



13 September 2019

Re: Consultation Paper on Amendments to Digital Asset Business Act 2018

Dear Stakeholders,

The Bermuda Monetary Authority (the Authority) would like to thank stakeholders for their continued support in furthering the development of the Bermuda FinTech regulatory framework by providing comments on the consultation paper regarding amendments to the Digital Asset Business Act 2018.

The Authority appreciates the feedback received, and is committed to ensuring that Bermuda's regulatory regime is effective and aligned with evolving best practice standards.

The Authority's responses to the **key substantive comments** that were received are outlined below.

Additional clarification may be obtained by contacting the Authority directly at policy@bma.bm.

Paragraph/section	Stakeholder comment	The Authority's response
General Comments	<p>1— If a trust company is appointed executor of an estate that includes a digital asset and the trust company is not acting in the capacity of Trustee, will the trust company be required to obtain a digital asset business licence?</p>	<p>Digital assets differ from more traditional assets in a variety of ways, particularly as it relates to the safety risks surrounding custody and the transfer of assets from one party to another. Accordingly, both custodians must have sufficient capacity (knowledge, governance, risk management, controls, and resources) to fulfil this role. Further, persons responsible for selecting digital asset custodians require sufficient skills to provide appropriate oversight to ensure that the digital asset custodian has implemented and is maintaining safety adequate standards. The intent is to bring those fulfilling the above roles within the scope of the Digital Asset Business Act 2018 (DABA) to ensure that beneficiaries are appropriately protected. Nonetheless, there is an avenue for a person to approach the BMA to request an exemption in the event risks are deemed to be minimal.</p>
	<p>2 – The DABA requirements could be considered excessive for individuals. Perhaps there should be some sort of threshold or clarification where a trustee is acting as a custodian rather than for an individual. For example, something as simple as a subscription to access <i>The Times</i> online would seem to qualify as a digital asset, considering it is “anything that exists in binary format and comes with the right to use it”. It could also be a ticket on one’s cell phone to access an event or even Apple music card, etc.</p>	<p>The definition of digital assets has not really altered from the inception of the regulatory regime. The examples listed in the stakeholder comment are not digital assets and neither has the Authority sought to regulate such items.</p> <p>Further, the aim of the regulatory regime is to capture entities holding themselves out as carrying on a business, not for just any individual.</p>

	<p>3 – A trustee, particularly smaller trust companies, may find it difficult to pay a minimum of \$15K for a DABA licence.</p>	<p>The Authority has sought to balance the cost of regulation with ensuring that beneficiaries of digital assets are afforded adequate protection. As stated in the Consultation Paper, in accordance with the Authority’s assessment of nature, scale and complexity, fees may be lowered or even waived entirely under DABA. Licencees may submit requests to the Authority in this regard.</p>
	<p>4 – How would the Authority define ‘specialist skills’?</p>	<p>It is important to consider the intent of the digital asset business regime, particularly as it relates to custody. In the case of “specialist skills”, the Authority has published the Digital Asset Custody Code of Conduct 2019. A specialist would be able to evidence having both the knowledge, experience and capacity to effectively implement the standards contained in this Code, as well as other relevant standards and requirements outlined within the digital asset business regulatory regime.</p>
	<p>5 -- How will a qualified custodian be determined? Will the BMA publish a list and will there be a Committee to decide?</p>	<p>To be recognised as a qualified custodian, a person would need to be able to evidence specialist skills as described above. The Authority will not publish a list of all qualified custodians; however, it will be publically evident which Bermuda licenced digital asset businesses are recognised by the Authority as qualified custodians. Otherwise, a digital asset business would be able to request that a given custodian be recognised for that digital asset business’ client’s digital assets. Similar to licensing and other authorisation decisions, determination of qualified custodians would be subject to the Authority’s internal governance decision framework.</p>

