

LEGAL UPDATE:

LEGAL REQUIREMENTS UNDER THE BAHAMAS' DIGITAL ASSETS AND REGISTERED EXCHANGES BILL, 2019

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GENERAL

The Securities Commission of The Bahamas ("SCB"), the independent regulatory body responsible for digital assets and investor protection, has issued the draft Digital Assets and Registered Exchange Bill ("DARE Bill") for industry consultation. The DARE Bill prescribes the legal requirements for issuance and sale of digital tokens, and the regulation of issuers and those conducting digital asset business in or from The Bahamas. The following is a summary of the scope, and main obligations of registrants under the DARE Bill.

SCOPE

The DARE Bill applies to every person engaged in digital asset business or who participates in the formation, promotion, maintenance, sale and redemption of an initial token offering in The Bahamas. A person carries on digital asset business where (i) they are incorporated or registered under the companies' laws of the Bahamas, and (ii) are engaged in the course of business in any one or more digital asset activities; or (iii) carries on digital asset business from a place of business maintained by such a person in the Bahamas.

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Digital asset business includes services related to digital token exchanges¹; sponsorship of initial token offers; wallet services; custody of digital assets; and any other activity prescribed. Of note, the DARE Bill captures both fiat to token and token to token exchanges.

An initial token offering is defined as the public offer for the sale of digital tokens² in exchange for fiat currency or other digital tokens. Initial token offers to accredited³ investors are not subject to registration requirements of the DARE Bill. The DARE Bill does not apply to (i) persons who solely by reason of their professional capacity act on behalf of persons engaged in procuring the organization, promotion issuance or trade of digital assets; or the issuance and trade of security tokens (or securities) as defined in the Securities Industries Act, 2011 ("SIA"). Asset tokens⁴ proposed to be offered through an initial token offer are required to be evaluated by the SCB before proceeding with an application for registration to ensure that they are not deemed or designated as a security or security token.

Stable coins⁵ are considered asset tokens under the DARE Bill and would have to be evaluated by the SCB prior to registration.

REGISTRATION OF DIGITAL ASSET BUSINESS

No person may offer services as a digital asset business unless it is a legal entity incorporated or registered in the Bahamas and has been properly registered to conduct digital asset business by the SCB.

The Application is made in the prescribed form to the SCB and accompanied by the following information:

- Detailed current business plan including financial and operational projections, staffing and technological requirements.
- Certificate of good standing by Registrar of Companies.
- Certified copy of Memorandum and Articles of association or equivalent constitutive documents.
- Schedule of proposed fees and charges for listing, execution of trades, clearing and settlement and any other charges (as applicable).
- Completed forms for each founder, beneficial owner, security holder, director and officer.
- Prescribed application fee.

¹ A marketplace in the form of an electronic platform for the sale trade or exchange of digital tokens whether for fiat currency or one or more digital tokens.

² This definition includes- virtual currency tokens, asset tokens, utility tokens, non-fungible tokens, and any other digital representation of value designated by the SCB to be a digital token for the purposes of the DARE Bill.

³ This term is as defined in the SIA subjects entities and individuals to net worth or annual income and joint income requirements and includes investors outside of the Bahamas who meet the definition of an accredited investor or similar status under the securities laws of their country of residence. For a complete definition please refer to the SIA.

⁴ Asset token means a digital asset that represents a claim against the issuer that a) is intended to represent and asset and is embedded with underlying assets; b) derives its value by reference to an underlying asset; or c) is secured by an underlying asset or d) is backed by assets held as collateral for the primary purpose of encouraging price stability.

⁵ See definition of "asset token" sub-paragraph d).

In addition to the application requirements, every digital asset business must:

- Maintain standards of professional conduct as prescribed in the DARE Bill.
- Demonstrate adequate financial resources for the nature and scope of their operations, that is, to be able to maintain solvency and meet the risk of its financial and corporate operations and maintain the prescribed regulatory capital by the Commission.
- Provide evidence of adequate insurance to cover insurable risks and professional indemnity risks unless exempted.
- Maintain proper books and records for the statutory retention period.
- Appoint an auditor who must be approved by the SCB and submit its annual financial statements and records.
- Comply with the legislation, rules and guidelines as issued the SCB.
- Implement and maintain appropriate data security measures for protection of customer's personal data against unauthorized access, alteration, disclosure or destruction.
- Implement and maintain property record keeping measures for collection of information and documents related to the originator and beneficiary of digital assets.
- Implement and maintain policies in relation to risk management, and prevention of money laundering and terrorism financing.
- Comply with all applicable laws and the SCB's rules on anti-money laundering and countering of terrorist financing.

