



# **BERMUDA MONETARY AUTHORITY**

**FINTECH DEPARTMENT**

## **GUIDANCE NOTES**

**DIGITAL ASSET BUSINESS ACT 2018**

**HEAD OFFICE GUIDANCE**

**APRIL 2021**

**TABLE OF CONTENTS**

**Introduction..... 3**  
**Factors taken into consideration for determining compliance with the head office requirements3**  
**Application of the proportionality principle to the head office requirements..... 5**  
**Closing remarks ..... 6**

## **Introduction**

The Bermuda Monetary Authority (Authority or BMA) recognises that the environment in which Digital Asset Businesses (DAB) operate is digital in delivery and global in reach. As such, DABs operating in or from within Bermuda may have part of their structure and some of their functions outside of the jurisdiction or outsourced to third parties, who may also be outside of the jurisdiction. Further, they may, in some cases, rely on technology to operate in a decentralised fashion.

Nonetheless, the presence of a local head office is a cornerstone of appropriate and effective supervision to have access to records, systems, and key personnel. Thus, Section 21 of the *Digital Asset Business Act 2018* (DABA) requires licensed undertakings to be directed and managed from their head office in Bermuda.

Considering the inherent complexities that may exist in evaluating the compliance with Section 21 of the DABA, this guidance intends to provide information and clarification as it relates to the Authority's evaluation of compliance with the head office requirement, taking into account the nature, scale, complexity and risk profile of a licensed undertaking.

It should be noted that Section 21 of the DABA does not apply to Class T (Test) licence holders; it only applies to Class M (Modified) and Class F (Full) licence holders.

This guidance is structured in two parts: 1) the factors taken into consideration for determining compliance with the head office requirement and 2) the application of the proportionality principle to the head office requirement.

## **Factors are taken into consideration for determining compliance with the head office requirement**

In order to evaluate the compliance with the overarching principle of Section 21 of the DABA and always adopt a substance-over-form approach, the Authority considers three primary factors and three secondary factors.

<b>Primary factors</b>	<b>Interpretation</b>
(a) Where the strategy, risk management and operational decision-making of the licensed undertaking occurs	<p>To make this evaluation, the Authority considers each of the functions individually. For example, strategy, risk management, operations – which can be further broken down depending on the entity's organisational structure and functions (accounting, product development, business development, IT/cybersecurity, administration, etc.). Decision-making refers to the delegation of Authority to either a person or committee.</p> <p>Where a committee is vested with decision-making authority, the location where its meetings are being held is considered as the location where the decision has taken effect.</p> <p>The expectation is not that all decision-making be performed from a central location, but that proportionality is applied in considering whether this primary factor is met. Therefore, more weight is attributed to functions that are</p>

	<p>most crucial with regards to the nature, scale, complexity and risk profile of the entity.</p> <p>Where third parties providing outsourced services are involved in the decision-making process, the Authority may consider that third party's location in determining where the decision-making takes place. This notwithstanding, it should be clarified that decision-making powers are not outsourced to such third parties in these instances; decision-making is vested with the undertaking at all times, and the Authority will seek to evaluate the location from where that occurs.</p> <p>In cases where decision-makers accomplish their functions from multiple locations, the Authority will consider the time allocation, the frequency of visits and the nature of their tasks when they are physically present in Bermuda.</p>
<p>(b) Whether the presence of senior executives who are responsible for, and involved in, the decision-making related to the digital asset business of the licensed undertakings are located in Bermuda</p>	<p>A senior executive is defined under DABA as a person who, under the Authority of a director or the chief executive, exercises managerial functions or is responsible for maintaining accounts or records of the undertaking.</p> <p>For the purpose of this factor's evaluation, the location where the functions of the chief executive are accomplished carries more weight than that of other executives.</p> <p>For the purpose of this criterion, the location where the functions are accomplished is more important than the residence. Therefore, this criterion may be met by a senior executive that travels for the purpose of making decisions between his place of ordinary residence and Bermuda.</p> <p>It should further be noted that the decision-making's involvement beyond the final decision is also to be considered in determining whether this factor is satisfied. The Authority may interpret this factor broadly when the executives involved in the decision-making are located in Bermuda, but the final approval is taken elsewhere (e.g. a local executive committee recommendation with final decision-making at the global head office outside of Bermuda).</p>
<p>(c) Where meetings of the board of directors of the licensed undertaking occur</p>	<p>Generally, meetings are considered to be occurring where the majority of directors are physically located at the time of the meeting. Where there is a tie, the Chair's location may carry more weight in determining the location of the meeting.</p>
<p><b>Secondary factors</b></p>	<p><b>Interpretation</b></p>
<p>(a) The location where management of the licensed undertaking meets to effect policy decisions of the licensed undertaking</p>	<p>While the primary factor under paragraph 1 above considers where the decisions occur, this secondary factor considers where the decisions are given effect by management and staff.</p>

