

ADVISORY | INDUSTRY INFORMATION

Bermuda Digital Asset Issuance Act 2020 (the "DAIA")

The Digital Asset Issuance Act 2020 (the "DAIA") became operative on 6 March 2020. Any undertaking that wishes to conduct a digital asset issuance in or from within Bermuda is required to seek prior authorisation from the Bermuda Monetary Authority (the "BMA"), the sole financial services regulator in the jurisdiction. The Act replaces provisions in the Companies Act, 1981 and the Limited Liability Company Act, 2016, relating to initial coin offerings.

Key provisions of the DAIA include: (i) a widening of the scope of the previous initial coin offering regime to cover all types of digital asset issuances; (ii) provision for the BMA to authorise undertaking wishing to conduct digital asset issuances in or from within Bermuda (rather than the Minister of Finance, as was previously the case with respect to initial coin offerings) (iii) the ability for any undertaking who conducts a digital asset issuance on an appointed stock exchange or an 'accredited digital assets exchange' to do so without having to publish and file the issuance offering document with the BMA.

What is the definition of a 'digital asset issuance' under the DAIA?

A "digital asset issuance" means an offer to the public to acquire digital assets or to enter into an agreement to acquire digital assets at a future date.

What type of digital assets does the DAIA cover?

The term 'digital assets' under the DAIA has the same meaning given to it under Bermuda's Digital Asset Business Act, 2018 (as amended) ("DABA"), which is Bermuda's legislative framework for licensing certain digital asset business activities carried on in from within Bermuda. Under DABA, the term 'digital asset' is widely defined and covers anything which exists in binary form and comes with the right to use it and includes a digital representation of value. It captures digital coins, security, equity or utility tokens and anything intended to provide access to an application, product or service by means of distributed ledger technology.

Exemptions under DAIA

An offer is not deemed to be made to the public if: (i) an offer which the board considers as not being calculated to result directly or indirectly in the digital assets becoming available to more than 150 persons; (ii) an offer to 'qualified acquirers'; or (iii) an offer which the board considers as not being calculated to result directly or indirectly in digital assets becoming available to persons other than those whose ordinary course of business involves the acquisition, disposal or holding of digital assets, whether as principals or agents.

Under the DAIA, a qualified acquirer means:

- a high income private acquirer: namely, an individual who had a personal income in excess of US\$200,000, or joint income with their spouse in excess of US\$300,000, in each of the two preceding years, and who has a reasonable expectation of reaching the same income level in the year in which he acquires a digital asset;
- a high net worth private acquirer: namely, an individual whose net worth, or joint net worth, with their spouse exceeds US\$1,000,000, in the year in which he acquires a digital asset;
- a body corporate or unincorporated association, partnership or trust which has total assets of not less than US\$5,000,000 which are held solely by such entity or held partly by the entity and a member of its group;
- a body corporate, partnership, limited liability company or trust, all of whose shareholders, members or beneficiaries (as the case may be) fall within the above categories.

Any undertaking claiming the above exemption is required to file a digital assets placement declaration form with the BMA prior to entering into any transaction.

How do I become authorised to carry out a digital asset issuance?

Unless exempted under the DAIA, a person shall not conduct a digital asset issuance in or from within Bermudan unless that person is authorised under the DAIA to do so by the BMA.

In order to obtain authorisation, a undertaking must submit the following documentation to the BMA: (i) a business plan; (ii) a copy of the issuance document (i.e. an offering document); (iii) particulars for the applicant's arrangements for the management of the offering; and (iv) the application fee (being US\$2,266). The BMA also have the authority to request further information from the undertaking as well, if required.

Once the BMA authorise the undertaking, details of the offering and the undertaking will be published on the BMA's website, at such point the undertaking will also be required to pay an authorisation fee. The authorisation fee is based on a sliding scale with the size of the value of the digital asset issuance and ranges from US\$5,000 for an offering of not exceeding \$20 million, up to a fee of US\$50,000 for an offering exceeding \$500 million.

Minimum Criteria for Authorisation

The minimum criteria for authorisation replicates that for conducting a digital asset business under the DABA namely: (i) controllers and officers must be fit and proper persons; (ii) the digital asset issuance must be conducted in a prudent manner; (iii) the digital asset issuance must be conducted with integrity and the professional skills appropriate to the nature and scale of activities; (iv) the authorised undertaking shall implement corporate governance processes as the BMA considers appropriate given the nature, size, complexity and risk of the issuance; and (v) the position of the authorised undertaking within the structure of any group shall not obstruct the conduct of effective consolidated supervision.

Statement of Principles, Code of Conduct and Rules

Under the DAIA, the BMA may issue statements of principle, codes of conduct and rules, which an authorised undertaking must have regard to ensure that it is considered to be conducting the digital asset issuance in a prudent manner. The BMA has published the Statement of Principles Digital Asset Issuance Act 2020 on 23 June 2020, which, among other things, sets out how the BMA will apply the minimum licensing criteria to an authorised undertaking. In addition, the BMA has issued the Digital Asset Issuance Rules 2020, which include the detailed requirements for: (i) minimum required information to be included in the issuance document; (ii) ongoing disclosure or other requirements; (iii) continuing obligations with respect to information technology and cybersecurity; (iii) requirements for reconciliations of assets held under custody; and (iv) other compliance measures, including requirements to verify the identity of digital assets acquirers and to conduct due diligence on a risk-based basis having regard to money laundering and terrorist financing risks.

Oversight by the BMA

The Act re-assigns responsibility for authorisation of digital asset issuances from the Minister of Finance (via the Registrar of Companies) to the BMA. This effectively consolidates all digital assets authorisation, licensing and supervision within the BMA, which has a dedicated Fintech team, resulting in a unified regime for the sector.

Accredited Digital Asset Exchanges

Under the DAIA, there is no requirement to publish or file with the BMA a copy of the issuance document if the digital assets are listed on an appointed stock exchange or on an accredited digital asset exchange.

An "accredited digital asset exchange" is defined under the DAIA as a digital asset business licensed by the BMA pursuant to DABA to carry on digital asset business as an exchange. The rules and regulations of any such appointed stock exchange or licensed digital asset exchange would be subject to the oversight of the BMA or other competent authority. This effectively means that an appointed stock exchange or a Bermuda licensed digital asset exchange can act as a self-regulating organisation with respect to proposed digital asset issuances launched on their platform, which should assist with bring such issuances speedily to the market.

Further information

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