

THE BERMUDA MONETARY AUTHORITY

Digital Asset Business Act 2018

Statement of Principles

September 2018

Contents

I. INTRODUCTION..... 3

II. EXPLANATION FOR THE STATEMENT OF PRINCIPLES 3

III. SCHEDULE 1: MINIMUM CRITERIA FOR LICENSING 5

 Introduction..... 5

 Schedule 1 Paragraph 1: “Controllers and Officers, to be fit and proper persons”..... 5

 Shareholder Controllers 7

 Schedule 1 Paragraph 2: "business to be conducted in a prudent manner" 8

 Schedule 1 Paragraphs 2 (4) and (5): “adequate accounting and record- keeping systems” 10

 Schedule 1 Paragraph 3 “Integrity and skill” 10

 Schedule 1 Paragraph 4 “Corporate Governance” 11

 Schedule 1 Paragraph 5 “Consolidated Supervision” 11

IV. PRINCIPLES RELATING TO THE GRANTING OF LICENCES 11

V. POWERS TO OBTAIN INFORMATION AND REPORTS 12

I. INTRODUCTION

1. This Statement of Principles (the “Principles”) is made pursuant to section 5 of the Digital Asset Business Act 2018 (the “Act”) which requires the Bermuda Monetary Authority (the “Authority”) to publish in such manner as it thinks fit a statement of principles in accordance with which it is acting or proposing to act:
 - a. in interpreting the minimum criteria specified in Schedule 1 to the Act and the grounds for revocation specified in section 24;
 - b. in exercising its power to grant, revoke or restrict a licence;
 - c. in exercising its power to obtain information and reports, and to require production of documents; and
 - d. in exercising other enforcement powers.
2. The Principles are of general application and seek to take into account the diversity of digital asset business service providers (“DABs”) that may be licensed under the Act and the prospect of institutional and market changes. As a consequence of this, the Principles may likely need to be revised and further developed over time. If the Authority makes a material change to the Principles, the Authority will publish a revised version. The Principles should be read in conjunction with any Guidance Notes which are issued pursuant to section 5(2) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (SEA Act 2008); and in accordance with section 49M of the Proceeds of Crime Act 1997 (POCA 1997), and section 12O of the Anti-Terrorism (Financial and Other Measures) Act 2004 (ATFA 2004).
3. This document is also to be read in conjunction with the Statement of Principles on the Use of Enforcement Powers (“SPUEP”). The SPUEP sets out the principles in accordance with which the Authority acts or proposes to act in exercising its power to use formal powers to compel compliance or to penalise non-compliance with statutory or regulatory requirements.. In relation to enforcement activities where there are any differences between the SPUEP, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 Statement of Principles (“AML Principles”), and the Principles then the content of the SPUEP will prevail.

II. EXPLANATION FOR THE STATEMENT OF PRINCIPLES

4. The Principles, along with the SPUEP, are relevant to the Authority’s decisions on whether to license a DAB company and whether to revoke or restrict a licence. The Authority’s interpretation of the minimum licensing criteria in Schedule 1 and the grounds for revocation in section 24 of the Act, together with these Principles

underlying the exercise of its powers, encapsulate the main standards the Authority considers when conducting its supervision of DABs. The functions of DAB supervision include monitoring the ongoing compliance of DABs with these standards and verifying compliance with the obligations imposed under the Act, the policies and procedures of the DAB and compliance with external obligations, for example the Proceeds of Crime Act 1997, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 and the relevant Regulations.

