



BERMUDA

DIGITAL ASSET BUSINESS (CUSTODY OF CLIENT ASSETS) RULES 2024

BR / 2024

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 Digital Asset Business (Custody of Client Assets) Rules 2024.

**Interpretation**

2 In these Rules—

“Act” means the Digital Asset Business Act 2018;

“approved bank”, in relation to a client bank account, means—

- (a) where the account is opened in Bermuda, an institution licensed under the Banks and Deposit Companies Act 1999;
- (b) where the account is opened elsewhere, a bank licensed to conduct banking business in that country or territory which, in the opinion of the Authority, is subject to supervision equivalent to the supervision of banks licensed in Bermuda;

“assets” means fiat assets and digital assets;

“Authority” means the Bermuda Monetary Authority;

“client” means any person whose assets are held under the control of a digital asset business;

“client account” means client bank account and client wallet account;

“client assets” has the meaning given in rule 4;

“client bank account” means an account at an approved bank which—

- (a) is a current or deposit account;
- (b) is in the name of a digital asset business; and
- (c) includes the words ‘client’ or an appropriate description to distinguish the account as an account containing client fiat assets, from an account containing fiat assets belonging to the digital asset business;

“client wallet account” means a wallet account which—

- (a) is maintained by a digital asset business either with itself or with an intermediary pursuant to rule 5(4); and
- (b) includes the words ‘client’ or an appropriate description to distinguish the wallet account as a wallet account containing client digital assets, from a wallet account containing digital assets belonging to the digital asset business;

“default” means the commencement of liquidation or any insolvency proceedings in any jurisdiction;

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

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

“digital asset business agreement” means any agreement the making or performing of which by either party constitutes a digital asset business activity;

“fiat assets” include cheques and other payable orders in any currency;

“group” means an undertaking and any person who is—

- (a) a parent of an undertaking;
- (b) a subsidiary of an undertaking;
- (c) a subsidiary of a parent of an undertaking;
- (d) a parent of a subsidiary of an undertaking;
- (e) an entity in which an undertaking or an any entity in subparagraphs (a), (b), (c) or (d) has a participating interest.

“intermediary” means a person —

- (a) to whom any client assets held by the digital asset business have been passed; or
- (b) from whom any assets are owed to the digital asset business which, once received by him, will be client assets.

In respect of a digital asset business agreement entered into with or for a client, and includes a third-party qualified custodian where such client assets consist of or include client digital assets;

“pooling event” has the meaning given in rule 12;

“qualified custodian” has the meaning given in section 2 of the Act;

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

## PART I – GENERAL

### General Overview

- 3 (1) These Rules apply to assets held by digital asset businesses —
- (a) which are client assets; and
  - (b) until the fiduciary duty imposed by these Rules on the digital asset business is discharged.
- (2) Where these Rules apply, a digital asset business —
- (a) must keep client assets separate from its own assets in accordance with rule 5 (2);
  - (b) must hold client assets as a fiduciary for the client in accordance with Part II;
  - (c) must account for the assets properly in accordance with rules 15 and 16; and
  - (d) must implement client assets controls, based on the nature, scale and complexity of its business.
- (3) A review of client assets controls, implemented by a digital asset business pursuant to paragraph (2)(d), shall be conducted annually by a qualified person who shall prepare a report on his findings.
- (4) The report prepared by a qualified person pursuant to paragraph (3) shall include the following information —

- (a) related internal accounts and records that readily identify the balances of assets held for each client;
- (b) details of the accounts where client assets are held and the relevant agreements with those entities;
- (c) details of third parties carrying out any related outsourced tasks and details of any outsourced tasks;
- (d) key individuals of the digital asset business involved in related processes, including those responsible for oversight of the digital asset business's requirements in relation to the custody of client assets; and
- (e) agreements relevant to establish client ownership over assets.

(5) A copy of a report prepared by a qualified person pursuant to paragraph (3) shall be maintained by a digital asset business holding a Class F or a Class M licence at its head office, or by a digital asset business holding a Class T licence at its principal place of business, for not less than five years and shall be made available to the Authority upon request.

(6) For the purposes of these Rules, a "qualified person" means— the internal auditor of a digital asset business; the approved auditor of a digital asset business; or such person approved by the Authority in writing to perform the functions of a qualified person under paragraph (3).

#### **Meaning of "client assets"**

4 (1) Subject to this rule, client assets are fiat assets and digital assets which, in the course of carrying on digital asset business, a licensed person receives or holds (whether in Bermuda or elsewhere) in respect of a digital asset business agreement entered into, or to be entered into with or for a client.