- Obtain SCB approval for changes in operations as prescribed by the DARE Bill.
- Notify the SCB of certain changes in information relative to a registrant.

Once approved, registration is renewable annually.

REGISTRATION OF INITIAL TOKEN OFFERING

A registrant seeking to make an initial token offering, must apply to a duly licensed token sponsor for preliminary approval. A token sponsor may be an attorney in good standing with the Bahamas Bar Association, a chartered accountant or accounting firm, an unrestricted fund administrator as defined in the SIA, a registered firm under the SIA or any other person duly approved by the SCB. The token sponsor is responsible for ensuring inter alia that the issuer has satisfied the requirements of the DARE Bill and is a fit and proper person to carry out the initial token offering.

In order to obtain preliminary approval of the token sponsor, subject to final approval by the SCB, the issuer must complete the prescribed form, pay the relevant application fee and pay the prescribed registration fee at least 45 days before token offering commences.

Information to be provided to a token sponsor includes inter alia:

- Written legal opinion by a Bahamian attorney identifying the class or classes of tokens available for subscription.
- General information on the projection such as the

name of entity, name of project, names of founders and their backgrounds and details of all persons involved inter alia.

- Detailed project description including the key features of service, profile of investors, residence restrictions (if any), project organization, planning and timelines, methods for payment accepted and projected raise total in fiat currencies or digital assets.
- Information on the issuance of the digital asset such as technological methods and standards of creation, issuance, transfer and redemption procedures and details on the KYC/AML processes inter alia⁶.
- Information on transfer and secondary market as prescribed in the DARE Bill.
- Vesting of Digital Assets or utility tokens⁶ as prescribed.

Where a token sponsor preliminarily approves the initial coin offering application, the token sponsor will submit the material particulars of the application along with the prescribed fee to the SCB. Material particulars include:

- Offering memorandum.
- Certificate of compliance by the token sponsor or qualified Bahamas counsel appointed by the sponsor.
- Information and documentation the sponsor relied upon in reviewing the application.

Where the SCB has reviewed documentation submitted by the sponsor and the Commission has no objection, the token sponsor will issue a certificate of registration to registrant and must submit a copy of the certificate to the SCB promptly thereafter.

This memorandum is intended to be general and non-exhaustive in nature and may not cover all material aspects of the DARE Bill. The DARE Bill is in consultation form and is likely to be amended significantly prior to passage. You are encouraged to contact us at Graham Thompson should you wish to remain updated on the state of the DARE Bill or should you require further specific advice.

⁶Utility token or a right of access or a discount represented in binary format to an application, utility or service but which does not directly or indirectly provide the holders thereof with any of the following contractual or legal rights: i) ownership or equity interest in the issuer or in any person or pool of assets ii) entitlement to a share of profits, losses, assets or liabilities of the issuer or any person or pool of assets, (except in the event of the liquidation of the issuer to receive a portion of the original subscription price paid at the time of the initial token offering) iii) legal status as a creditor or iv) entitlement to receive distribution of profits, revenues, assets or other distributions from the issuer or any other person or pool of assets.

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the development of the Investment Condominium (ICON) legislation and travelled globally promoting the jurisdiction in Latin America, Asia and Europe. Aliya is recognised for her expertise in capital markets, investment funds and regulatory practice and has consistently played a leading role in the development and revision of industry defining legislation. Including her leadership of Graham Thompson's consulting team to the Securities Commission on the Investment Funds Act, 2019. She has contributed to crafting and promoting policy initiatives on FinTech, Blockchain and digital assets.

Aliya specializes in banking, investment funds, securities, securitisation and capital markets, Technology, FinTech, Blockchain and digital assets. She has written for highly regarded publications co-writing a chapter in Chambers Law and Practice, 2019 on Investment Funds and has released a whitepaper, "The Bahamas' place in a Crypto-Graphic World" which was cited in 2018 by the U.S. Law Library of Congress.

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