5. If there are concerns, with regard to the role of the Senior representative or with the company itself the Authority will consider what steps should be taken to address the issue and where appropriate, it will seek remedial action by persuasion and encouragement. Where persuasion and encouragement fail, the Authority may look into stronger measures to ensure compliance. If the Authority considers that its powers should be exercised in the public interest, it may utilise the various powers provided in the Act, including the imposition of restrictions on a licence and, ultimately, revocation of a licence.
6. The Principles include references to various policy and guidance papers issued by the Authority from time to time. Copies of the relevant material are generally available from the Authority's website www.bma.bm.
7. Section III of the Principles considers the interpretation of each of the licensing criteria in Schedule 1 to the Act. Section IV sets out the considerations relevant to the Authority's exercise of its discretion to grant a licence. Section V sets out the principles underlying the exercise of the Authority's power to obtain information and reports and to require the production of documents.
8. The SPUEP sets out the interpretation of the various grounds for the initiation of an enforcement action. An assessment will be made on a case-by-case basis, but will also take into account the wider context. The Authority's assessment will include consideration of whether using alternative tools is more appropriate, taking into account the overall circumstances of the RFI itself, the conduct under review, and the wider context.
9. It is likely that the Authority would likely exercise its powers to restrict or revoke a licence, in the context of the enforcement process. The Authority may also exercise its discretion, to utilise such powers in a supervisory context (e.g. to impose additional reporting requirements or where an institution ceases operations or conducts limited scope business). These powers might also be used to protect the interests of the public, in connection with an external threat unconnected with the DAB's conduct, in accordance with section 8 of the Act.

III. SCHEDULE 1: MINIMUM CRITERIA FOR LICENSING

Introduction

10. Before a DAB may be granted a licence, the Authority has to be satisfied that all the criteria in Schedule 1 to the Act are, or are capable of, being fulfilled by the applicant. Once licensed, DABs are subject to the Authority's continuing supervision and regulation, which includes the criteria for licensing. DABs are required to submit information about their business at intervals determined by the Authority in accordance with the Act and any related regulations, rules, guidance notes or codes. Where a DAB fails to meet a criterion, the Authority can and may take action in accordance with the powers vested under the Act and as detailed in the Principles, the AML Principles and the SPUEP.
11. The Act sets out the framework for the minimum criteria to be met and complied with by licensed DABs. These criteria are interpreted and applied in the context of the particular circumstances of individual DABs, and developments in the sector generally. In addition to reviewing the periodic, annual and other reporting data received from DABs, the Authority's supervision involves detailed prudential discussions with the DAB's senior management as required. The Authority shall determine the frequency of those discussions based on the nature, scale, complexity and risks undertaken by the DAB and the conduct of its business. Meetings may take place either at the Authority's offices or at the DAB's premises.
12. In addition, compliance visits are routinely made on the premises of DABs to add to the Authority's understanding of the DAB's management structures, operations, policies and controls and to assist the Authority in satisfying itself that each DAB continues to conduct its business prudently and in accordance with all relevant criteria.
13. Where a DAB becomes aware of breaches or potential breaches, it is expected that the DAB will alert the Authority forthwith so that any necessary remedial action can quickly be agreed. Similarly, the DAB must alert the Authority to any proposed material change in its business. This will allow the Authority to assess whether the changes impact the DAB's ability to fulfil the minimum criteria.
14. This part of the Principles set out the Authority's interpretation of the statutory licensing criteria.

Schedule 1 Paragraph 1: "Controllers and Officers to be fit and proper persons"

15. This paragraph provides that every person who is, or is to be, a controller or an officer (as defined under section 3 of the Act (officers are defined as including persons appointed as directors, secretaries or senior executives) of a DAB is to be a fit and proper person to perform DAB-related functions.

