treated as an offer to the public. In such instances, the issuer and/or promoter would be required to file a digital asset placement declaration form with the BMA prior to entering into any transaction rather than having to seek prior authorisation. "Qualified acquirers" include high income (US$200,000 per annum for two years) and high-net-worth (greater than US$1,000,000 excluding residence value) private acquirers, corporate and unincorporated bodies with not less than US$5,000,000 in assets and other similar persons and arrangements.

Conducting a digital asset issuance in or from within Bermuda without authorisation is a criminal offence punishable by a fine of up to US$100,000, imprisonment for a term of up to five years, or both.

Authorisation requirements

An application for authorisation to conduct a digital asset issuance shall be made to the BMA and be accompanied by (a) a business plan setting out the nature and scale of the digital asset issuance to be conducted, (b) a copy of the issuance document to be made available to digital asset acquirers, (c) particulars of the applicant's arrangements for the management of the offering via the issuance, (d) policies and procedures to be adopted by the applicant to meet the obligations under the DAIA and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, (e) such other information and documents as the BMA may reasonably require for the purpose of determining the application, and (f) the applicable application fee.

Authorisation criteria

The DAIA provides that the BMA may not authorise an undertaking to conduct a digital asset issuance unless it is satisfied that the applicant fulfils certain minimum criteria addressing the fitness and propriety of directors and officer ensuring business is conducted in a prudent manner, the integrity and skill of the business's management, and standards of corporate governance observed by the undertaking. This is consistent with the position under other regulatory laws applicable to other sectors and is intended to ensure the BMA maintains high standards for the conduct of regulated business. The BMA has also published the Digital Asset Issuance Rules 2020 (Rules), detailing requirements as to, *inter alia*, minimum required information for a digital asset issuance document, ongoing disclosures and information technology and cybersecurity, custody of acquirer assets and compliance measures.

The DABA requires licensees to notify the BMA upon changes in directors or officer and the BMA has powers to, *inter alia*, object to and prevent new or increased ownership of shareholder controllers and the power to remove controllers, directors and officers who are no longer fit and proper to carry on their role.

Ongoing obligations

Authorised undertakings are subject to several ongoing obligations:

Communications facility: the promoter shall provide during the period of an offer or suspension, an electronic facility for persons to access the issuance document, post and read messages relating to the offer and ask questions relating to the offer

Cooling-off rights: provide a mechanism through which any applicant that has agreed to acquire digital assets under the offering to withdraw the application within three business days after the application is made.

Information technology and cybersecurity rules: an authorised undertaking is under an obligation to establish and maintain, for the duration of its authorisation and five years beyond, a data audit node in Bermuda where all information about the digital asset issuance will be stored real-time in an accurate and tamper-proof manner as well as deliver a cybersecurity report and program similar to those required under the DABA (see above).

Custody and separate accounts: an authorised undertaking holding the assets of digital asset acquirers shall keep its accounts in respect of such assets separate from any accounts kept in respect of any other business for a period of time as specified in the legislation and Rules.

Local representative: authorised undertakings must appoint a local representative, to be approved by the BMA, who must maintain an office in Bermuda and who is sufficiently knowledgeable about both the authorised undertaking itself and the industry in general. This local representative will be under a duty to report to the BMA certain significant matters, including: a likelihood of the licensee becoming insolvent; breaches by the authorised undertaking of any conditions imposed by the BMA; involvement of the licensee in criminal proceedings, whether in Bermuda or elsewhere; a material misstatement being found in the issuance document; and other material developments.

Compliance measures: an issuer shall ensure that it applies "appropriate measures" with regard to customer due diligence in relation to a digital asset issuance as set out in the Rules as well as appoint a Reporting Officer and Compliance Officer.

BMA's supervision and enforcement powers

The DAIA grants the BMA wide-ranging powers of supervision and enforcement similar to those granted under the DABA (see above).

Sales regulation

Other than digital asset business activity or issuing, selling or redeeming of digital assets under the DABA and the offering of digital assets by way of an issuance under the DAIA, there are no Bermudian laws, regulations or other restrictions governing the participation of persons resident or situated in Bermuda in the purchase, holding or sale of digital assets.

Taxation

There are no income, capital gains, withholding or other taxes imposed in Bermuda on digital assets or on any transactions involving them (the potential application of Bermuda's foreign currency purchase tax is discussed below, under "Border restrictions and declaration"). Moreover, exempted companies or limited liability companies carrying on digital asset business, including digital asset issuers, may apply for an undertaking from the Minister of Finance to the effect that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income or computed on any capital asset, gain or appreciation, then the imposition of any such tax shall not be applicable to such company or to any of its operations.

Money transmission laws and anti-money laundering requirements

Operating a payment service business utilising digital assets (including the provision of services for the transfer of funds) or operating a digital asset exchange constitutes a regulated activity for the purposes of the DABA (on which see above).

Bermuda has a long-established and well-earned reputation as an international financial centre, and a crucial aspect of this is its robust AML/ATF regime. The jurisdiction made further enhancements to this regime ahead of its fourth-round mutual evaluation by the Financial Action Task Force in 2018.

The DABA amended certain provisions of Bermuda's existing AML/ATF laws and regulations in order to ensure that the AML/ATF regime applies expressly to the carrying on of digital asset business, with the BMA subsequently issuing new AML/ATF guidance notes relating specifically to the conduct of digital asset business.

Most recently, at the time of publication of this chapter, the BMA had published for industry consultation its 2021 Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering and Anti-Terrorist Financing, Annex VIII Sector-Specific Guidance Notes (SSGN) for Digital Asset Business.

A detailed discussion of the requirements imposed by Bermuda's AML/ATF regime is beyond the scope of this chapter, but in short, digital asset businesses are required to establish policies and procedures to prevent money laundering and terrorist financing. These policies and procedures must cover 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.

Promotion and testing

The Bermuda government has launched and continues to develop a number of initiatives aimed at promoting investment by technology businesses in Bermuda, including the Class T licence under the DABA and the Insurtech Sandbox regime, which allow for the testing and development of technology or technologically driven products and services in a safe and cooperative regulatory environment.

