



Bermuda  
blockchain and  
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## 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 has implemented 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:

- the Digital Asset Business Act comprises a regulatory framework for fintech businesses operating in or from Bermuda; and
- although not covered by the Digital Asset Business Act, initial coin and security token offerings are 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, offers through the Bermuda Business Development Agency a concierge service for businesses wishing to establish operations on the island, 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 are 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 jurisdiction’s financial regulator and issuer of its national currency, backed any cryptocurrency itself, and the Bermuda dollar remains the territory’s legal tender.

## 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. Bermuda has, accordingly, led the way in introducing a regulatory framework for digital asset business and coin and token offerings.

## Digital Asset Business Act

The 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.

At the time of writing, the BMA was engaged in a consultation exercise with a view to amending certain provisions of the DABA to give greater clarity to certain sections and to make other changes that are intended to facilitate more effective administration of its provisions.

## 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. 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, is 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 does not include initial coin offerings or security token offerings (collectively, “ICOs”) to fund the issuer’s or promoter’s own business or project. Instead, ICOs are 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 captures 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 are also caught.

- **Providing custodial wallet services**

This covers 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 regulates 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 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:

- 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 exempts 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 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.

Two classes of licence are available for applicants:

- The **Class M** licence is a restricted form of “sandbox” licence, with modified requirements and certain restrictions, and 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 is 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. 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.



### 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 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 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 officers, 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 theft (including cybertheft); 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 (the "Cybersecurity Rules"). Under the Cybersecurity Rules, licensees must 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 carried on or to be carried on by the licensee, and the cybersecurity programme implemented and proposals for steps for the redress of any inadequacies identified.

The cybersecurity programme 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:
  - track and maintain data that allows for the complete and accurate reconstruction of all financial transactions and accounting;
  - protect the integrity of data stored and maintained as a part of the audit trail from alteration or tampering;
  - 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;
  - log system events including but not limited to access and alterations made to the audit trail systems, and cybersecurity events; and
  - maintain records produced as part of the audit trail.

Licensees must engage a qualified independent party to audit its systems and provide a written opinion to the BMA that the cybersecurity programme and controls are suitably designed and operative effectively to meet the requirements of the Cybersecurity Rules and applicable codes of practice.

**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. Any such trust account must be maintained with a "qualified custodian", which the DABA defines as a licensed Bermuda bank or trust company or any other person recognised by the BMA for this purpose. 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 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 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.

### ICO regulation

As noted above, the DABA does not apply to any ICO intended to finance the issuer's or promoter's own business. Instead, the Companies Act 1981 and the Limited Liability Company Act 2016 (collectively, the "Company Legislation") were amended in 2018 to include a regulatory framework for ICOs.

The Company Legislation defines 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 designates 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 are exempted, as are 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 is 35 in most cases). Regulations published under the Company Legislation set out key information required to be included with the application for consent, including details as to the proposed project to be funded by the ICO and the persons involved as well as information on the coin or token proposed to be offered and its transferability, and information on compliance features intended to be included in the issuer's systems.

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 also grants investors a cooling-off period during which they are 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 is guilty of an offence punishable with 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 is regulated under the DABA if carried on as a business, and ICOs are regulated under the Company Legislation, 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 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 FATF 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.

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

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.

The government has appointed a specialist fintech team with a remit to promote the sector in Bermuda and bring more fintech business to the island. Among its initial success stories is that of Omega One, an agency brokerage for cryptocurrencies, which has opened an office in Bermuda (and received the first licence granted under the DABA), and has committed to hiring at least 20 Bermudians over the next three years, and donating 10% of a planned token sale to philanthropic causes (with 10% of the amount donated going to sports and community clubs in Bermuda).

A further government initiative is a tailored immigration policy for fintech businesses, which 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 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.

The government has also entered 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 the 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.

## Ownership and licensing requirements

Under current Bermuda law, and under the ICO Act and the DABA, 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 a digital asset services vendor and thus subject to regulation under the DABA. The BMA is consulting on proposals to require Bermuda trust companies which hold digital assets as trust property to obtain a licence to do so 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 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. It therefore remains an unregulated activity.

Although mining is not prohibited by any Bermuda law of which we are aware and is not 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 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 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.





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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

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### PLEASE NOTE

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