	<p>For each function of the organisation, the Authority considers such downstream implications as the number of staff affected, seniority, and location from where they complete their duty. Where a function is completed from multiple locations, the Authority will consider the principle of proportionality in reaching a decision.</p> <p>In arriving at determining where the decisions are given effect, the Authority will consider the policies and procedures related to each function and the associated staff responsible for their application. Where procedures are applied in multiple locations, the Authority may consider the amount of time spent accomplishing a set of tasks, the number of steps in a relevant process and the number of staff and/or the degree of complexity associated with each task.</p> <p>Finally, the appropriateness of the physical premises is also taken into account for this factor's purposes. The Authority will consider the principle of proportionality when analysing the suitability of the undertaking's premises.</p>
(b) The residence of the officers or employees of the licensed undertaking	<p>When evaluating this factor, the Authority will take into consideration the nature, scale, complexity and risk profile of the undertaking in reaching a determination.</p> <p>While no fixed threshold is set, the Authority will consider seniority and decision-making authority in its determination – with particular importance attributed to the availability of key officers and employees for the purpose of effective supervision.</p>
(c) The residence of one or more directors of the licensed undertaking in Bermuda	<p>This factor is met when at least one director is ordinarily resident of Bermuda.</p>

### **Application of the proportionality principle to the head office requirement**

The factor-based approach described in the previous section enables the Authority to apply the proportionality principle when validating compliance with the head office requirement. Hence, on the one hand, depending on the nature, scale, complexity and risk profile of the entity and adopting a substance-over-form approach, a licensed undertaking meeting only one factor may still be considered compliant. On the other hand, another licensed undertaking meeting several factors may be considered non-compliant, if it does not meet the overarching principle of Section 21 of the DABA.

In general, entities that carry more risk, that are large in size or that are inherently complex, will be subject to a higher threshold than those that carry less risk, are smaller in size and are inherently less complex.

Further, the Authority generally recognises that newly licensed undertakings may require a period of time to substantially meet some of the above factors. Therefore, where the demonstration has been made to the Authority's satisfaction that the head office requirement will be substantially met within a specific

timeline, the Authority may, at its own discretion, consider partial compliance with the head office requirement as adequate for the purpose of licensing. Generally, the said timeline should not be longer than 24 months from the granting of the licence.

The nature, scale and complexity of an entity are highly dependent on facts and circumstances. However, the factors below may be used for the purposes of this guidance and should not be construed as exhaustive.

<b>Nature, scale and complexity<sup>1</sup> evaluation may include factors such as:</b>		
<b>Nature</b>	<b>Scale</b>	<b>Complexity</b>
Type(s) of digital asset activity undertaken	Number of clients/customers	Legal structure of the undertaking
Types/nature of products offered	Number of products or services	Activities in multiple jurisdictions, the complexity of each individual product
Targeted customers	Transaction volume	Outsourcing arrangements
Overall risk profile	Number of employees/consultants	Other regulated financial activity is undertaken, activities are undertaken from an unregulated jurisdiction
Net assets	Growth projections	Other non-regulated activity undertaken
Interconnectedness and interdependency on service providers and partners	Number of transactions and individual transaction size	Interdependency among product and service offerings
Potential financial stability implications	Number of markets/jurisdictions	Cross-organisational interdependencies between activities
		Distribution of business management and functions

### **Closing remarks**

This guidance can be used as a tool to evaluate the factors being taken into consideration by the Authority in determining an undertaking's compliance with the head office requirement under the DABA. These factors should always be evaluated within the context of the nature, scale, complexity and risk profile of the licensed undertaking. It should be reiterated that these requirements are a cornerstone of appropriate and effective supervision by the Authority.

---

<sup>1</sup> Nature, scale, complexity and risk profile are intrinsically linked together and factors may overlap between categories and should always be evaluated in conjunction with all other factors that make the overall risk profile of the DAB.