



BERMUDA MONETARY AUTHORITY

CONSULTATION PAPER

DIGITAL ASSET BUSINESS AMENDMENT ACT 2020

7 AUGUST 2020

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The digital asset industry and other interested persons are invited to share their views on the proposals set out in this paper and Bill. Comments should be sent to the Authority digitally, via the below survey link or QR code, no later than **07 September 2020**.

<https://www.surveymonkey.com/r/3XP5DRN>



I. INTRODUCTION

1. The Digital Asset Business (DAB) environment is a new and rapidly evolving space. As such, it is important that Bermuda's regulatory and supervisory framework keeps pace with the rapid rate of change so as to remain fit for purpose. The Bermuda Monetary Authority (Authority) has undertaken to enhance its oversight of DABs as part of the ongoing development of Bermuda's digital asset regulatory framework.
2. The Authority is proposing to amend the *Digital Asset Business Act 2018* (DABA or Act) to give greater clarity to certain sections and to make other changes that are intended to facilitate the development of the FinTech sector in Bermuda and a more effective administration of the Act.
3. The amendments to the Act (Bill) will cover, among other things, the following areas:
 - (a) Amending some definitions to clarify the Authority's intent in certain sections
 - (b) Insert a requirement to notify the Authority regarding changes to exemption conditions
 - (c) Extending the Authority's ability to modify applicable fees
 - (d) Establishing a new testing licence to be called a Class T licence

II. ENHANCEMENTS TO THE DIGITAL ASSET REGULATORY FRAMEWORK

4. The Authority develops risk-based financial regulations that it applies to the supervision of all of Bermuda's financial sectors, including banks, trust companies, investment businesses, insurance companies and DABs. The following proposed changes are intended to improve on the overall administration of the Act.
5. The Authority is proposing the following changes:
 - Amending the definition of "digital asset exchange" to "digital asset exchange" means a centralized or decentralized electronic marketplace used for digital asset issuances, distributions, conversions and trades, including primary and secondary distributions, with or without payment; provided that digital asset conversions and trades may also be entered into by the electronic marketplace as principal or agent'
 - "Digital asset derivative exchange" means a centralized or decentralized marketplace used for digital asset derivatives issuances, distributions and trades with or without payment; provided that digital asset derivatives trades may also be entered into by the marketplace as principal or agent

- In the definition of “digital asset services vendor” replace the word ‘means’ with ‘includes’
6. The Authority is proposing to introduce a requirement for companies that seek an exemption order under section 11 of the Act to file an application for such exemption and for such companies to be required to declare annually that they continue to qualify for exemption. This proposal will improve the oversight regime for this sector. This proposal will require the Minister of Finance to amend the existing exemption Order process to provide for persons to notify the Authority of their exempted status and to re-notify annually. Further, section 11 will also be amended with the exemption in 11(5) (a) deleted. The wording here has been interpreted differently from its intended use and, in order to avoid any further confusion, is to be removed.
 7. Additionally, the Authority is clarifying a power introduced last year that would allow it to modify a fee in cases where companies would require other licences in addition to a DAB licence, particularly where a business activity crosses between legislative Acts such as investing in digital assets. Presently, a company may need both an investment business licence and a DAB licence, potentially requiring two fees for a single activity. The Authority is of the view that in these particular cases it may be appropriate for the Authority to offer a flexible fee structure. The Authority is proposing to amend section 16 of the Act to add the following:

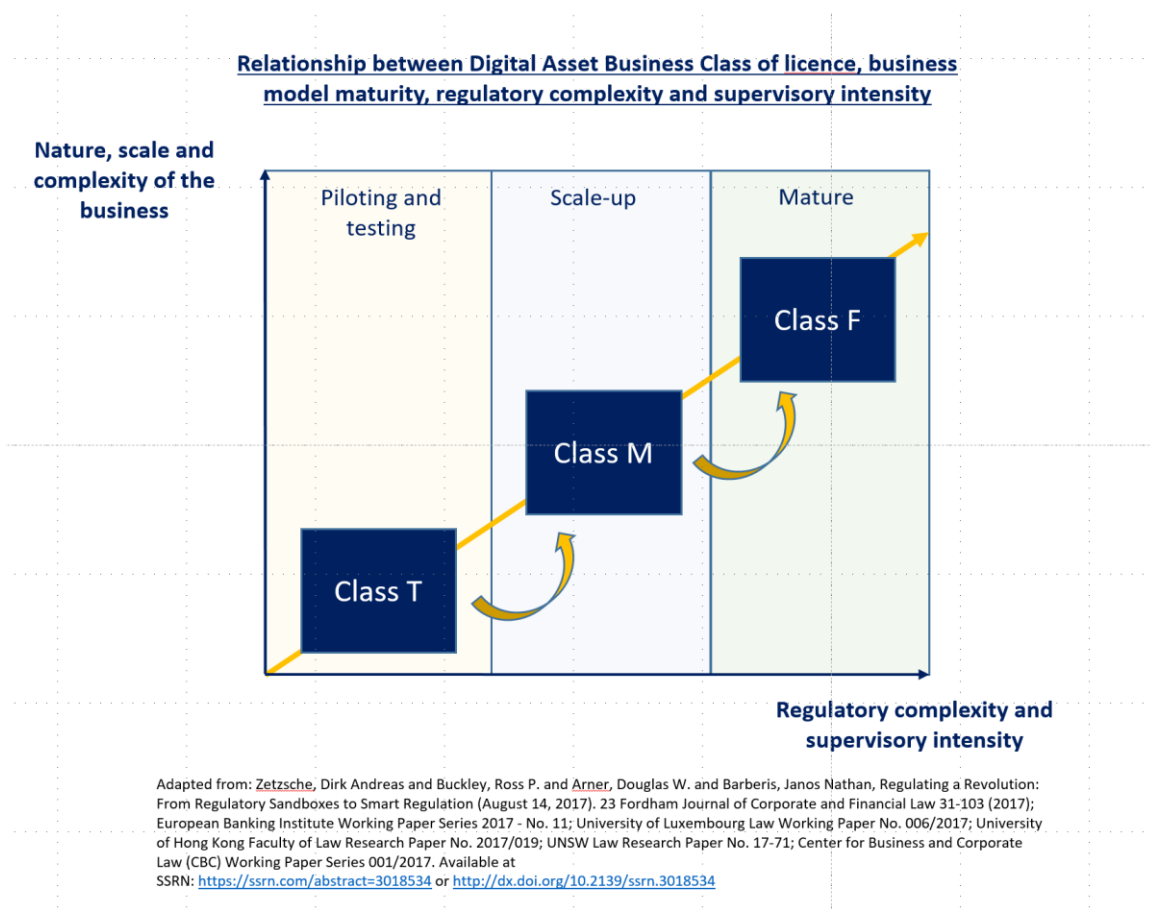
The Authority may, where it has made a determination –

- (a) Exempt a registered person from the requirement to pay any fee under this section, as may be prescribed under the Bermuda Monetary Authority Act 1969*
 - (b) Reduce any fee required to be paid by a registered person under this section by such amount as it considers appropriate, as may be prescribed under the Bermuda Monetary Authority Act 1969*
 - (c) In granting an exemption from, or reduction of, any fee payment under section (16), the Authority may impose any condition on such exemption or reduction, as it may determine appropriate*
 - (d) The Authority shall not grant an exemption from, or reduction of, any fee payment under section (16) unless it is satisfied that it is appropriate to do so having regard to the nature, scale and complexity of the business carried on by the registered person*
8. It should be noted that the proposals in paragraphs 6 and 7 have previously been consulted on in a consultation paper titled *Digital Asset Business Amendment Act 2019* in May 2019. However, the requisite changes were omitted from the Act. As such, their inclusion in this consultation paper is intended primarily as a reminder to industry stakeholders of the Authority’s previously planned amendments to the Act.

