

Bermuda
blockchain and
cryptocurrency
regulation 2019,
first edition

Government attitude and definition

The current Bermuda government was elected in 2017 having undertaken to create new economic pillars in Bermuda, identify new opportunities for economic diversification, and seek local and overseas investment to develop new local industry and thereby create jobs in Bermuda. Since its election, it has enthusiastically embraced the financial technology (“fintech”) sector and the potential it offers, and has repeatedly expressed its intention for Bermuda to be a significant centre for this industry.

In furtherance of this goal, the government is in the process of implementing a comprehensive regulatory regime aimed at providing legal certainty to industry participants and ensuring that business in the sector conducted in or from Bermuda is done in a properly regulated matter, in accordance with the highest international standards. This regulatory regime is described in more detail below, but, in summary:

- a new Digital Asset Business Act has been passed by the Bermuda Parliament and is awaiting royal assent. When passed, this will comprise a regulatory framework for fintech businesses; and
- although not covered by the Digital Asset Business Act, initial coin offerings will be regulated under a separate regime.

The government has also announced that fintech businesses wishing to set up in Bermuda are to benefit from a relaxed work permit policy, and has signed a number of memoranda of understanding with fintech businesses, under which these businesses have committed to establishing operations and creating jobs in Bermuda.

Although digital asset offerings and businesses will be regulated in the manner described in this article, there is no legislation or other provision of Bermuda law affording official or legal recognition of any cryptocurrency or any other digital asset, or conferring equivalent status with any fiat currency. Nor has the government or the Bermuda Monetary Authority (the “BMA”), the territory’s financial regulator and issuer of its national currency, backed any cryptocurrency itself, and the Bermuda dollar remains the territory’s legal tender.

In advance of the publication of such review and any steps to implement the same, however, this chapter sets out the current legal position in the Cayman Islands.

Cryptocurrency regulation

While both the Bermuda government and the BMA are on record as being keen to embrace the potential offered by fintech, both recognise that the industry presents tremendous risk, requiring prudent regulation.

The Financial Action Task Force (the “FATF”) recommended in its June 2014 report on virtual currencies¹ that regulators, for the time being, focus their efforts on convertible virtual currencies (i.e. those which can be converted into and out of fiat currencies), on the basis that these currencies presented the highest money-laundering risk. This guidance has heavily influenced the BMA in shaping Bermuda’s proposed regulatory regime for digital assets.

Digital Asset Business Act

In April 2018, the BMA published a consultation paper on the regulation of digital asset business. This consultation exercise has resulted in the enactment of a new Digital Asset Business Act (the “DABA”), which, at the time of writing, had been passed by the Bermuda Parliament and was awaiting royal assent. Once in force, the DABA will be supplemented by rules, regulations, codes of practice, statements of principles and guidance promulgated by the BMA, and so will operate in a similar manner to the regulatory frameworks in place for other financial services regulated by the BMA.

In summary, the DABA will specify the digital asset-related activities to which it applies, impose a licensing requirement on any person carrying on any of those activities, lay out the criteria a person must meet before it can obtain a licence, impose (and permit the BMA to impose) certain continuing obligations on any holder of a licence, and grant to the BMA supervisory and enforcement powers over regulated digital asset businesses.

Scope of the DABA

The DABA will apply 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. The term “digital asset” in the legislation is defined widely enough to capture cryptocurrencies, representations of debt or equity in the promoter, representations of other rights associated with such assets, and other representations of value that are intended to provide access to an application or service or product by means of distributed ledger technology. “Digital asset business”, for the purposes of the DABA, will be 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 business providing these services to other businesses or to individuals. It will not include initial coin offerings (“ICOs”) to fund the issuer’s or promoter’s own business or project. Instead, ICOs will be regulated under a separate regime, on which 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 anti-money laundering and anti-terrorist financing (“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”. The aim here is to ensure that businesses involved in the transfer of digital assets fall within the DABA’s ambit.