16. With regard to an individual who is, or is to be, a controller or officer, the relevant considerations include whether the person has relevant experience, sufficient skills, knowledge, and soundness of judgment to undertake and fulfil his or her particular duties and responsibilities. The standards required of persons in these positions will vary considerably, depending on the precise position held by the person concerned. Thus, a person could be fit and proper for one position, but not be fit and proper to a position involving different responsibilities and duties.
17. The diligence with which the person is fulfilling, or is likely to fulfil, those duties and responsibilities are also considered so that the Authority can assess whether the person does or will devote sufficient time and attention to them.
18. The Authority's view is that the standards need to be high in the case of persons with primary responsibility for the conduct of a DAB's affairs, taking into account the nature and scale of the DAB's business.
19. In assessing whether a person has the relevant competence, soundness of judgment and diligence, the Authority considers whether the person has had previous experience with similar responsibilities, the record in fulfilling them and, where appropriate, whether the person has suitable qualifications and training. As to soundness of judgment, the Authority looks to the person's previous conduct and decision taking.
20. The probity of the person concerned is very important. It is essential that a person who is responsible for the conduct of DAB business is of high integrity. In contrast to the fitness elements of this criterion which reflects an individual judgment relating to the particular position that the person holds or is to hold, the judgment of probity reflects much more of a common standard, applicable irrespective of the particular position held.
21. Specifically, the Authority takes into account the person's reputation and character. It considers, inter alia, whether the person has a criminal record, convictions for fraud or other dishonesty, which would clearly be particularly relevant. The Authority also gives particular weight to whether the person has contravened any provision of law, including legislation covering the trust, banking, insurance, investment sectors or other legislation designed to protect members of the public against financial loss, due to dishonesty, incompetence or malpractice.
22. In addition, it considers whether the person has been involved in any business practices appearing to the Authority to be deceitful or oppressive or improper, or which would otherwise discredit his or her method of conducting business. In addition to compliance with statutory provisions, the Authority also considers a person's record of compliance with various non-statutory codes in so far as they may be relevant to the licensing criteria and to the public interest.

23. The Authority also takes into consideration whether the person has been censured or disqualified by professional or regulatory bodies, e.g. Institute of Chartered Secretaries and Administrators; Institute of Directors; Society of Trust and Estate Practitioners; Bermuda Bar Association; Chartered Professional Accountants of Bermuda; Bermuda Stock Exchange; Chartered Financial Analysts (CFA) Institute; or corresponding bodies in other jurisdictions. Those who have been censured or disqualified are unlikely to be acceptable.
24. While any evidence of relevant past misconduct needs to be taken into consideration, the Authority recognises that lapse of time, and a person's subsequent conduct, are factors which may be relevant in assessing whether the person is now fit and proper for a particular position.
25. Once a DAB is licensed, the Authority continues to consider the performance of the person in exercising his or her duties. Imprudence in the conduct of a DAB's business, or actions which have threatened (without necessarily having damaged) the public interest will reflect adversely on the competence and soundness of judgment of those responsible. Similarly, failure by a DAB to conduct its business with integrity and professional skills will reflect adversely on the probity and/or competence and/or soundness of judgment of those responsible. This applies whether the matters of concern have arisen from the way the persons responsible have acted or from their failure to act in an appropriate manner. The Authority takes a cumulative approach in assessing the significance of such actions or omissions – that is, it may determine that a person does not fulfil the criterion on the basis of several instances of such conduct which, if taken individually, may not lead to that conclusion.

Shareholder Controllers

26. Shareholder controllers, as defined by sections 3(4) and 3(5) of the Act may hold a wide variety of positions relating to a DAB, and the application of the fit and proper criterion takes account of this. The key consideration is the likely or actual impact on the interests of clients and potential clients of a person holding the particular position as shareholder controller. This is viewed in the context of the circumstances of the individual case, and of the particular position held. The general presumption is that the greater the influence on the DAB, the higher the threshold will be for the shareholder controller to fulfil the criterion. Thus, for example, higher standards will generally be required of a shareholder controller owning, say, 20 per cent or more of the shares of a DAB compared with a shareholder controller owning 5 per cent.
27. In reviewing the application of the criterion to shareholder controllers or persons proposing to become such controllers, the Authority considers two main factors.
28. First, it considers what influence the person has or is likely to have on the conduct of the affairs of the DAB. If the person does, or is likely to, exercise a close control over

the business, the Authority would look for evidence that he has the probity and soundness of judgment and relevant knowledge and skills for running a DAB. On the other hand, if the shareholder does not, or is not likely to, influence the directors and management of the DAB on the detailed conduct of the business, it would not be necessary to require such a level of relevant knowledge and experience.