Other proposed changes

9. After its first complete year of FinTech operation, the Authority undertook a reflection upon the lessons learned from its licensing process, as well as from its interactions with market participants. In an effort to maintain the appropriate regulatory framework and to ensure that it continues to support financial innovation that may benefit the jurisdiction, the Authority considered whether the current set of classes under DABA were fit for purpose. In particular, consideration was given as to whether the present M (modified) and the F (full) licences were appropriate to support all stages of innovation of the evolving DAB environment.
10. Based on its research and analysis, the Authority considers it may be appropriate to enhance the FinTech regulatory framework to support all stages of innovation by giving additional consideration to the fact that innovation requires rapid testing and piloting. As such, it may be necessary for the Authority to enhance its regulatory framework to support that objective.
11. Further, the Authority is of the view that the best way to adapt the present framework is by the addition of a new “test” or Class T licence. The purpose of this licence class is for the testing of a minimum viable product/service via beta testing or piloting. Applicants must; (1) develop a success criterion for the test within their business plan, (2) list their pre-identified or targeted customers or counterparties, (3) hold capital of at least BD\$10,000 equivalent and (4) ensure that appropriate risk disclosures for potential counterparties are in place.
12. The T licence will have an initial duration of 12 months or less and appropriate regulatory requirements based on proportionality. The business models in this class should be a DABA licensable activity and licensing fee would be limited to BD\$1,000.
13. The three licences available under the Act are meant to provide a progression of regulatory complexity and supervisory intensity that is commensurate with the nature, scale and complexity of the business and that supports prudent industry development. The focus of the Authority is always to be risk-based, proportional and to provide clear expectations to the industry. We expect that the introduction of a specific testing class reduces the ex-ante costs of understanding the regulatory requirements for entities seeking to run contained pilots or tests.
14. In addition, it clarifies, with a view to protecting the public, which companies are in testing or piloting phases and that, as such, may represent a higher risk of failure. In return, customers of financial services may be better equipped to make an informed decision.

15. The graph below illustrates the relationship between the proposed class of licences.



16. For clarity as to the expectation for each of these classes and without prejudice to the powers of the Authority to impose additional conditions, please find a summary table of some of the key features below:

Licence class	Class T (test)	Class M (modified)	Class F (full)
Business model maturity	Testing and piloting a business model, a product or a service which is still unproven generally or in a specific context	Scaling up a business model that has previously been tested and building full compliance programme	Proven business model at scale with fully developed compliance programme
Limitations on licence	Very limited scale, pre-set number or category of participants	Limited scale or volume of business	Usually none

Supervision	Limited reporting, important emphasis on disclosure of risks and limitations of test to prospective customers	Monthly supervisory meeting and returns with pre-determined key performance indicators	Yearly annual returns with on-site supervision
Minimum net assets	\$10,000	\$100,000	\$100,000+
Insurance requirements	No	Yes	Yes
Head office requirements under DABA¹	Local incorporation only	Proportional expectations as the company grows in scale and complexity	Full obligations
Duration	Three to 12 months with the potential to extend	12-24 months with the potential to extend	No pre-determined duration
Application filing costs	Reduced to \$1,000	\$2,266	\$2,266
Annual (or for the pre-determined period) licence costs	Reduced to \$1,000	Regular fee structure applies	Regular fee structure applies

17. Related to the addition of the new T Licence, the Authority is proposing to amend section (15) (1) by adding after the words “licensed undertaking” the words “except Class T licence holders”; and in section 19 (3) after the word “Bermuda” add the words “except in the case of a T licence where the Authority has granted an exemption to this provision”. Section 21 (Head Office) will carry a similar exemption as the Authority recognizes that this is a very early stage of business development.

18. In section 66 Certificates of Compliance, the Authority is proposing to add a sentence to state that in cases where a licence expires before the financial year-end then a company should submit its certificate within 30 days of licence expiration.

Housekeeping changes

19. Housekeeping changes generally include a mix of minor technical changes, errors and/or omissions and consequential amendments.

¹Notwithstanding any other potential legal obligations, including economic substance.

20. A consequential amendment is being made as a result of the passing of the *Digital Asset Issuance Act* (DAIA) which amends section 7(1) of the DABA 2018 (prudential and other returns), after paragraph (f) by inserting (g) “accreditation of digital asset business;”.