- **Operating as an electronic exchange**

This category will capture online exchanges allowing customers to buy and sell digital assets, whether payments are made in fiat currency, bank credit or in another form of digital asset. Exchanges facilitating the offer of new coins or tokens through ICOs will also be caught.

- **Providing custodial wallet services**

This will cover any business whose services include storing or maintaining digital assets or a virtual wallet on behalf of a client.

- **Operating as a digital asset services vendor**

This category will regulate 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. It is intended to capture any other business providing specific digital asset-related services to the public, such as operating as a custodian of digital assets.

In addition to the above categories, the DABA will include 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 will not constitute digital asset business:

- contributing connectivity software or computing power to a decentralised digital asset, or to a protocol governing transfer of the digital representation of value (this category will exempt mining from the DABA’s scope);
- 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 purposed of its business operations or the business operations of any of its subsidiaries.

Licensing requirement

The DABA will require 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 announced any proposed exemption orders.

Two classes of licence will be available for applicants:

- The Class M licence will be a restricted form of licence, with modified requirements and certain restrictions, and will be valid for a specified period, the duration of which will be determined by the BMA on a case-by-case basis. Following the expiry of this specified period, it is generally expected that the licensee will either have to apply for a Class F Licence (as described in further detail below) or cease carrying on business, although the BMA will have discretion to extend the specified period.
- The Class F licence will be a full licence not subject to any specified period, although it may still be subject to restrictions the BMA may deem appropriate in any given case.

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 some sort of track record before obtaining 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 will almost invariably include an obligation to disclose to prospective customers the fact that the licensee holds a 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 if the BMA decides that a Class M licence would be more appropriate in the circumstances. It is also anticipated that the licence will 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 will be a criminal offence punishable by a fine of up to US\$250,000, imprisonment for a term of up to five years, or both.

Criteria to be met by licensees

The DABA will provide 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 officers, 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 the BMA maintains high standards for the conduct of regulated business. The BMA has also announced an intention to publish a code of practice detailing requirements as to governance and risk management proportionate to the size, complexity and risk profile of a licensee.

The DABA will require licensees to notify the BMA upon changes in directors or officers, and the BMA will have 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 will be subject to several ongoing obligations.

Dissemination of key information to customers: in order to mitigate the high degree of risk for consumers owing to the highly speculative and volatile nature of digital assets, the BMA has announced it will use powers conferred to it under the DABA to 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; whether it has insurance against loss of customer assets arising from theft (including cybertheft); the extent to which a transfer or exchange of digital assets is irrevocable and any exceptions; and the extent to which it will be liable for an unauthorised, mistaken or accidental transfer or exchange. Draft rules published by the BMA for this purpose also oblige licensees to confirm certain information regarding transactions with clients at the conclusion of each such transaction.

Crisis management programme: the BMA announced in its consultation plans that licensees will be required to develop and implement a comprehensive crisis management, including cybersecurity, programme commensurate to the licensee's nature, size, complexity and risk profile. This programme must be sufficient to enable the licensee to:

- identify internal and external risks;
- protect the licensee's electronic systems and the information stored on them;
- detect systems intrusions and breaches;

- respond to a detected event in order to mitigate negative effects; and
- recover from operational disruption to the normal course of the licensee's business.

Although licensees will be permitted to engage the services of specialist third parties in order to enhance and supplement the strength of their own cybersecurity systems, ultimate responsibility for compliance with these requirements will rest with the licensee.

Custody and protection of consumer assets: licensees will be required to have in place and maintain a surety bond, trust account or indemnity insurance for the benefit of their customers. Any such trust account must be maintained with a "qualified custodian", which the DABA will define as a licensed Bermuda bank or trust company or any other person recognised by the BMA for this purpose. A licensee will, in addition, be 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 will impose an obligation on licensees to appoint a senior representative, to be approved by the BMA, who must be resident in Bermuda 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 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 will be 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 standard annual prudential return will include information relating to business strategy and risk appetite, products and services, number of customer accounts and geographical profile of accounts, information on risk and cybersecurity (including a risk self-assessment and policies in these areas), audited financial statements and details on any outsourcing to third parties.