29. The second consideration is whether the financial position, reputation or conduct of the shareholder controller or prospective shareholder controller has damaged or is likely to damage the DAB through ‘contagion’ which undermines confidence in that DAB. For example, if a holding company, or a major shareholder, were to suffer financial problems it could damage confidence of clients or potential clients in the stability or financial integrity of the licensed DAB. Generally, the higher the shareholding, the greater the risk of ‘contagion’ if the shareholder encounters financial difficulties. The risk of contagion is not, however, confined to financial weakness. Publicity about illegal or unethical conduct by a holding company or another member of the group may also damage confidence in the DAB. DABs are expected to notify the Authority immediately if they become aware of material concerns regarding the suitability of a shareholder controller.
30. In the case of a controller who ‘directs’ or ‘instructs’ a shareholder controller, similar considerations apply to those relevant to assessing the fulfilment of the shareholder controllers criterion. In other words, the standards that an indirect controller needs to satisfy are likely to be at a minimum the standards also required of the person who is indirectly controlled.
31. Where a person is a controller by virtue of ‘directing’ or ‘instructing’ the board of a DAB, the standards required are high. The controller has to have the probity and relevant knowledge, experience, skills and diligence for running a DAB. The qualities required are those which are also appropriate for the board of directors or partners of a DAB.

Schedule 1 Paragraph 2: "business to be conducted in a prudent manner"

32. Schedule 1 sub-paragraphs 1 and 6 of the Act make it clear that there is a general requirement for DABs to conduct their business in a prudent manner. It is the overall responsibility of the board, partners, and senior management of an institution to ensure that there is effective control over the entire business and that it is conducted prudently. Board members, partners, and senior management must understand the underlying risks in the business and be committed to a robust controlled environment.
33. Sub-paragraphs 2 to 5 set out a number of specific requirements, each of which must be fulfilled before a DAB may be regarded as conducting its business in a prudent manner.

34. The Act also makes it clear that the specific requirements outlined in sub-paragraphs 2 to 5 are not exhaustive. Accordingly, the Authority takes into account a range of other considerations in assessing whether a DAB is prudently run. These include for example, the DAB's management and corporate governance arrangements (such as, in the case of a company, the composition of the board of directors and the arrangements for the board's overall control and direction of the institution); the DAB's general strategy and objectives; planning arrangements; policies on accounting, market conduct; and recruitment arrangements and training to ensure that the DAB has adequate numbers of experienced and skilled staff in order to carry out its various activities in a prudent manner.
35. Particularly close attention is also paid to the arrangements in place for preventing and detecting criminal activities, and for ensuring compliance with the DAB's legal obligations in preventing money laundering and terrorist financing. The Authority would also expect a DAB to occupy premises suitable for the purpose of conducting its business.
36. Failure by the DAB to comply with applicable laws in foreign jurisdictions, in which the DAB or its subsidiaries operate, if applicable, may also affect the Authority's assessment of prudent conduct.
37. A DAB should have policies and procedures to enable it to comply with international sanctions in force in Bermuda.
38. DABs face a wide variety of potential major financial risks in their business although the possibility of many of these risks crystallising is, hopefully, generally remote. Rather than explicitly requiring DABs to hold capital against all these risks, the Act requires DABs more generally hold adequate capital and insurance cover. A DAB will not be regarded as carrying on its business in a prudent manner unless it maintains insurance coverage that is appropriate to the nature and scale of its operations.
39. In judging the adequacy of insurance protection, the Authority looks to be satisfied that the scope and scale of cover in place provides reasonable assurance of the ability of the DAB to continue to operate in the event that it should face either major damage to its infrastructure or material claims from clients for loss or damage sustained. It is in the first instance for those directing the business of the licensed undertaking to assess the level of risk they face in the business and to determine the type and extent of coverage appropriate for that business. Relevant types of insurance include the following: errors and omissions/professional indemnity; directors' and officers' liabilities; fidelity and forgery; loss of property; computer crime; computer damage; business interruption; office contents. The Authority will review the adequacy of cover in place, having regard to the scale, composition and complexity of the business.