	<p>6 -- Bringing trustees within the scope of DABA is not necessary, as there is already an existing framework to regulate the fiduciary obligations of trustees. If a trustee does not make appropriate arrangements for the safekeeping of digital assets, that trustee would be in breach of its fiduciary duties.</p>	<p>As can be gleaned from the Digital Asset Custody Code of Conduct 2019, digital asset custody is much more complex than the custody of more traditional assets. In this area of heightened risk, it is important that arbitrage opportunities do not exist. As acknowledged by the stakeholder comment, any business acting in a fiduciary role in relation to digital assets must possess the necessary skill to either custody the asset or be sufficiently knowledgeable to select and exercise appropriate oversight over a custodian to which this task is outsourced. In the absence of more specific standards, judgment with respect to the appropriateness of standards may vary widely. Accordingly, the Authority has sought to bring these roles under the digital asset business regulatory framework, given that framework clearly outlines the appropriate standards. Such specification does not exist within any other regimes.</p>
	<p>7 -- Paragraph 6 sets out the intention that trustees that hold digital assets will fall within the scope of carrying on digital asset business in Bermuda and should therefore apply for and obtain a DABA licence. It would be useful to understand the rationale for this inclusion, as the trustee simply holding the digital asset does not mean that the trustee is engaging in the selling or issuing of such assets.</p> <p>It is highly likely that a trustee that holds digital assets as a fiduciary will engage a custodian to hold such assets, much like a trustee would delegate the investment of trust assets to an investment manager/adviser. The investment manager will administer and manage the assets/digital assets on behalf of the trustee.</p>	<p>The scope of DABA has always gone beyond buying and selling of digital assets to also include custody. The gap that existed, which the amendment is seeking to address, is ownership of the digital asset. DABA was designed to bring into scope businesses that perform services where the digital assets are owned by the clients. What was missed in the design is that, unlike other arrangements, the trustee (not the client) owns the digital assets, thus unintentionally scoping out trustees. The amendment is required because (as noted above, digital assets are unlike other more traditional assets) an inadequate skill in the performance of a custodial role (or selection of a custodian) could result in client loss. The Authority applies a risk-based approach, appreciating the importance of proportionality. Accordingly, DABA was designed with the flexibility for the Authority to tailor its supervisory approach according to the risk characteristics and tasks undertaken by the licensee. With this end, there is the potential to modify or waive certain requirements where warranted. While a trustee could outsource digital asset custody, fiduciary responsibility for oversight of the custodian and ensuring that the custodian has implemented appropriate measures cannot be outsourced. The digital asset regulatory framework specifies the standards a trustee must require of a digital asset custodian. It is possible for aspects of the framework that may not be relevant for a trustee with a narrow scope to be waived so that the regulation applied is fit for purpose.</p>

	<p>8 -- It would be unduly cumbersome for the licensee to re-notify the BMA each year.</p> <p>In many of the major IOSCO jurisdictions, once the licensee is exempted or licensed, it becomes incumbent on the licensee to inform the Authority or commission of any changes before they occur and seek approval. This procedure should be followed in Bermuda rather than a yearly notification requirement.</p>	<p>At the same time, there are IOSCO jurisdictions that require annual re-notifications. A lesson arising from the various assessments that Bermuda has had to undergo (e.g. Anti-Money Laundering/Combating the Financing of Terrorism, etc.) is that it is important to have a relatively current understanding of the activity being undertaken within the jurisdiction, including the quantum of activity benefiting from exemption. Accordingly, the re-notification is being introduced. The Authority does not consider the requirement to be onerous.</p>
	<p>9 -- The definition of “digital asset services vendor” includes two limbs without an “and/or”. The Authority should clarify whether it is an “and” or an “or”.</p>	<p>It should be “or”. Either of the limbs alone would qualify under the definition.</p>
	<p>10 – The Authority is encouraged to consider whether dematerialised securities and/or securities where Bermudians can see their ownership through online platforms can be specifically excluded from the legislation. The current definition is ambiguous on the point but that the spirit of the law would not include the same. For example, securities held on the BSX held through the Bermuda Securities Depository nominee.</p>	<p>Non-digital asset securities are not within scope of the DABA. It is not intended to cover such.</p>

	11 -- 'Administration and management of digital assets' should be defined.	The Authority agrees with this suggestion and has added a definition.
	12 -- There should not be two separate licensing regimes for the same business activity with the same regulator. Suggest exemption from IBA for Class F licence holders.	The Authority will review the need for additional exemptions on a case-by-case basis.
	13 -- Definition of 'digital asset exchange' should be amended to include 'issuances' and 'conversions'. Remove bullet points for clarity and consistency.	The Authority agrees with this suggestion and has amended the wording.
	14 -- The proposed definition of 'digital asset services vendor' is too broad as section (d) is too widely drawn.	The Authority agrees with this suggestion and has amended the wording.
	15 -- Recommend that section 79(1) is amended to include additional activities in the transitional provisions for those DABs currently conducting them.	The Authority agrees with this suggestion and has added the wording.
	16 -- Recommend amending section 79(3) to include amendments above.	See previous response.
	17 -- Definition of 'market maker' to be revised to ensure it only applies to activities involving the use of client digital assets.	The Authority agrees with this suggestion and has amended the wording.