



# **BERMUDA MONETARY AUTHORITY**

## **CONSULTATION PAPER**

### **DIGITAL ASSET BUSINESS AMENDMENT ACT 2021**

**NOVEMBER 2021**

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The views of the digital asset industry and other interested persons on the proposals in this paper and the Digital Asset Business (Exemption) Rules 2021 are invited. Comments should be sent to the Bermuda Monetary Authority digitally, via the below survey link or QR code, no later than **7 January 2022**.

<https://www.surveymonkey.com/r/ZPHYLYN>



## I. INTRODUCTION

1. Globally, the Digital Asset Business (DAB) environment continues to evolve rapidly and, as such, it is important that Bermuda's regulatory and supervisory framework keeps pace so as to remain fit for purpose. The Bermuda Monetary Authority (Authority or BMA) has enhanced its oversight of DABs as part of the ongoing development of Bermuda's DAB regulatory framework.
2. The Authority is proposing to amend the Digital Asset Business Act 2018 (DABA or Act) along with enhancements to certain DAB rules to provide further clarity to certain sections and make other changes intended to facilitate more effective administration of the Act.
3. The amendments to the Act (the Bill) will cover, among other things, the following areas:
  - a) Introduction of new definitions for:
    - i. *digital assets lending* or *digital assets borrowing*;
    - ii. *digital assets repurchase transactions*; and
    - iii. *digital assets lending, digital assets borrowing or digital assets repurchase transactions services provider*;
  - b) Inclusion of a new DAB activity;
  - c) Introduction of exemption for entities licensed under the Investment Business Act 2003 (IBA);
  - d) Change in approach to the exemptions procedure; and
  - e) Clarification regarding administrative penalties.

## II. INTRODUCTION OF NEW DEFINITIONS FOR DIGITAL ASSETS LENDING OR DIGITAL ASSETS BORROWING AND DIGITAL ASSETS REPURCHASE TRANSACTIONS

4. To support the inclusion of new DAB activity in section III below, the Authority proposes to introduce the following definitions:
  - a) "digital assets lending" or "digital assets borrowing" - means a transaction by which a counterparty transfers digital assets subject to a commitment that the borrower will return equivalent digital assets with or without interest or premium on a future date or when requested to do so by the transferor, that transaction being considered as digital assets lending for the counterparty transferring the digital assets and being considered as digital assets borrowing for the counterparty to which they are transferred;
  - b) "digital asset repurchase transaction" - means a transaction governed by an agreement by which a counterparty transfers digital assets subject to a commitment to repurchase them or substituted digital assets of the

same description at a specified price with or without premium, on a future date specified, or to be specified, by the transferor, being a digital asset repurchase agreement for the counterparty selling the digital assets and a reverse digital asset repurchase agreement for the counterparty buying them;

- c) “digital assets lending, digital assets borrowing or digital assets repurchase transactions services provider” - means a person facilitating digital assets lending or digital assets borrowing or digital assets repurchase transactions either as principal or agent;

### **III. INCLUSION OF NEW DIGITAL ASSET BUSINESS ACTIVITY**

- 5. The Authority proposes to introduce the following activity under DABA:
  - a) digital asset lending or digital asset borrowing or digital asset repurchase transactions services providers
- 6. Considering the emergence of products seeking to facilitate lending, borrowing and repurchase transactions in digital assets and provide legal clarity to the market, the Authority seeks to expressly set out this specific activity under DABA. The Authority is also in the process of drafting guidance pertaining to this specific activity, which is intended to be issued for public consultation. Therefore, it is noted that the inclusion of the said activity will come into effect only after the relevant stakeholders have been consulted and the pertinent guidance has been finalised.
- 7. In consideration of the nature and complexity associated with such business models and the accompanying supervision, the Authority proposes a commensurate licence and annual fee applicable equal to the greater of \$100,000 and 0.00075 multiplied by client receipts. It is noted that the proposed fee will be applicable as soon as the inclusion of the said activity comes into effect; therefore, undertakings granted a licence to carry out this DAB activity after such time will be subject to the said licence and annual fee, whereas undertakings already licensed and carrying out this DAB activity will be subject to the said annual fee upon such fee becoming due (i.e., for the year starting on 1 January 2023).