The government has also appointed a specialist technology team with a remit to promote the sector in Bermuda and attract more business to the island. The team also provides a specialist concierge service aimed at making the transition to Bermuda as easy as possible for new entrants.

The government has also introduced a tailored immigration policy for technology businesses that allows technology-focused companies that are new to Bermuda to receive immediate approval of up to five work permits for non-Bermudian staff within the first six months of obtaining its business permit. In order to benefit from this, a business must present a plan for the hiring, training and development of Bermudians in entry-level or trainee positions. A business may not, however, apply for a work permit under this policy in respect of any job categories that are closed (i.e. reserved exclusively for Bermudians, their spouses and permanent resident certificate holders only) or restricted (in respect of which a permit may only be obtained for one year) under Bermuda's employment legislation, or which are entry-level, graduate or trainee positions.

Ownership and licensing requirements

Under current Bermuda law, and under the DABA and DAIA, no licensing requirements are imposed on any person merely by virtue of that person holding any form of digital asset, unless that person does so in the course of its business and on behalf of another, in which case that person will likely be regarded as either a digital asset trust services provider or a digital asset services vendor and thus subject to regulation under the DABA.

An investment fund incorporated or formed in Bermuda that proposes to deal in digital assets as part of its investment strategy may fall within the ambit of the Investment Funds Act 2006. Depending on the type of fund, this may require an application for authorisation from or registration with the BMA prior to commencing business.

Mining

Digital asset mining is not within scope of the DABA as an activity in its own right and therefore remains an unregulated activity from a Bermuda perspective, whether conducted in Bermuda or by a Bermuda company outside of Bermuda. Notwithstanding this, the BMA is aware of other jurisdictions where such activity is prohibited or restricted in some way and will expect any Bermuda company conducting mining activity outside of Bermuda to be wholly compliant with any laws or regulations applied by the governing authorities of the jurisdictions where such activities are being conducted.

Border restrictions and declaration

Bermuda imposes a foreign currency purchase tax of 1% whenever a Bermuda resident purchases a foreign currency from a Bermuda-based bank. This tax will not apply to most (if not all) purchases of cryptocurrency or other digital assets, on the grounds that these are purchased almost exclusively from digital exchanges, whereas the foreign currency purchase tax applies only to purchases from banks in Bermuda. This renders immaterial the question of whether "foreign currency" in this context would include cryptocurrency (the BMA has not, to date, expressed a view).

There are no other border restrictions on cryptocurrencies or other digital assets; the only obligation to make a customs declaration in respect of any form of money arises in respect of cash or negotiable instruments in excess of US$10,000.

Reporting requirements

Digital asset businesses and their senior representatives are subject to certain reporting obligations under the DABA, as described in more detail above. The DABA does not impose any reporting requirements in respect of individual digital asset payments, irrespective of their value, although licensees are required to include anonymised details on transaction volume, value and geographical spread in their annual returns.

Estate planning and testamentary succession

There is no particular regime of Bermuda law that deals specifically with the treatment of cryptocurrencies or other digital assets upon the death of an individual holding them. This means that, in principle, digital assets will be treated in the same way as any other asset and may be bequeathed to beneficiaries in a will, or, if a person dies intestate, will fall to be dealt with under the Succession Act 1974.

The main potential difficulty that may arise is practical and is by no means unique to Bermuda; namely that anyone inheriting any kind of digital asset will, on the face of it, only be able to access that digital asset if the beneficiary has, or can obtain or access, the private key to the wallet in which it is stored. Most exchanges have policies in place to transfer digital assets to next of kin but these policies, and the transfer requirements, will vary between the exchanges.

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Steven's practice covers a broad spectrum of corporate and commercial law with specific depth and experience in corporate governance, finance securities, regulatory compliance, mergers and acquisitions and restructuring.

A recognised specialist in the digital asset sector, Steven worked with the Bermuda government and other key stakeholders in the introduction and development of Bermuda's digital asset legal and regulatory regime, and represents a significant number of digital asset companies headquartered, or with operations, in Bermuda. He also has particular expertise in the wider technology, telecommunications and energy sectors with depth and experience in representing clients on local and cross-jurisdictional corporate and regulatory transactions and restructurings, including complex multinational joint ventures and public and private offerings.

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Endnotes

Originally published in conjunction with Global Legal Insights.

Contributing editor Josias Dewey.

PLEASE NOTE


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Global Legal Insights
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Government attitude and definition

The Cayman Islands is a leading global financial centre and has developed a reputation as one of the world's most innovative and business-friendly places to operate. The jurisdiction offers a stable society and political system, judicial and legislative links to the United Kingdom, tax neutrality, sophisticated service providers, and a proportionate regulatory regime that focuses closely on the financial services industry, and in particular those catering to sophisticated and institutional investors based elsewhere.

It is this reputation and these attributes that have helped the jurisdiction become an obvious choice for many of those proposing to establish fintech-related structures, whether it be in the form of a fund vehicle investing into digital assets, an exchange or initial coin or token offering or the launch of a decentralised finance protocol or network.

Each of the Cayman Islands Government, the Cayman Islands Monetary Authority ("**CIMA**"), and industry bodies such as Cayman Finance and the Cayman Islands Blockchain Foundation, acknowledge the importance of continuing to attract fintech and digital assets business to the jurisdiction and ensuring the further growth of the sector. They are also aware, however, of the need to balance this approach with maintaining the Cayman Islands' commitment to the highest standards of financial probity and transparency and the specific considerations that can accompany digital assets.