BMA's supervision and enforcement powers

The DABA will grant 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 making false or misleading statements), the power to issue such directions as appear to be desirable to it for safeguarding the interests of a business's customers or potential customers, and the power to impose conditions and restrictions on licences. For example, the BMA may:

- require a person or entity 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 person or entity from soliciting business, either generally or from prospective customers;
- prohibit a person or entity from entering into any other transactions or class of transactions; and
- require the removal of any officer or controller.

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 will have 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. It is expected that the BMA will issue guidance in the form of a statement of principles setting out how it proposes to use these enforcement powers shortly after the DABA is passed.

ICO regulation

As noted above, the DABA will not apply to any ICO intended to finance the issuer's or promoter's own business. Instead, the Companies and Limited Liability Company (Initial Coin Offering) Amendment Act, 2018 (the "ICO Act") will effect amendments to the Companies Act 1981 and the Limited Liability Company Act 2016 which will form a regulatory framework for ICOs. At the time of writing, the ICO Act had been passed by both houses of the Bermuda Parliament and was awaiting royal assent.

The ICO Act will define an ICO as an offer by a company or a limited liability company (a "LLC") to the public to purchase or otherwise acquire digital assets and designate any ICO as a "restricted business activity", requiring consent from the Minister of Finance before any ICO may be made to the public. Private sales and offers of further coins or tokens to existing holders of coins or tokens of the same class will be exempted, as will issuances where the offer is made to a limited number of persons (the actual limit depends on the type of company or LLC the issuer is, and will be 35 in most cases).

The application for consent from the Minister will be required to include specific details regarding:

- the persons managing the issuer and the underlying digital asset(s) offered for sale;
- the development and implementation of any product, service or other project related to the ICO, including timelines for completion;
- the target amount to be raised through the ICO;
- rights, features, functionality and intended transferability of the digital asset(s) offered for sale;
- the technology to be used and confirmation of the ability of the technical platform to enable the collection, confirmation and storage of purchaser identity information; and
- compliance and auditing of ICO transactions.

In addition to obtaining consent from the Minister of Finance, a prospective ICO issuer will also have to publish, in electronic form, an offering document and file this with the Bermuda Registrar of Companies. The offering document must contain:

- details regarding any promoter, including its registered or principal office and details of its officers;
- the business or proposed business of the issuer company or LLC;
- a description of the project to be funded by the ICO and the proposed timeline for the project, including any proposed project phases and milestones;
- the amount of money that the ICO is intended to raise;
- disclosure as to the allocation of the amounts intended to be raised amongst the classes of any issuance (pre-sale, post-ICO etc.);
- any rights or restrictions on the digital assets that are being offered;
- the date and time of the opening and closing of the ICO offer period;
- a statement as to how personal information will be used; and

- a general ICO risk warning containing:
 - information regarding any substantial risks to the project which are known or reasonably foreseeable;
 - information as to a person's rights or options if the project which is the subject of the ICO in question does not go forward;
 - a description of the rights (if any) in relation to the digital assets that are being offered; and
 - information regarding any disclaimer in respect of guarantees or warranties in relation to the project to be developed or any other asset related to the ICO.

If an ICO issuer offers digital assets to the public over a period and any of the particulars in its offering document cease to be accurate in a material respect, the issuer must publish supplementary particulars disclosing the material changes and file these with the Registrar.

The promoter must provide an electronic platform to facilitate communication with prospective investors, and the legislation will also grant investors a cooling-off period during which they will be permitted to withdraw an application to purchase the digital assets offered.