Schedule 1 Paragraphs 2 (4) and (5): “adequate accounting and record- keeping systems”

40. The Authority does not regard a DABs’ records and systems as adequate unless they can enable its business to be prudently managed and the DAB is able to comply with the duties imposed on it by or under the Act. In other words, the records and systems must be such that the DAB is able to fulfil the various other elements of the prudent conduct criterion and to identify threats to the public interest. They should also be sufficient to enable the DAB to comply with the notification and reporting requirements under the Act. Thus, delays in providing information or inaccuracies in the information provided, will call into question the fulfilment of the requirement of sub-paragraphs 2 (4) and 2 (5). The systems for client records should be sufficient to enable the DAB to maintain its books and records with satisfactory back-up in place.
41. The nature and scope of the particular records and systems which a DAB should maintain should be commensurate with its needs and particular circumstances, so that its business can be conducted without endangering its clients and potential clients. In determining whether a DABs’ records and systems are adequate, the Authority considers the nature, scale and complexity of its business.

Schedule 1 Paragraph 3 “Integrity and skill”

42. This paragraph is concerned with the manner in which the business of the DAB is conducted and is distinct from the question of whether its controllers and officers are fit and proper persons. The business of a DAB must be conducted ethically and honestly and the staff employed by the DAB must have the skills and knowledge appropriate to the nature and scale of the DAB.
43. The integrity element of the criterion requires the DAB to observe high ethical standards in conducting its business. Criminal offences or other breaches of statute will obviously call into question the fulfilment of this criterion. Particularly relevant are contraventions of any provision made by or under enactments, whether in Bermuda or elsewhere, designed to protect members of the public against financial loss due to dishonesty, incompetence or malpractice.
44. The Authority would expect DABs to have a number of employees sufficient to carry out the range and scale of its business. The Authority, in determining whether a DAB has sufficient personnel, will take into account the human resources that the DAB may draw upon through other arrangements, e.g. outsourcing, secondments, or other similar arrangements as well as the methods of recruitment to ensure that the DAB employs an adequate number of persons who are fit and proper to perform the duties for which they are employed.
45. Staff must be provided with on-the-job training on the DAB’s internal policies, procedures and internal controls. The DAB should ensure that adequate training provided is specific to the roles and responsibilities that staff members perform. Such

training should be provided on an ongoing basis, including training on its AML/ATF responsibilities.

46. A DAB shall establish procedures to ensure the adequate supervision of staff in their dealings with clients and the management of client structures. Appropriate records relating to the training, experience and qualifications of staff shall be maintained.

Schedule 1 Paragraph 4 “Corporate Governance”

47. This paragraph provides that the DAB shall implement corporate governance policies and processes as the Authority considers appropriate given the nature, scale, complexity and risk profile of the DAB.
48. In the case of a DAB which is a company or partnership, the business should be effectively directed by such number of individuals as the Authority considers appropriate given the nature, scale, complexity and risk profile of the DAB. The Authority recognises that standard’s of good corporate governance may differ between DABs according to the size and complexity of their respective businesses.
49. In the case of a DAB which is a company, the directors should include such number (if any) of non-executive directors, as the Authority considers appropriate. The number will depend on the circumstances of the DAB and the nature, size, complexity and risk profile of the DAB.
50. The Authority considers that non-executive directors can play a valuable role in bringing an outsider’s independent perspective to the running of the business and to ensure proper challenge to the executive directors and other management. The Authority sees non-executive directors as having, in particular, an important role as members of a DAB’s audit committee or in performing the role which such a committee would otherwise perform.