Consequently, in May 2020, recognising the newly adopted international standards set by the Financial Action Task Force, a new framework for the supervision and regulation of virtual asset services businesses was introduced in the Cayman Islands, namely the Virtual Asset (Service Providers) Act,[1] 2020 (the "**VASP Act**"). The features of the VASP Act are described further in this chapter; however, it is important to note that at the time of writing, this new legislation is only partially in force; the VASP Act is being introduced in two phases, with the first primarily dealing with anti-money laundering ("**AML**") regulations and requiring virtual asset service providers ("**VASPs**") to be registered, and the second phase dealing with licensing and other matters. A specific date for implementation of phase two of the VASP Act has not yet been announced, but it is expected to be in the near term.

Overall, the new framework continues to make the Cayman Islands an attractive jurisdiction for virtual asset services businesses, as it provides a flexible regulatory foundation with a great deal of certainty for those wishing to operate in the space, while furthering Cayman's commitment to international standards.

Under the VASP Act, a "virtual asset" is broadly defined as a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes. Specifically excluded from this are digital representations of fiat currencies, as well as "virtual service tokens", which are digital representations of value that are not transferrable or exchangeable with a third party at any time (including digital tokens whose sole function is to provide access to an application or service or to provide a service or function directly to its owner).

To provide further clarity on the VASP Act, the Virtual Assets (Service Providers) Regulations (the "**VASP Regulations**") were introduced in October 2020. The VASP Regulations include the registration application requirements and details of fees as well as providing some further guidance as to virtual asset issuances (as discussed further below).

Cryptocurrency regulation

The VASP Act clearly establishes the legitimacy of digital assets and cryptocurrencies in the Cayman Islands and regulates businesses providing services related to virtual assets. Virtual assets themselves and parties dealing with virtual assets for their own purposes are generally not subject to specific regulation in the Cayman Islands.

Under the VASP Act, all VASPs are required to be licensed or registered with CIMA, obtain a waiver or hold a sandbox licence. A "VASP" is an entity that is incorporated or registered in the Cayman Islands and that provides a virtual asset service as a business or in the course of business.

A "virtual asset service" for this purpose means the issuance of virtual assets or the business of providing any of the following services or operations for or on behalf of another person or entity:

- exchange between virtual assets and fiat currencies;
- exchange between one or more other forms of convertible virtual assets;
- transfer of virtual assets;
- virtual asset custody service, which is the business of safekeeping or administration of virtual assets or the instruments that enable the holder to exercise control over virtual assets; or
- participation in, and provision of, financial services related to a virtual asset issuance or the sale of a virtual asset.

Cryptocurrency and other digital asset businesses that are not caught by any of the above categories may still be subject to regulation in the Cayman Islands that does not specifically target digital assets, such as the Securities Investment Business Act ("**SIBA**"), the Money Services Act and AML regulations (each described further below).

Sales regulation

VASP Act

As set out above, the issuance of virtual assets, the provision of financial services related to a virtual asset issuance or the sale of a virtual asset, as well as the transfer of virtual assets, if being carried out by a Cayman Islands entity as a business on behalf of another party, will likely constitute virtual asset services and require a licence or registration with CIMA under the VASP Act.

Under the VASP Act, any issuance of virtual assets requires CIMA's prior approval. For this purpose, an issuance means the sale of newly created virtual assets to the public in exchange for fiat currency, other virtual assets or other consideration. "Public" is not defined in the VASP Act so should be interpreted broadly for this purpose; however, helpfully the VASP Regulations distinguish a "private sale", broadly defined as a sale that is not advertised and is sold to a limited number of persons by private agreement from a sale to the public (meaning that registration under the VASP Act may not be required for certain sales). The sale of virtual service tokens will also be excluded from this requirement and any transfer that is not for consideration (e.g. a bonus or "airdrop") should be excluded.

Direct issuances will be subject to a prescribed maximum threshold, which, at the time of writing, has not been fixed. The threshold will not apply where the issuance is facilitated by way of one or more virtual asset trading platforms or obliged entities, provided that the relevant platforms are either licensed under the VASP Act or regulated in another non-high-risk jurisdiction.

Investment funds

An entity that operates as an investment fund that is formed or registered in the Cayman Islands and that issues digital assets may come within the ambit of the Mutual Funds Act (for open-ended funds) or the Private Funds Act (for closed-ended funds), and be required to obtain a registration or licence thereunder to the extent such digital assets constitute equity or investment interests. This will of course depend on a number of aspects, including the terms of the issue and the nature of the assets, and specific advice should be sought. For example, under the Mutual Funds Act, the definition of "equity interest" has recently been amended to include "any other representation of an interest", which is likely broad enough to capture a variety of forms of digital asset.

Additionally, any pooling vehicle that is investing into the digital asset space, or accepting digital assets by way of subscription and then investing into more traditional asset classes, would be advised to seek Cayman Islands legal advice on the point.

Securities Investment Business Act

Pursuant to SIBA, an entity formed or registered in, or that is operating from, the Cayman Islands that engages in dealing, arranging, managing or advising on the acquisition or disposal of digital assets, may come within the ambit of SIBA and be required to obtain a registration or licence from CIMA thereunder (which may be in addition to a registration or licence required under the VASP Act). This applies to the extent that the relevant digital assets constitute "securities" for the purposes of SIBA.

Notably, the definition of "securities" thereunder includes virtual assets that can be sold, traded or exchanged immediately or at any time in the future and that (i) represent or can be converted into another form of traditional securities (e.g. equity interests, debt instruments, options or futures), or (ii) represent a derivative of traditional securities. Consequently, consideration will need to be given on a case-by-case basis as to whether the digital asset in question falls within one of the above categories.

Offerings within the Cayman Islands

In relation to the offering sale, or issuance of interests within the Cayman Islands, certain regulatory provisions should be borne in mind. For example, the Companies Act prohibits any exempted company formed in the Cayman Islands and not listed on the Cayman Islands Stock Exchange from offering its securities to the Cayman Islands public. The Limited Liability Companies Act includes a similar prohibition in relation to limited liability companies ("LLCs"). Even persons based, formed or registered outside the Cayman Islands should be careful not to undertake any activities in relation to a sale or issuance of digital assets that would constitute "carrying on a business" in the Cayman Islands. To do so may entail various registration and licensing requirements and financial and criminal penalties for those who do not comply. There is no explicit definition of what will amount to "carrying on a business" for these purposes and, consequently, persons who propose to undertake concerted marketing to the Cayman Islands public, particularly if it involves engaging in any physical activity in the Cayman Islands, are encouraged to seek specific legal advice.