### **IV. INTRODUCTION OF EXEMPTION FOR ENTITIES LICENSED UNDER THE INVESTMENT BUSINESS ACT 2003**

- 8. The Authority is proposing introducing an exemption that would eliminate the need for dual licensing in certain cases. This exemption, which mirrors the exemption currently drafted under the IBA, will ensure that entities licensed under the IBA and carrying out DABA-related activities in an ‘ancillary’ manner will be exempted from licensing under DABA. Further to this exemption, a notification requirement

is proposed to be imposed on the DAB's senior representative and introduced under section 20 of the Act.

9. There will also be a new requirement for the senior representative to notify the Authority in cases where the DAB ceases to provide IBA services in an 'ancillary' manner (in which case, a licensing requirement under the IBA would be triggered).
10. The Authority is also proposing to exempt investment funds, as defined in section 3 of the Investment Funds Act 2006. This exemption would not be available to self-managed investment funds (which would carry out the function of an investment manager and would, therefore, trigger both DABA and IBA licensing requirements).

## **V. CHANGE IN APPROACH TO EXEMPTIONS**

11. In view of the rapid pace of this sector's evolution and in order to simplify and consolidate the administration of exemptions under DABA, a new approach to exemptions is proposed. The Authority proposes to amend the Act to add a new rule-making power regarding exemptions. Consequential to the addition of the new exemption rule-making powers under section 7 of DABA, the Authority would proceed with the issuance of Digital Asset Business (Exemption) Rules (Exemption Rules) consolidating the current exemptions.
12. This change is intended to facilitate greater flexibility in cases where the Authority identifies a new business model as falling either within (where an existing exemption would be removed from the Exemption Rules) or outside the scope of the Act (where a new exemption would be introduced under the Exemption Rules).
13. All exemptions would be consolidated under the Exemption Rules, including:
  - Exemptions found under the definition of the digital asset in sections 2 (e) and (f) of DABA
  - Exemptions found in sections 11 (5) (b) and (c) of DABA
  - Governmental exemption found under section 4 (5) of DABA
  - Proposed exemption under section IV of the present consultation paper
14. Entities seeking to avail themselves of an exemption under the Exemption Rules, except those owned by the Government of Bermuda, must file an exemption form with the Authority, both prior to carrying out any activity qualifying for such exemption, as well as on an annual basis thereafter.

## **VI. CLARIFICATION REGARDING ADMINISTRATIVE PENALTIES**

15. The Authority proposes to amend the existing administrative penalty regime for undertakings under sections 7, 16, 57 and 66 regarding the attraction of a financial

penalty where they have not complied with prescribed filing or other similar requirement deadlines. The Authority currently imposes such “administrative” penalties under the Act and other regulatory acts; as one of many different forms of regulatory tools utilised by the Authority to address non-performance of certain statutory obligations imposed on undertakings.

16. The Authority is of the view that such contraventions are more efficiently addressed as “default” (i.e., “administrative”) penalties in the first instance. As such, and to provide clarity regarding these penalties, the Authority is proposing to amend sections 7, 16, 57 and 66 by deleting the word “civil” so that it is clear that these penalties are distinct from the civil penalties under section 39. The removal of this word would ensure that, in relation to certain infringements that are deadline-related and can thus be easily ascertained, the necessity for the right of appeal is extinguished.
17. Additionally, where an undertaking pays such a penalty, it shall not be subject to further “civil” penalty. Nevertheless, where the Authority subsequently determines such an undertaking that it is not meeting any other minimum licensing requirement, the civil penalty for those contraventions may be imposed in addition to any “administrative” penalty imposed. This would become due on the day on which the default occurs, including a default penalty, which would be due for each week or part of a week that it is in default.

## **VII. OTHER PROPOSED CHANGES**

18. In addition to changes to the Act, the Authority is proposing to change the name of the Digital Asset Business (Cybersecurity) Rules 2018 to the Digital Asset Business (Cyber Risk) Rules 2018 and further amend Rule 3 of these Rules by inserting wording in the lines of: *“Every licensed undertaking shall annually, or at such intervals specified in its licence, file with the Authority...”*
19. The proposed wording will cover instances where the duration of a licence is less than a year (e.g., Class M and Class T), but the Authority would still require the submission of a cybersecurity report. This is the same wording that was used under the Digital Asset Issuance Rules to address the same issue (given that the duration of a Digital Asset Issuance authorisation will most likely be a few months).
20. Regarding the Digital Asset Business (Client Disclosure) Rules 2018, specifically, Rule 3(3)(a): The Authority is proposing to introduce a requirement for a licensed undertaking to also:
  - a) provide a brief description of the nature/limitations of the licence in case of Class M or Class T (the Authority could provide standardised wording in this regard); and
  - b) disclose the actual activity or activities allowed to be carried out under the said licence class.