Any person who makes or authorises the making of a false statement in an ICO offering document will be guilty of an offence punishable by a fine of up to US\$250,000, imprisonment for a term of up to five years, or both, unless the person proves either that the statement was immaterial or that at the time he made the statement he had reasonable grounds to believe it was true. Officers of the issuer and promoters of the ICO will also incur civil liability to any person who suffers loss as a result of false statements in the offering document, subject to certain defences.

Sales regulation

Issuing, selling or redeeming cryptocurrencies will be regulated under the DABA if carried on as a business, and ICOs will be regulated under the ICO Act, in each case in the manner described more particularly above.

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 LLCs carrying on digital asset business, including ICO issuers, may apply for, and are likely to receive, 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 cryptocurrency or other digital assets (including the provision of services for the transfer of funds) or operating a digital exchange will constitute 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. Bermuda is also due to undergo its fourth round mutual evaluation by the FATF in 2018.

As part of its consultation exercise on the DABA, the BMA announced that activities falling within the scope of the DABA will be subject to AML/ATF regulation. Consequently, the DABA contains provisions amending certain provisions of Bermuda's existing AML/ATF laws and regulations in order to ensure that the carrying on of digital asset business is expressly captured. However, the BMA also recognises the need for new AML/ATF guidelines relating specifically to the conduct of digital asset business, and at the time of writing the BMA is engaged in the drafting of these guidelines in collaboration with the National Anti-Money Laundering Committee and the Bermuda government. These draft guidelines will be presented, along with a new consultation paper addressing the AML/ATF aspects of digital asset business, for industry feedback in due course.

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 will be 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

As noted at the beginning of this chapter, the Bermuda government is very enthusiastic about the potential offered by fintech for the territory's economy and has launched, or is in the process of developing, a number of initiatives aimed at promoting investment by fintech businesses in Bermuda.

One aspect of this is a new immigration policy for fintech businesses, announced by the Minister of Home Affairs to the Bermuda Parliament in early May 2018. This allows a company operating in the fintech space and which is 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 which are closed (i.e. reserved exclusively for Bermudians, their spouses and permanent resident cardholders 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.

Throughout 2018, the government has also been busy entering into a series of memoranda of understandings with various digital asset businesses. Under these memoranda:

- Binance Holdings Limited, the parent company of the Binance Group, the world's largest digital exchange, has committed to develop its global compliance base in Bermuda, creating at least 40 jobs, and to develop a digital asset exchange in Bermuda. It has also undertaken to sponsor university scholarships for Bermudians in blockchain technology development and regulatory compliance, and to make capital available for investment in new Bermuda-based blockchain companies.
- Medici Ventures LLC, a subsidiary of overstock.com (the world's first major enterprise to accept Bitcoin), will create at least 30 jobs in Bermuda over three years, develop a security token trading platform in Bermuda, support the training of Bermudians in software development, and collaborate with government, the BMA and other stakeholders in developing and improving Bermuda's legal and regulatory framework applicable to digital asset businesses.
- Shyft, a blockchain AML/ATF and identity startup, will invest up to US\$10 million over the next three years into Bermuda's economy, support the training of Bermudians in blockchain technology and software development, and collaborate in the development and improvement of Bermuda's digital asset legal and regulatory framework. Shyft has also signed a separate MOU with Trunomi, a Bermuda-based consent and data rights platform, which aims to leverage Shyft's blockchain technology with Trunomi's expertise in consumer consent frameworks to support Bermuda in the implementation of an electronic ID scheme.
- Omega One, an agency brokerage for cryptocurrencies, will open an office in Bermuda, hire at least 20 Bermudians over the next three years, and donate 10% of a planned token sale to philanthropic causes (with 10% of the amount donated going to sports and community clubs in Bermuda).
- Arbitrade, a coin and cryptocurrency exchange, is to move its global headquarters to Bermuda.

Ownership and licensing requirements

Under current Bermuda law, and under the ICO Act and the DABA, no licensing requirements are (or will be) 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 a digital asset services vendor and thus subject to regulation under the DABA.