In practice, however, these restrictions do not generally pose a significant practical concern for issuers given that:

- the "public" in this instance is taken to exclude other exempted companies, exempted limited partnerships, and LLCs (which together comprise the majority of Cayman Islands entities); and
- issuers' target investors tend not to include other persons physically based in the Cayman Islands.

Taxation

There are no income, inheritance, gift, capital gains, corporate, withholding or other such taxes imposed by the Cayman Islands Government, including with respect to the issuance, holding, or transfer of digital assets.

Stamp duty may apply to original documents that are executed in the Cayman Islands or are brought into the Cayman Islands following execution. However, the sums levied are generally of a nominal amount.

Entities formed or registered in the Cayman Islands may apply for and, upon the payment of a fee of a relatively small amount, receive a tax exemption certificate confirming that no law enacted in the Cayman Islands after the date thereof imposing any tax to be levied on profits income, gains or appreciations shall apply to such entity or its operations. Such certificates will generally apply for a period of between 20 and 50 years (depending on the type of entity).

Money transmission laws and anti-money laundering requirements

Money transmission laws

Pursuant to the Money Services Act, any person carrying on a "money services business" in or from the Cayman Islands must first obtain a licence from CIMA thereunder. Any breach of this requirement will constitute a criminal offence

For the purposes of the foregoing, a "money services business" means the business of providing, among other things, money transmission or currency exchange services.

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 Money Services Act and consult appropriate advisors.

Anti-money laundering requirements

The very nature and, in some cases, the intended features of digital assets can present heightened compliance risks and practical hurdles to addressing the same. Such features may include the lack of a trusted central counterparty, increased anonymity, and ease of cross-border transfer without any gating or restriction.

Consequently, the Cayman Islands authorities have maintained a keen focus on balancing the jurisdiction's long track record of innovation and the promotion of a business-friendly environment with its commitment to the prevention of crime and maintaining robust standards of transparency. In general, this has been done not by establishing an entirely separate regime for digital assets, but by applying the purposive approach enshrined within the existing framework, which focuses on the specific activity and the nature of the assets in question so as to properly quantify the risk that the same may be used to facilitate illegal activity.

Pursuant to the provisions of the Proceeds of Crime Act, the Anti-Money Laundering Regulations, and the guidance notes thereon (together, the "**AML Laws**"), any persons formed, registered or based in the Cayman Islands conducting "relevant financial business" are subject to various obligations aimed at preventing, identifying, and reporting money laundering and terrorist financing.

"Relevant financial business" is defined in the Proceeds of Crime Act and includes the provision of virtual asset services (which is defined dslightly differently for this purpose than under the VASP Act).

Although a detailed consideration of the specific requirements of the AML Laws falls outside of the scope of this chapter, any person subject to the regime will generally need, among other things, to do the following:

- appoint a named individual as an AML compliance officer to oversee its adherence to the AML Laws and to liaise with the supervisory authorities (and, under the VASP Act, a VASP must have such office approved by CIMA);
- appoint named individuals as the money laundering reporting officer and a deputy for the same to act as a reporting line within the business; and
- implement procedures to ensure that counterparties are properly identified risk-based monitoring is carried out (with specific regard to the nature of the counterparties, the geographic region of operation, and any risks specifically associated with new technologies such as virtual assets), proper records are kept, and employees are properly trained.

In addition, CIMA has issued specific AML-related guidance for VASPs and new regulatory requirements have been put in place to ensure sufficient information is obtained relating to transfers of virtual assets by intermediaries.

In our experience, most parties will be best advised to consult specialist third-party providers to assist with this process.

Promotion and testing

Sandbox licences

The VASP Act has introduced a sandbox licence, intended for providers of virtual asset services or other fintech services that utilise innovative technology or use an innovative method of delivery. A sandbox licence provides flexibility such that CIMA can impose additional requirements or allow certain exemptions, to cater for the relevant business.

Sandbox licences will be temporary, available for a maximum of one year, during which we anticipate that CIMA will assess how best to regulate the business in the future, including whether that requires legislative change, to further promote and monitor the use of the relevant innovation. Further details as to eligibility are not yet available.

Special Economic Zone

Additionally, the Cayman Islands Government has been active in promoting the Special Economic Zone (the "**SEZ**") to those wishing to develop fintech related products from the jurisdiction

The SEZ offers businesses focused on the fintech industry the opportunity to establish physical operations within the Cayman Islands in a more streamlined manner. It provides several benefits including a simpler, more rapid, and cost-effective work permit process, concessions with respect to local trade licences and ownership requirements, the ability to be operational within four to six weeks, and allocated office space.

When coupled with the other benefits of the jurisdiction and its recently updated intellectual property laws, the SEZ has proven highly popular with the fintech industry, with the number of blockchain-focused companies established within it continuing to grow.

Ownership and licensing requirements

The Cayman Islands does not impose any restrictions or licensing requirements that are specifically targeted at the ownership, holding or trading of digital assets by those doing so for their own account.

As described above, under the VASP Act, all VASPs (as defined above) are required to be licensed or registered with CIMA, obtain a waiver or hold a sandbox licence. The applicability of other regulatory regimes, such as the Mutual Funds Act and SIBA (each as further detailed above), should also be considered.

Pursuant to the VASP Act, a VASP is required to ensure that its beneficial owners are approved by CIMA as fit and proper persons to have such control or ownership. Subject to possible exceptions for publicly traded companies, ownership interests or voting rights totalling 10% or more in a VASP cannot be issued or voluntarily transferred without CIMA's prior approval.