(2) Assets are not client assets if—

- (a) they are immediately due and payable to the digital asset business for its own account—
  - (i). in respect of fees and commissions in a manner which satisfies paragraph (3); or
  - (ii). otherwise, though not, in such a case, if the obligation of the digital asset business in respect of which the assets are so payable to the digital asset business has not yet been performed; and
- (b) it is not held in (or it is properly withdrawn from) a client account.

(3) Assets are not regarded for the purposes of paragraph (2) as due and payable in respect of fees and commissions claimed to be payable to the digital asset business unless—

- (a) the fees or commissions have been accurately calculated and are in accordance with a formula or on a basis agreed to in writing by the client;
- (b) 14 days have elapsed since a statement showing the amount of those fees or commissions has been delivered to the client, and the client has not questioned

the sum specified; or

- (c) the amount of the fees or commission has been agreed in writing with the client or has been finally determined by a court or arbitration.

### **Segregation of client assets**

5 (1) A digital asset business shall pay all client assets which it holds or receives into a client account.

(2) Client assets and assets belonging to the digital asset business must be kept separate from one another.

(3) A digital asset business may, with the written consent of the client and in accordance with the terms and conditions of the digital asset business agreement and such other requirements as may be laid down by the Authority, and without prejudice to the client's right of ownership over his assets held by such digital asset business, place and keep such assets in a common pool of identical assets.

(4) A digital asset business may deposit digital assets held by it on behalf of its clients into an account or accounts opened with an intermediary.

(5) Where a digital asset business opens a client account with an approved bank or intermediary, the digital asset business must give or have given notice to the approved bank or intermediary requiring the bank or intermediary to acknowledge it in writing—

- (a) that all assets standing to the credit of the account are held by the digital asset business for and on behalf of its clients; and
- (b) the bank or intermediary is not entitled to combine the account with any other account or to exercise any right of set-off or counterclaim against assets in that account in respect of any sum owed to it on any other account of the digital asset business.

### **Payments into client accounts**

6 (1) Where a digital asset business holds client assets it must either—

- (a) pay it as soon as possible (and in any event, not later than the next day after so beginning) into a client account; or
- (b) pay it out or pay it over in a manner which secures under rule 9 that it is no longer a client asset.

(2) Where client assets are received by the digital asset business in the form of an automated transfer, the digital asset business must ensure that—

- (a) where possible, the assets are transferred into a client account; and
- (b) in the event that the assets are transferred into the digital asset business's own account, the assets are paid into a client account no later than the next day after the transfer.

(3) Where a digital asset business receives a ‘mixed remittance’ (that is an aggregate sum of assets which is in part client assets and in part other assets) it must pay the full sum into the relevant client account, but must then ensure that, except to the extent that it represents fees and commissions due to the digital asset business, the other assets are paid out of the account within one day of the day on which the digital asset business would normally expect the remittance to be cleared.

#### **Discharge of fiduciary duty**

7 Assets cease to be client assets if they are paid—

- (a) to the client;
- (b) to a third party on the instruction of the client;
- (c) into a bank account or wallet account in the name of the client (not being an account which is also in the name of the digital asset business or an account to which the digital asset business has otherwise access to); or
- (d) to the digital asset business itself, where it may properly be so paid under these Rules.

## **PART II DEFAULT OBLIGATIONS**

#### **Purpose of this Part**

8 (1) This Part applies to all client assets held by a digital asset business so as to create—

- (a) a fiduciary relationship between the digital asset business and the client, under which the client assets are in the legal ownership of the digital asset business but in the beneficial ownership of the client; and
- (b) a system of pooling of the beneficial interests of different clients once there has been a “pooling event”.

(2) Rules 9 and 10 apply whether or not there has been a “pooling event”, and rules 11 and 12 apply after there has been such a pooling event.

#### **Nature of client assets held by a digital asset business**

9 (1) Whenever the circumstances are that client assets are held by a digital asset business in the course of digital asset business activity carried on in Bermuda, the client assets are held in accordance with these Rules by the digital asset business for and on behalf of its clients —

- (a) upon the terms and for the purposes set out in these Rules;
- (b) subject to subparagraph (a), for the respective clients for whom those client

assets are held, according to their respective beneficial ownership rights; and

- (c) after all valid claims under subparagraph (b) have been met, for the digital asset business itself.

(2) For the purposes of this rule, digital asset business includes such other person to whom functions, duties or assets may be delegated or entrusted in terms of rule 10.

#### **Delegating functions and duties or entrusting assets to another person**

10 A digital asset business shall be required to comply with these Rules even where it passes client assets to an intermediary.