An investment fund incorporated or formed in Bermuda which proposes to deal in digital assets as part of its investment strategy or programme may fall within the ambit of the Investment Funds Act 2006. This requires open-ended funds, subject to certain exceptions, to apply to the BMA for authorisation prior to commencing business, and subjects such funds to the ongoing supervision of the BMA. It does not apply to closed-ended funds, such as private equity funds.

Mining

Mining is specifically exempted from the scope of the DABA, as currently drafted. It will therefore remain an unregulated activity.

Although mining is not prohibited by any Bermuda law of which we are aware and will not be subject to regulation under the DABA, Bermuda's high energy costs will, it is anticipated, operate as a practical deterrent to the establishment of any mining operations in Bermuda.

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 a 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 will be subject to certain reporting obligations under the regulatory regime to be imposed by the DABA, as described in more detail above. The DABA will not impose any reporting requirements in respect of individual digital asset payments, irrespective of their value.

Estate planning and testamentary succession

There is no particular regime of Bermuda law which 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.

Authors



Michael Hanson
Managing Partner

D +1 441 542 4501
E michael.hanson@careyolsen.com

Michael Hanson is the managing partner of Carey Olsen Bermuda. His core practice is centred on human capital and regulatory law where he advises the largest insurance and reinsurance, banks and professional services businesses on the island.

Michael has particular and significant expertise in corporate, employment and regulatory investigations, complex executive disputes, multijurisdictional crisis management and executive benefit and incentive programs.

Michael is ranked as a leading lawyer by Chambers Global and The Legal 500 describing him as “highly rated”, “very knowledgeable”, and that “his responsiveness is unbelievable!”.



Adam Bathgate
Counsel

D +1 441 542 4511
E adam.bathgate@careyolsen.com

Adam is counsel in the Bermuda office and advises on all aspects of Bermuda corporate law. His particular specialisms lie in debt finance transactions, the formation and maintenance of investment funds, and the fintech sector.

Adam has considerable expertise in the areas of fund finance, leveraged and acquisition finance and general lending, whether secured or unsecured. He has also worked on asset finance and structured finance transactions.

In the funds sphere, Adam’s practice is largely focused on the formation and maintenance of private equity, infrastructure and real estate funds, including related downstream deal work, although he also has experience in hedge funds and hybrid funds.

Adam is ranked as a “rising star” in IFLR1000.

Endnotes

1. Virtual Currencies: Key Definitions and Potential AML/CFT Risks, FATF, June 2014.

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Contributing editor Josias Dewey.

‘Carey Olsen Bermuda’ is the trading name for Michael Hanson, a barrister and attorney, carrying on Bermuda legal services. The use of the title ‘Partner’ is merely to denote seniority. Services are provided on the basis of our current terms of business, which can be viewed at <http://www.careyolsen.com/sites/default/files/TermsofBusiness.pdf>

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Our offices

Jurisdictions

Bermuda

Carey Olsen Bermuda
2nd Floor
Atlantic House
11 Par-la-Ville Road
Hamilton HM11
Bermuda

T +1 441 542 4500
E bermuda@careyolsen.com

British Virgin Islands

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Cayman Islands

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

Guernsey

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

Jersey

Carey Olsen
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

International offices

Cape Town

Carey Olsen
Protea Place
40 Dreyer Street
Claremont
Cape Town 7708
South Africa

T +27 21 286 0026
E capetown@careyolsen.com

Hong Kong

Carey Olsen (Hong Kong) LLP
Suite 4120
Jardine House
1 Connaught Place
Hong Kong

T +852 3628 9000
E hongkong@careyolsen.com

London

Carey Olsen LLP
8-10 Throgmorton Avenue
London EC2N 2DL
United Kingdom

T +44 (0)20 7614 5610
E londonco@careyolsen.com

Singapore

Carey Olsen Singapore LLP
10 Collyer Quay #24-08
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

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