Mining

The mining of digital assets is not regulated or prohibited in the Cayman Islands currently, nor will it (in and of itself) be regulated or prohibited under the VASP Act. We would note, however, that the import duties applicable to computing equipment and the high cost of electricity production in the Cayman Islands are likely to present practical deterrents to the establishment of any material mining operations within the jurisdiction. It is possible that the increased availability of renewable energy options, and the falling price of the same, may mitigate this somewhat in the future.

Border restrictions and declaration

The Cayman Islands does not impose any general border restrictions on the ownership or importation of digital assets.

As part of the Cayman Islands' commitment to combatting money laundering and terrorist financing the Customs (Money Declarations and Disclosures) Regulations mandate that individuals transporting money amounting to CI$15,000 (approximately US$18,292) or more into the Cayman Islands must make a declaration in writing to customs officer at the time of entry. However, the Customs Act defines "money" as being confined to cash (i.e. bank notes or coins that are legal tender in any country) and bearer-negotiable instruments (i.e. travellers' cheques, cheques, promissory notes, money orders). As such, we would not expect such a requirement to apply to virtual assets or any other type of digital asset. Further, given the nature of these assets, particularly those based or recorded on a distributed ledger, there is a conceptual question of what would amount to the importation or transportation of such assets.

Reporting requirements

VASPs registered or licensed under the VASP Act will be required to:

- prepare audited accounts and submit them to CIMA annually;
- obtain prior approval from CIMA to appoint senior officer or AML compliance officers;
- provide certain notices to CIMA confirming compliance with AML Laws and data protection laws and ensuring that all communications relating to the virtual asset service are accurate;
- undertake audits of their AML systems and procedures at the request of CIMA; and
- notify CIMA of any licence or registration in another jurisdiction or the opening of an office or establishment of a physical presence in another jurisdiction, the holding or acquisition of a controlling interest in another person engaged in virtual asset service.

Additional reporting and other requirements may apply and may be imposed, which in some cases differ based on the type of virtual asset service being provided.

To the extent that any payment or transfer is made in the context of the conduct of a "relevant financial business" for the purposes of the AML Laws, there may of course be an obligation to make certain filings or reports in the event that there is a suspicion of money laundering or other criminal activity.

Estate planning and testamentary succession

Neither the VASP Act nor any other particular regime under Cayman Islands law deals specifically with the treatment of virtual assets upon the death of an individual holding them. This means that, in principle, and assuming Cayman Islands law governs succession to the deceased's estate, virtual assets will be treated in the same way as any other asset and may be bequeathed to beneficiaries in a will, or, if a person dies intestate, will be dealt with under the intestacy rules in the Cayman Islands Succession Act.

As is the case in many jurisdictions beyond the Cayman Islands, there is likely to be some uncertainty as to where the situs of a virtual asset is located (or indeed whether or not a situs can be determined at all). To the extent that the asset can be analysed under traditional conflict-of-laws rules as sited in the Cayman Islands, then a grant of representation would be required from the Cayman Islands court to preclude the risk of intermeddling claims in dealing with the asset in the Cayman Islands (even though the grant itself would not necessarily prevent someone with access to the private keys associated with a digital asset from dealing with the same).

The main potential difficulty that may arise is practical; namely, that anyone inheriting a virtual asset will, on the face of it, often only be able to access that virtual asset if the personal representative of the deceased or the beneficiary (as the case may be) has or can obtain the information needed in order to gain access and control over that virtual asset (e.g. a private key to the wallet in which it is stored). Most exchanges have policies in place to transfer virtual assets to next of kin but these policies, and the transfer requirements, will vary across exchanges and it is generally regarded as prudent to avoid leaving significant value on exchanges for any length of time due to the risks of hacking and insolvencies.

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Endnote

1 Known as the VASP Law until a recent change amending the way in which Cayman Islands primary legislation is referred to.

Originally published in conjunction with Global Legal Insights.

Contributing editor Josias Dewey.

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Global Legal Insights

Jersey blockchain and cryptocurrency regulation 2022, fourth edition

CAREY OLSEN

Government attitude and definition

Jersey continues to welcome fintech including cryptocurrencies, blockchain and distributed ledger technology ("**DLT**") more widely as a pioneer in fintech regulation. Jersey enjoys a sophisticated legal, regulatory and technological infrastructure, supporting development and innovation in fintech including:

- payment services and online payment solutions;
- electronic identification ("**E-ID**");
- virtual currency exchanges ("**VCEs**") (cryptocurrency exchanges);
- security token and non-security token issuances and initial coin offering security token offerings ("**ICOs**"/"**STOs**");[1]
- custody services and arrangements for holding digital assets; and
- fintech funds and other vehicles.[2]

Jersey is fast becoming an established market for fintechs and professional investment firms being home to a number of token issuers, global payment platforms and fintech-focused investment funds. In the past few months alone, Jersey has seen multimillion pound investments and capital raises structured using Jersey vehicles and advisers. Jersey clients include tech giants, cryptocurrency exchanges, payment platforms and emerging blockchain developer talent.

Jersey recognised cryptocurrencies as a separate asset class long before the "ICO Craze" of 2017, when the island's regulator, the Jersey Financial Services Commission (the "**JFSC**"), licensed the world's first Bitcoin-focused, regulated fund (GABI Plc). From that point onwards, the island has seen a surge in exchange vehicles, token issuers and fintech funds choosing Jersey, including the world's largest investment fund (the SoftBank "Vision Fund", which raised USD 97 billion over two years). Both GABI and SoftBank were advised by Carey Olsen.

The JFSC is a member of the Global Financial Innovation Network and participates in the cross-border testing pilot.

Jersey has an exceptional pool of blockchain expertise, developed from the JFSC's forward thinking attitude combined with Jersey's flexible erange of corporate vehicles and favourable tax regime.