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WHEREAS it is expedient to amend the Digital Asset Business Act 2018 to, amongst other measures, introduce a new class of licence; revise the definitions of digital asset exchange, digital asset derivative exchange and digital asset services vendor and to revise the power of the Authority to exempt any undertaking from the payment of any fee imposed under the Bermuda Monetary Authority Act 1969; or to reduce such fees; and for purposes connected with and incidental to those matters;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

Citation

1 This Act which amends the Digital Asset Business Act 2018 (the “principal Act”), may be cited as the Digital Asset Business Amendment Act 2020.

Amends section 2

2 Section 2 (1) of the principal Act is amended—

(a) by repealing and replacing the definition of “digital asset exchange” as follows—

“digital asset exchange” means a centralized or decentralized electronic marketplace used for digital asset issuances, distributions, conversions and trades, including primary and secondary distributions, with or without payment; provided that digital asset conversions and trades may also be entered into by the electronic marketplace as principal or agent”;

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- (b) by repealing and replacing the definition of “digital asset derivative exchange” as follows-
“digital asset derivative exchange” means a centralized or decentralized marketplace used for digital asset derivatives issuances, distributions and trades with or without payment; provided that digital asset derivatives trades may also be entered into by the marketplace as principal or agent;”;
- (c) in the definition of “digital asset services vendor” by deleting the word “means” and substituting “includes”.

Amends section 11

- 3 Section 11 of the principal Act shall be amended by —
 - (a) deleting subparagraph (5) (a)

Amends section 12

- 4 Section 12 of the principal Act shall be amended —
 - (a) by inserting the following after subparagraph (3) “(b)” —
 - “(c)” class T licence, under which a person shall be licensed to provide any digital asset business activity under the definition of digital asset business, for a defined period determined by the Authority and for the purpose of carrying

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- out pilot or beta testing in relation to such activity.”;
- (b) in subparagraph (4) by inserting after “licence” the words “or class T licence”;
- (c) in subparagraph (5) by inserting after “licence” the words “or class T licence”.

Amends section 15

- 5 Section 15 of the principal Act is amended —
- (a) in subsection (1), by inserting after “undertaking”, the words “other than a licensed undertaking granted a class T licence pursuant to section 13,”;
 - (b) inserting the following new subsection after subsection (1) —
 - “(1A) A licensed undertaking granted a class T license shall —
 - (i) not be required to keep its licence on display at its principal place of business in Bermuda; and
 - (ii) publish a statement on its website for the duration of its licence, that it has a been issued a class T licence by the Authority to carry out pilot or beta testing in relation to the digital asset business activity.

Amends section 16

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6 The principal Act is amended in section 16 by deleting the word “licensed” in subsections (1), (5) (a) and (b) and (7) where it appears.

Amends section 19

7 The principal Act is amended in section 19 (3) by inserting after “Bermuda”, the words “except where such representative has been approved by the Authority to be appointed to a licensed undertaking granted a class T licence pursuant to section 13.”.

Amends section 21

8 The principal Act is amended in section 21(1) by inserting after “undertaking”, the words “other than a licensed undertaking granted a class T licence pursuant to section 13,”.

Schedule 1 Amended

9 Schedule 1 to the principle Act is amended in paragraph 2 —

(a) in subparagraph (3) by inserting after “A licensed undertaking” the words, “other than an undertaking granted a class T licence”;

(b) by inserting the following after subparagraph (3) —

“(3A) An undertaking granted a class T licence shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain minimum net assets of \$10,000 or such amount as the Authority may direct

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taking into consideration the nature, size and complexity of the licensed undertaking;”

- (c) in subparagraph (6) by inserting after “A licensed undertaking” the words, “other than an undertaking granted a Class T licence”.

Consequential Amendment

- 10 The consequential amendments set forth in the Schedule have effect.

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DIGITAL ASSET BUSINESS AMENDMENT ACT 2020 EXPLANATORY MEMORANDUM

This Bill seeks to, amongst other measure; introduce a new class of DABA licence; repeal and replace the definitions of “digital asset exchange”, “digital asset derivative exchange” and revise the definition of “digital asset services vendor”; scope all new Class T licensees from the requirements to display a licence and maintain an office and head office in Bermuda; and to revise the power of the Authority to exempt any undertaking from the payment of any fee imposed under the Bermuda Monetary Authority Act 1969; or to reduce such fees:

Clause 1 provides for citation of the Bill.