#### **Pooling events**

11 (1) The power of a digital asset business, in accordance with Part I, to pay assets into and out of the accounts in which client assets are held is interrupted by the occurrence of a pooling event specified in paragraph (2).

(2) The pooling events are—

- (a) the default of the digital asset business;
- (b) the default of an intermediary;
- (c) the coming into force of a direction by the Authority in respect of all client fiat assets or client digital assets, or both, held by the digital asset business; or
- (d) the default of any approved bank or intermediary with which any client assets held by the digital asset business are deposited, in which case rule 13 applies.

(3) Notwithstanding paragraph (2), a pooling event will not occur, and rule 13 will not apply, if, on the default of an approved bank or intermediary, the digital asset business repays to its clients or pays into a client account an amount equal to the amount of client assets held on their behalf with that bank or intermediary.

(4) A digital asset business shall inform the Authority and all affected clients of any pooling event, as soon as practicable after its occurrence.

#### **Pooling**

12 (1) Save as described in this rule, where a pooling event occurs, assets held in all the digital asset business's client accounts are pooled and must be made available to meet the claims of clients in respect of whom client assets are or should be held in those accounts on a *pari passu* basis.

(2) Where, at the time when a pooling event occurs, client assets from a client account are in the hands of an intermediary, they shall, on their return to the client account, be pooled in accordance with paragraph (1).

(3) Where client assets referred to in paragraph (2) cannot be returned within one

month after the pooling event, the digital asset business may make distributions from the account in advance of that date if it makes provision for the possibility of such assets not being returned.

(4) If any surplus remains in the pool created by the operation of paragraph (1) after all the valid claims of clients to assets in that pool have been met, that surplus shall be distributed to the digital asset business.

(5) Where a digital asset business receives assets from a client after a pooling event which, but for that event, would fail to be paid into a client account, those assets —

(a) shall be placed in a new client account duly opened after the pooling event; and

(b) shall not be pooled with the assets held in the digital asset business's client accounts at the time of the pooling event.

#### **Pooling on default of approved bank or intermediary**

13 (1) Where client assets are held by an approved bank or an intermediary which defaults or which, following a pooling event by a digital asset business, fails to recognise that the assets are client assets held in accordance with these Rules —

(a) the assets shall—

- (i). be pooled separately;
- (ii). be made available to satisfy the separate claims of the separate clients *pari passu*; and
- (iii). after the claims described in subparagraph (a)(ii) have been satisfied, be paid into the pool created under Rule 12 (1); and

(b) the pool created under that Rule shall be applied—

- (i). to meet any claims of separate clients that are not separate claims and the claims of other clients (all ranking equally); and
- (ii). after the claims described in subparagraph (b)(i) have been satisfied, to meet any unsatisfied separate claims of separate clients.

(2) In this Rule —

“separate claim” means the claim of a separate client to the value of the assets that were or should have been held with the approved bank or intermediary; and

“separate client” means a client whose assets were, or should have been, held with the approved bank or intermediary.

### **PART III INTEREST AND RECORD KEEPING**



**Interest on client assets**

14 A digital asset business must clarify in writing with a client whether or not interest is payable to the client in respect of client assets, and if so, on what terms.

**Accounting for and use of client assets**

15 (1) A digital asset business must account properly and promptly for client assets and, in particular, must ensure that—

- (a) save as permitted by these Rules, client assets and other assets do not become mixed;
- (b) individual transactions can be accurately identified and traced;
- (c) the credit standing to the account of each client is calculated each day; and
- (d) assets belonging to one client are not used for another client.

(2) Wherever the daily calculation referred to in paragraph (1)(c) reveals an overdraft or that one client's assets have been used for another—

- (a) the digital asset business must pay in a sum of assets equivalent to the deficit; and
- (b) assets paid in by the digital asset business under sub-paragraph (a) shall be treated as client assets and must not be withdrawn by the digital asset business until the client responsible for the deficit has paid in a sum of assets equivalent to the deficit.

**Reconciliation of accounts**

16 (1) A digital asset business shall, not less frequently than once a month—

- (a) reconcile the balance on each client account, as recorded by the digital asset business, with the balance on that account as set out in the statement issued by the approved bank or intermediary, covering the period in respect of which the reconciliation is made; and
- (b) reconcile the total of the balances on each client account with the total of the corresponding balances in respect of each of its clients, (both totals as recorded by the digital asset business).

(2) The reconciliation referred to in paragraph (1) must be performed within 10 days of the date to which the reconciliation relates, and any differences must be corrected forthwith unless they arise as a result of differences in timing between the accounting and settlement systems of the digital asset business and the approved bank or intermediary.

Made this      day of      2024.

Chairman of the Bermuda Monetary Authority

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