Examples of structures that have recently used Jersey (advised in each case by Carey Olsen) include:

- CoinShares (Europe's largest digital asset investment firm with USD 3 billion in assets under management ("**AUM**")) recently used Jersey for the establishment of its new institutional-grade cryptocurrency-backed exchange-traded product ("**ETP**"). CoinShares Physical Bitcoin (Ticker: BITC) launched on 19 January 2021 with USD 200 million in AUM, and is the first CoinShares product to be listed on the SIX Swiss Exchange. The ETP programme's physically backed structure provides institutions that are experienced in trading similar commodity-based investment securities with a familiar structure for cryptocurrency investments.
- CoinShares previously used Jersey for the launch of its ETH denominated investment fund (2017), which provided investors with exposure to the liquid digital asset ecosystem, and the 2014 launch of the first ever regulator-approved Bitcoin investment fund.
- Radix, a decentralised finance platform, used Jersey for the launch of its utility token. The platform allows users to transact with each other over a fast, secure blockchain-based platform without the need for intermediaries. Tokenholders are able to use the tokens to pay transaction fees and/or to participate in the platform's "proof of stake" consensus mechanism to validate transactions.
- Global payment solutions provider Checkout.com, which undertook a USD 450 million Series C fundraising round. The transaction gave the company a post-money valuation of USD 15 billion, making Checkout.com the fourth-largest fintech globally and the EMEA's most valuable venture-backed business.
- Token issuer PIP Limited used Jersey for the launch of its Vow token ecosystem, a solution for distributing debt-free liquidity into local communities through a customer loyalty mechanic.

Jersey distinguishes between traditional fiat currency and cryptocurrencies and does not treat cryptocurrencies on an equal footing to fiat currencies. For example, regulations around holding client monies focus only on fiat. Within cryptocurrencies, Jersey distinguishes between utility tokens and security tokens, as set out in the ICO guidance published by the JFSC.

There are no cryptocurrencies backed by the Government of Jersey and Jersey does not have a central bank. Jersey uses British pound sterling, although the States of Jersey Treasury issues its own bank notes separate to those in the UK.

In terms of trends, we are seeing an increased use of, and enquiries relating to, funds rolling out crypto-backed products, primarily but not limited to Bitcoin- and Ethereum-backed products, online payment solutions and E-ID and a continued interest in the establishment of cryptocurrency and security token exchanges. More recently, as a result of COVID-19, we are seeing a sharp increase in the uptake of technology and new entrants to the market. Whilst not fintech as such, this includes a widespread use and adoption of electronic signatures (including witnessing) and a general shift towards digitisation and automation of manual procedures consistent with a widespread move to remote working. We are therefore expecting this trend to continue in the coming months and welcome the opportunities that this may present in terms of increased usage of blockchain and smart contracts and automation and AI in Jersey.

In terms of innovation generally, Jersey is striving to promote fintech development by supporting local fintech talent and innovation. Digital Jersey, a Government-backed economic development agency and industry association dedicated to the growth of the digital sector, aims to do this. Further, the JFSC is a member of the Global Financial Innovation Network and participates in the cross-border testing pilot. COVID-19 has also brought about pragmatic developments in Jersey's legal practice and has given rise to recent guidance from The Law Society of Jersey in relation to the signing of certain powers of attorney by electronic signature, which demonstrates Jersey's willingness to adopt technological developments.

Blockchain and cryptocurrency/digital asset regulation

To date, Jersey has not sought to introduce any fintech specific legislation. The JFSC has sought to cater for fintech businesses within the existing regulatory framework until such time as there is a global consensus on how to regulate aspects of the fintech ecosystem; for example, if the fintech service involves the provision of a financial service, it will fall to be regulated within Jersey's financial services regime under the Financial Services (Jersey) Law 1998 (the "**FSJL**") unless an applicable exemption is available. The FSJL defines "financial services business" as investment business, trust company business, general insurance mediation, money services business, fund services business or alternative investment fund services business.

The main types of fintech activities that are currently active in Jersey and require some level of regulatory oversight are:

- Payment services – depending on the payment services being offered these may be required to be regulated under the FSJL to undertake "money services business", trust company business (as outlined above to the extent the services include an e-wallet relating to digital assets) or under the Banking Business (Jersey) Law 1991 for "deposit-taking" business. There are a number of exemptions that may apply and early advice should be sought.
- VCEs – these exchanges must maintain a registration under the Proceeds of Crime (Jersey) Law 1999 (the "**POCJL**") as a "supervised business". The POCJL requires VCEs to comply with Jersey's laws, regulations, policies and procedures aimed at preventing and detecting money laundering and terrorist financing
- Security token exchanges – these exchanges are currently required to be regulated under the FSJL to undertake "investment business" (an "**IB Licence**"). A standard application for an IB Licence will take approximately eight weeks. An application for a digital assets-related matter may take a little longer. A full regulatory application to the JFSC will be required and will include the following documents:
  a. a regulatory application form;
  b. a business plan; and
  c. a business risk assessment.

  In terms of regulatory capital requirements, the main requirement to be aware of is that an exchange platform will be required to maintain at all times:
  a. a net liquid assets position of 130% of its projected quarterly expenditure;
  b a minimum of GBP 25,000 paid-up share capital; and
  c. a minimum net assets position of GBP 25,000.

  In addition, a Jersey security token exchange must be audited and the composition of the board must comply with the Jersey regulatory and economic substance requirements, being:
  a. there must be a minimum of two Jersey resident directors;
  b. the board must meet with adequate frequency having regard to the amount of decision making being undertaken;
  c. at meetings there must be a quorum of directors physically present in Jersey; and
  d. the directors of the company must have the necessary knowledge and expertise to discharge their duties (this is assessed on a whole-board basis).

Once an IB Licence has been obtained, the holder will need to observe the provisions of the JFSC's Code of Practice for Investment Business:

- There are locally regulated administrators in Jersey who can assist by providing "incubation" services to entities and groups that are new to Jersey.
- There is no requirement to have electronic clearing and settlement or for clearing of security tokens to be carried out by a clearing house or central depositary.
- The increase in uptake of exchange-related investment business in Jersey has resulted in the JFSC consulting on proposed amendments to the class of investment business to include a specific new category of exchange business. We await the outcome of the Consultation.
- Custody services and arrangements for holding digital assets – there are two models: (i) custody services provided by the exchange itself (or a related entity) to investors and exchange users; and (ii) custody services outsourced to a third-party custody provider to be provided to investors and exchange users.