Clause 2 provides for the repealing and replacing of the defined terms digital asset exchange, digital asset derivative exchange and a revision to the term digital asset services vendor.

Clause 3 proposes to amend section 11 by deleting subparagraph 5(a) in order to avoid misinterpretation of this activity in the market.

Clause 4 makes provision for a new limited duration test licence, the “Class T licence”. Licensees in this class will have an opportunity (likely for not more than 12 months), to carry out pilot or beta testing in relation to a digital asset business activity, while under the supervision and direction of the Authority and shall be required to obtain a “higher” M or “F” licence once the period of licensing has expired (where

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such licensee wishes to progress to the next phase). The Fees, supervision and matters such as the appointment of a senior representative have been taken into account in respect of the limited duration of the class. The Authority may impose any conditions it deems fit in the licensing of any person in this class. Once an undertaking has satisfied the Authority of the fitness of the digital asset business activity, it may surrender its licence and submit an application to be licensed by the Authority in either the “M” or “F” licensing classes as a next or final phase of licensing.

Clause 5 makes provision for section 15 to be amended to require a Class T licensee to publish the fact that it has attained a T license on its website for the duration it holds the licence to carry out pilot or beta testing in relation to the digital asset business activity, as due to the limited nature of the class, the Authority has determined that such entity will not have the opportunity to display such license in its registered office.

Clause 6 proposes to amend section 16 by amending subsections (1), (5) (a) and (b) and (7), by deleting the word “*licensed*”, which shall enable the Authority to exempt any undertaking from any fee imposed under the Bermuda Monetary Authority Act 1969; or allow for the Authority to reduce such fees as it sees fit. Previously, section 16 only allowed the Authority the power to exempt licensed undertakings from the requirement to pay any fee under section 16 (or to reduce said fees). The limitations of the Authority’s powers under this section to “licensed” undertakings was not aligned with the original consultation conducted with the market, whereby the intent of the Authority was noted as allowing it to exercise such powers in relation to *any* undertaking subject to fees under section 16. The Authority shall not grant such exemption unless it is satisfied with the matters set out under subsection (7) of section 16;

Clause 7 provides amendment to section 19 to be revised to allow for a Class T licensed undertaking’s senior

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representative to not have to maintain an office in Bermuda; The rationale for this amendment is that the T licence is an early stage developmental licence which allows limited business and as such the senior representative will often be an executive of the company. The office requirement would be amended as the business scales up.

Clause 8 proposes amendment to section 21 to scope out Class T licensees from the requirement to maintain an office in Bermuda; the point of this class of licence is to encourage the growth of testing and development in Bermuda. Considering the limited scope of the licence (testing) the intent is to expedite the process and ensure it makes financial sense.

Clause 9 proposes to amend the minimum criteria for licensing under Schedule 1 paragraph 2, to allow for a class T licensee to only have to hold assets equivalent to the amount of \$10,000 and to not have to comply with the obligations of a Class M or F licensee relating to obtaining an insurance policy in respect of its operations. Such lower barriers to entry have been carefully considered by the Authority with respect to the nature, scale and complexity of the digital asset business to be conducted by an undertaking in this licensing class.

Clause 10 proposes consequential amendments to be made to the Fourth Schedule to the Bermuda Monetary Authority Act 1969, under the heading “Digital Asset Business Act 2018” to introduce new fee payments in respect of the new licencing class.

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SCHEDULE

(Section 8)

Amends Bermuda Monetary Authority Act 1969

The Bermuda Monetary Authority Act 1969 is amended in the Fourth Schedule under “**PART C-2021 “Digital Asset Business Act 2018”**” by—

(a) inserting the following new paragraph after paragraph 2 “(h)” —

“(i) the fee payable by an undertaking carrying digital asset business in accordance with a Class T licence pursuant to section 12 (3) shall be \$1000”;

(b) inserting the following new paragraph after paragraph 3 “(h)” —

“(i) the fee payable by an undertaking carrying digital asset business in accordance with a Class T licence pursuant to section 12 (3) shall be \$1000”.