21. The rationale for this proposal is that customers are not likely to be familiar with the class tier system under DABA. This proposal should not only address any class tier system unfamiliarity but also ensure that customers and prospective customers have a proper understanding of the regulatory status of an entity, including a brief description of both:
- a) the restrictions associated with the Class M and Class T licences; and
  - b) the actual activities the undertaking is allowed to carry out under its DAB licence.

### **VIII. HOUSEKEEPING CHANGES**

22. Housekeeping changes generally include a mix of minor technical and simple, straightforward changes, errors and/or omissions, and consequential amendments. The following changes are proposed:
- a) Section 4(5) modifies wording to refer to the Government of Bermuda or any entity owned by the Government of Bermuda;
  - b) Section 7(1)(d) replaces the word cybersecurity with the words cyber risk;
  - c) Section 15(2)(b)(iii) includes reference to Class T licences;
  - d) Section 16(1) includes reference to the application fee made pursuant to section 12(6); and
  - e) Section 71(2) clarifies that the requirement to retain client documentation at the head office is applicable to Class F and Class M licence holders; for Class T licence holders, this information/documentation should be retained in their principal place of business.
23. Consequential amendments would be required under the Fourth Schedule to the Bermuda Monetary Authority Act 1969 (i.e., fees).

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**BERMUDA**

**DIGITAL ASSET BUSINESS (EXEMPTION) RULES 2021**

**BR / 2021**

The Bermuda Monetary Authority, in the exercise of the power conferred by section 7 of the Digital Asset Business Act 2018, makes the following Rules:

**Citation**

- 1 These Rules may be cited as the Digital Asset Business (Exemption) Rules 2021.

**Definitions**

- 2 In these Rules –

“Act” means the Digital Asset Business Act 2018;

“Authority” means the Bermuda Monetary Authority established under the Bermuda Monetary Authority Act 1969;

“digital asset business” has the meaning given in section 2 of the Act;

“group” in relation to a person (“A”), means A and any person who is—

- (a) a parent undertaking of A;
- (b) a subsidiary undertaking of A;
- (c) a subsidiary undertaking of a parent undertaking of A;
- (d) a parent undertaking of a subsidiary undertaking of A; or
- (e) an undertaking in which A or an undertaking mentioned in paragraph (a), (b), (c) or (d) has a participating interest;

“investment fund” has the meaning given in section 3 of the Investment Funds Act 2006;

“undertaking” has the meaning given in section 2 of the Act.

**Exemptions**

- 3 (1) Where a person wishes to avail themselves of an exemption under these Rules, it shall file an exemption form with the Authority in the specified format, both before

carrying out any activity qualifying for such exemption in or from within Bermuda as well as on an annual basis thereafter.

Provided that this requirement shall not be applicable to persons specified in rule 4(1) to (3).

(2) The exemption form referred to in this rule shall be set out on the website of the Authority: [www.bma.bm](http://www.bma.bm).

4 The persons specified in this rule are exempt from the requirement to hold a licence under the Act:

(1) the Government of Bermuda or any entity owned by the Bermuda Government;

(2) the Authority;

(3) public authorities established in Bermuda;

(4) a person providing an affinity or rewards programme, where value is granted as part of such programme, which value cannot be taken from or exchanged with the person for legal tender, bank credit or any digital asset;

(5) a publisher issuing, either themselves or via another person on their behalf, a digital representation of value, which is used exclusively within an online game, game platform or family of games sold by the same publisher or offered on the same game platform;

(6) a person providing data storage or security services for a digital asset business but are not otherwise engaged in digital asset business activity on behalf of other persons;

(7) an undertaking providing any digital asset business activity solely for the purpose of its business operations or the business operations of any group undertaking;

(8) an investment fund, provided that this exemption shall not be applicable where an investment fund has not appointed an investment manager either licensed under the Investment Business Act 2003 or authorised or licensed by a foreign regulator recognised by the Authority; and

(9) persons who are licensed under the Investment Business Act 2003 to carry on investment business (within the meaning of section 2 (1) of that Act) and provide digital asset business that is ancillary to the investment business for which those persons are licensed under that Act.

Made this X day of [month] [year]

Chairman  
Bermuda Monetary Authority

[Operative Date: X (month) (year)]