  In both models, where digital assets will be stored offline or where the investor or exchange user is not provided with the keys to access the digital asset, the investor/exchange user will no longer have control over the digital assets they have invested in. In this way, it is likely that the relevant custodian entity will be providing trustee services and will need to be regulated for "trust company business" under the FSJL. However, where the storage of digital assets is incidental or ancillary to the main purpose of the entity and where there was no separate remuneration, an exemption may apply. Early advice should be sought on this point, and this is something Carey Olsen has experience of advising on.
- Business relating to digital assets and cryptocurrency – the JFSC will treat involvement by Jersey structures with digital assets and cryptocurrencies as a "sensitive activity" under the JFSC's Sound Business Practice Policy. The practical consequence of this is that certain anti-money laundering/countering the financing of terrorism ("**AML/CFT**") obligations are imposed on the Jersey structure. For instance, a token-issuing company is required to carry out checks on: (i) the purchasers of the tokens who purchase coins directly from the issuer; and (ii) the holders of tokens issued by the issuer in the event they are sold back to the issuer. In such circumstances, the issuer will be required to obtain information to: (a) establish and obtain evidence to verify identity; and (b) establish and, depending on the level of risk, obtain evidence to verify the source of funds and source of wealth.

Sales regulation

In Jersey, the sale of Bitcoin or other crypto or digital tokens per se is not regulated by a specific securities law or commodities law. As noted above, transactions relating to digital assets and cryptocurrencies are treated as a "sensitive activity" under the JFSC's Sound Business Practice Policy. In addition, there are requirements under Jersey's existing regulatory framework for sale transactions that arise in the following circumstances:

- token issuers (whether utility tokens or security tokens) who issue or offer tokens for sale;
- companies operating VCEs – these exchange fiat monies to cryptocurrencies and vice versa; and
- companies operating security token exchanges – these exchange fiat monies to security tokens and vice versa.

The sale of cryptocurrencies in the secondary market (such as on an exchange) in return for payment in cryptocurrencies (i.e. crypto-to-crypto transactions) does not fall within the VCE or security token exchange regime although would still be considered a "sensitive activity" as outlined above.

Taxation

Jersey provides a stable, tax-neutral environment. Many Jersey companies (apart from locally regulated financial services companies and utilities) can be zero-rated for income tax and are not subject to capital gains tax within the jurisdiction. Jersey has no capital transfer or similar taxes and does not levy any withholding tax on dividends. There is also no stamp duty on Jersey share transfers. Companies can also be incorporated in Jersey but can be resident for tax purposes in another jurisdiction if certain criteria are met.

There are currently no specific laws regulating the taxation of cryptocurrencies or digital assets, although Jersey's Comptroller of Taxes has issued guidance on cryptocurrency tax treatment regarding both Jersey income tax and Jersey goods and services tax. The guidance provides that such assets will be taxed in accordance with general Jersey taxation principles and provisions.

Money transmission laws and anti-money laundering requirements

In terms of money transmission, as noted above, depending on the services in question, payment services business and money transmission services may be required to be regulated under the FSJL in order to undertake "money services business", trust company business (as outlined above to the extent the services include an e-wallet relating to digital assets) or under the Banking Business (Jersey) Law 1991 for "deposit-taking" business. There are a number of exemptions that may apply and early advice should be sought.

In terms of AML, as noted above, the JFSC will treat transactions with digital assets and cryptocurrencies as a "sensitive activity" under the JFSC's Sound Business Practice Policy. The practical consequence of this is that certain AML/CFT obligations are imposed on the issuer from Jersey's AML regime. This includes the issuer being obliged to carry out checks on: (i) the purchasers of the tokens who purchase coins directly from the issuer; and (ii) the holders of tokens issued by the issuer in the event they are sold back to the issuer. In such circumstances, the issuer will be required to obtain information to: (a) establish and obtain evidence to verify identity; and (b) establish and, depending on the level of risk, obtain evidence to verify the source of funds and source of wealth.

In addition, Jersey also has an industry working group focused on managing Virtual Assets Risk in relation to Virtual Assets and Virtual Assets Service Providers ("**VASPs**"). This working group involves Carey Olsen representatives, the Government of Jersey representatives, JFSC representatives and other interest groups on the Island. The working group is reviewing the Island's AML requirements in relation to Virtual Assets and VASPs.

Promotion and testing

Jersey promotes and tests fintech firms products and services in a number of ways. In terms of testing products and services, the JFSC has proven itself to be a proactive and forward-thinking regulator in becoming a member of the Global Financial Innovation Network (a group of international regulators and observers committed to supporting innovative products and services) and participating in the cross-border testing pilot that launched in January 2019, offering firms the opportunity to test their products and services in multiple jurisdictions.[3]

Jersey also operates a sandbox run through Digital Jersey, supporting local fintech firms and fintech firms seeking to relocate to Jersey.[4]

In terms of promoting fintech and thought-leading in Jersey, the Digital Assets Working Group (the "**DAWG**") works hard to raise awareness and interest in Jersey. Combining representatives of the States of Jersey, representatives of the JFSC and other interest groups on the Island, the DAWG is a group of individuals knowledgeable in the fintech space promoting digital assets and blockchain technologies in Jersey. Carey Olsen is a founder member of the DAWG and is an active participant and contributor.

Ownership and licensing requirements

There are no specific additional restrictions or licensing requirements on investment managers owning cryptocurrencies for investment purposes or holding cryptocurrency as an investment advisor or fund manager. We are seeing many fund structures starting to invest in cryptocurrencies and offering crypto-related products. The usual rules applicable to investment managers continue to apply in terms of both the general regulations applicable to them to undertake investment business and in relation to the investment policies described in their offer documentation.