Schedule 1 Paragraph 5 “Consolidated Supervision”

51. The Authority may agree to take on a wider role of consolidated supervisor of a DAB and its related institutions, particularly when the related institutions may have implications for the DAB. Under such an arrangement, the DAB and its related institutions are expected to fully cooperate with and provide all requested information to the Authority.

IV. PRINCIPLES RELATING TO THE GRANTING OF LICENCES

52. To grant a licence under the Act, the Authority needs to be satisfied that all the minimum licensing criteria in Schedule 1 are met. In order to be so satisfied, the applicant and any other relevant parties must first have provided all the appropriate

information requested by the Authority in connection with the application. Even where it is satisfied that the criteria are or can be met, the Authority retains a residual discretion not to grant a licence – notably, if it sees reason to doubt that the criteria will be met on a continuing basis or if it considers that for any reason there might be significant threats to the public interest or the interests of clients or potential clients.

53. The Authority also considers, in exercising its discretion, whether it is likely that it will receive adequate information from the DAB and relevant, connected parties to enable it to monitor the fulfilment of the criteria and to identify potential threats to the DAB's clients.

V. POWERS TO OBTAIN INFORMATION AND REPORTS

54. The Authority's supervisory arrangements for licensed DABs comprise three principal elements. First, the Authority conducts certain off-site analysis and reviews, based on regular data received from DABs. This is supplemented by a regular programme of prudential discussions, during which the Authority interviews senior management on a wide range of relevant issues, including recent and current performance, material compliance and control issues, and business development and strategy questions. Finally, the Authority conducts routine on-site reviews during which it assesses a DAB's on-going compliance with aspects of the licensing criteria and, in particular, with paragraph 2 (2) of Schedule 1 to the Act. These reviews, of compliance are intended to provide insight into the effectiveness of the internal controls in place and the ability of management to identify, monitor and manage key risks arising from the DAB's operations.
55. Prudential supervision involves the receipt and analysis of a variety of regular and ad hoc information from DABs. The Authority's standard reporting arrangements is kept under review and amended from time to time in light of developments.
56. Section 58 of the Act provides formal powers of the Authority by notice in writing to require from a DAB such information as it may reasonably require for the performance of the Authority's functions under the Act. The section also provides for the Authority to require a DAB to make available a report by its auditor (or by an accountant or other person with relevant professional skill) on any aspect of, or any matter about which the Authority has required or could require the DAB to provide. In the case of reports commissioned under section 58(1) (b), the Authority has agreed that they will wherever possible be commissioned from a DAB's own external auditors. However, in certain circumstances, another professional firm may be used. This would be the case, for example, where a report called for particular technical skills or when the Authority has had previous concerns about the quality or completeness of work conducted by the external auditor.

57. The Authority has also agreed that, as a general rule, it will limit the extent to which it will have recourse to professional reports of this nature. Instead, the Authority's general policy is to use its own staff to assess directly through the on-site work, described above, the adequacy of a DABs' systems and controls. Nonetheless, where particularly specialised work is required or other special considerations arise, the Authority may commission a professional report under section 58.
58. Section 59 of the Act provides statutory powers for the Authority by written notice to require a DAB to produce relevant documents or information. This power can also be used to obtain relevant documents in the possession of other persons and also to require information or documents from entities related to a DAB. Section 60 of the Act provides the Authority with specific powers to enter the business premises of persons on whom notice under sections 58 or 59 has been served for the purpose of obtaining relevant information or documents. The Authority makes routine use of section 58 and section 59 powers when conducting its on-site review visits to licence holders, in order to deal with any client confidentiality issues that might arise in the course of compliance testing.
59. Much of the information required by the Authority for its supervision of DABs is provided pursuant to the Authority's statutory powers in the Act to require relevant information and documents. In addition, the Act stipulates certain matters as being subject to specific statutory reporting requirements – notably, the requirement for a DAB to submit a certificate of compliance, signed by two officers (either two directors or one director and a senior executive), certifying that the DAB has complied with the minimum criteria to the best of their knowledge (as provided for in section 66 of the Act).