However, as noted above, cryptocurrency-related transactions do constitute "sensitive activities" and we would expect to see additional business risk assessments, policies and procedures relating to that specific asset class. This includes a level of diligence on the providence of the cryptoasset in question to detect any prior illicit activity relating to the asset. There are various service providers such as Chainalysis and Merkle Science that carry out crypto threat detection (i.e. previous transaction screening) and related services that can be used to mitigate the potential risk of acquiring tainted assets.

We do advise fund managers and investment managers looking to enter this space to make contact with us so that we can advise as appropriate. In some instances, it may be appropriate to address new policies with the JFSC.

Mining

Mining cryptocurrencies is not covered by any specific piece of legislation or regulation in Jersey. However, depending on the manner in which mining activities are conducted, it may fall within the existing regulatory framework for funds (mentioned above).

Border and declaration

At present, there are no border restrictions in place on declaring cryptocurrency holdings.

Reporting restrictions

Equally, there are currently no specific reporting requirements triggered for cryptocurrency payments.

Estate planning and testamentary succession

Cryptocurrencies are treated as intangible movable property. If the owner of the cryptocurrency is a natural person, then the cryptocurrency falls to be dealt with within the movable estate of the owner on his/her death. Although there is no decided case on the point, it is generally assumed that the Jersey Courts would determine the situs of any cryptocurrency by reference to Jersey's private international law rules, which broadly follow and adopt English private international law principles.

Additional considerations need to be given to the practicalities of accessing the digital assets and ensuring that the testator shares access to all private keys, hot and cold wallets and any other form of password-protected account with the administrator or executor of his/her estate to ensure that the digital assets are capable of being accessed and transferred in accordance with the testator's will in the event of his/her demise.

The future of DLT in Jersey

As a nascent technology, international industry practices around blockchain and DLT are still evolving and their applications and use cases (including outside the finance industry) being asserted. To maintain its place as a respected, well-regulated international finance centre, Jersey is cognisant, and encouraging, of the advantages blockchain and DLT bring to Jersey's finance industry.[5]

As a long-established, well-regulated international finance centre, Jersey boasts a host of industry experience and local expertise,[6] making it an ideal jurisdiction to launch new blockchain and DLT initiatives.

Leveraging this existing expertise and the low-tax environment, we expect to see Jersey and Jersey vehicles continue to be used in both established areas of finance as they embrace blockchain solutions (such as climatech, proptech, online settlement solutions, E-ID and regtech, etc.) and new areas of finance and other sectors as blockchain and DLT use cases are established.

The JFSC's considered and measured approach to fintech regulation to date should equip Jersey to be a leading blockchain and DLT jurisdiction of the future by ensuring that regulation in Jersey remains appropriate and commensurate to the product or service in question.

We would be happy to discuss any blockchain or DLT initiatives backed by persons of substance. Please do contact us using the details below.

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Christopher spearheads Carey Olsen's crypto practice and digital assets team, advising on the launch in 2017 of CoinShares Fund I (a venture cap fund investing in crypto assets) and ARC Reserve Currency, Jersey's first tinitial coin offering or "ICO". Christopher was instrumental in the launch of the Jersey platform for Binance, the world's largest cryptocurrency exchange. Christopher also advises on all aspects of fund and corporate transactions, including the legal and regulatory aspects of fund launches, and joint ventures. He also has considerable experience in dealing with the Jersey Financial Services Commission in navigating investment vehicles through the Jersey regulatory approval process.

Christopher has broad experience of both general international corporate and funds work with particular expertise in private equity and hedge funds, having spent 10 years as a corporate and funds lawyer in the City.

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Emma is a senior associate in the Carey Olsen Jersey digital assets team and has advised in relation to a number of blockchain and digital asset-related matters, including in relation to: payments, the establishment of virtual currency exchanges and security token exchanges; the use of Jersey vehicles for token issuances; and digital company administration in Jersey. Emma has a background in international corporate and finance transactions and her expertise includes the raising of finance through the issuance and listing of Eurobonds and other securities on The International Stock Exchange.

Emma is an advocate of the Royal Court of Jersey. She is a barrister of England and Wales (non-practising) and an English solicitor. She was educated at King's College London. Emma joined Carey Olsen in 2005. In 2016, she was seconded to The Royal Bank of Scotland International Limited.

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Holly is an associate in Carey Olsen's Jersey corporate department. She is a member of the digital assets team and has assisted with various matters related to cryptocurrencies/digital assets and blockchain, including the launch of Binance's Jersey exchange platform and in relation to payments. Holly also advises on the raising of finance by issuers and the listing of Eurobonds and other securities on The International Stock Exchange, having completed a secondment to The International Stock Exchange.

Holly is an advocate of the Royal Court of Jersey. She was educated at King's College London. Holly joined Carey Olsen in 2013.

Endnotes

1. In the fintech space, the ICO terminology has now largely been superseded by reference to security and non-security tokens, a reflection of the evolving regulatory backdrop. We retain reference to ICOs in this chapter because we, Carey Olsen, have advised in relation to a number of ICOs and that was the terminology used at that time. The settled approach now is to determine whether a coin or token or other digital asset issued constitutes a security or not and therefore whether it is a "security token" or not. We have addressed STOs and non-security token issuances separately.
2. There is JFSC guidance available at: https://www.jerseyfsc.org/media/2003/2018-07-12_jfsc-issues-ico-guidance-note.pdf. It has been confirmed that this JFSC guidance has a wider application and can be used to inform how digital assets and cryptocurrencies more generally will be treated.
3. The window for applications to participate in the January 2019 pilot has now closed.
4. See: https://www.digital.je.
5. Such as: (i) real-time settlement; and (ii) greater transparency as to origination or provenance of the asset in question. For example, as Jersey currently has no restrictions or requirements around financial settlement, Jersey is an ideal jurisdiction from which to launch securities and cryptocurrency exchanges.
6. Including in banking, international payments, compliance, funds, capital markets, real estate and company administration.

Originally published in conjunction with Global Legal Insights.

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