

Regulation of the Digital Asset Industry

Sophia Rolle-Kapousouzoglou and Valdere Murphy
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In 2020, The Bahamas enacted the Digital Assets and Registered Exchanges Act ("**DARE Act**") which is the legislative framework that regulates the issuance, sale and trade of digital assets in or from within The Bahamas. As a result of this legislation, The Bahamas became one of the first jurisdictions to have enacted regulatory legislation relative to the digital assets industry.

In recent months the US Treasury has emphasized an urgent need for crypto regulations to combat global and domestic criminal activities. Further, in June 2022 the European Commission reached an agreement whereby negotiations culminated in an agreement that the draft regulation on crypto-assets is likely to come into force.

In The Bahamas the effect of the DARE Act is that any legal entity which intends to provide, or which is providing services as a digital asset business is required to apply to the Securities Commission of The Bahamas ("**the Commission**") for registration under the Act.

A digital asset business includes the business of –

- (a) a digital token exchange;
- (b) providing services related to a digital token exchange;
- (c) operating as a payment service provider business utilizing digital assets;
- (d) operating as a digital asset service provider, including providing DLT platforms that facilitates –
 - (i) the exchange between digital assets and fiat currencies;
 - (ii) the exchange between one or more forms of digital assets; and
 - (iii) the transfer of digital assets;
- (e) participation in and provision of financial services related to an issuer's offer or sale of a digital asset; and
- (f) any other activity which may be prescribed by regulations.

As a result, the Solidus Labs Global Crypto Regulation (GCR) Index, has ranked The Bahamas number one on its index of countries that have implemented crypto regulatory regimes that protects investors and encourages innovations. The regulatory regime in The Bahamas has attracted some of the largest cryptocurrency exchanges in the world to the jurisdiction, namely FTX and OKX.

On 20th April 2022, the Government of The Bahamas released a white paper styled as "*The Future of Digital Assets in The Bahamas*" ("**the White Paper**"). The White Paper among other things, sets out a vision and a framework to guide Bahamian digital asset policy until 2026. The Government of The Bahamas has made it abundantly clear that it has a desire for The Bahamas to remain at the forefront of regulated digital asset jurisdictions, and the policy framework seeks to among other things, "*explore new opportunities in a rapidly and continuously evolving digital asset landscape, including developments in decentralized finance (DeFi), non-fungible tokens (NFTs), stablecoins and asset-referenced tokens*", and "*where necessary, to clarify and expand the scope of the current legislative framework, generally, and the DARE Act, in particular, to continue to safely regulate digital assets and digital asset business.*"

Powers of the Commission and why Regulation is Important in the crypto space

According to the Government of The Bahamas' White Paper the purpose of optimal regulation of the digital asset industry is intended to minimize the technological risks which are also criminal including financial crime such as fraud and money laundering, as well as financial and market based, including market abuse and misuse of information.

The goal of the regulatory approach is also to ensure that the interest of customer's as well as their money, assets and privacy are properly safeguarded and that they have compliance measures in place to detect and prevent financial crime.

In this vein, under the DARE Act, the Securities Commission has among other things wide ranging powers including the power to suspend or revoke the registration of a digital asset business and the power to assist and co-operate in the administration of the digital assets legislation of another jurisdiction.

Freeze Orders and International Co-operation

The Commission has been vested with the power pursuant to Section 41 of the DARE Act to assist overseas regulatory authorities in a variety of circumstances, including, the broad and general power to provide assistance where such assistance may be relevant to the functions of the overseas regulatory authority and is intended to enable such authority to carry out the supervision, investigation or enforcement to which the request relates.

Extraterritorial reach of legislation

The Commission also has the power to make freezing orders pursuant to Section 46A of the DARE Act which provides that if the Commission considers it in the public interest to do so, the Commission may *"for the administration of digital asset laws or to assist in the administration of the digital asset legislation of another jurisdiction, by order for a period not to exceed five days direct-*

- (a) a person having on deposit, under control or for safekeeping any funds, digital assets or other property of the person named in the order to hold them; or*
- (b) a person –*
 - (i) not to withdraw any funds, digital assets or other property from any person having them on deposit under control or for safekeeping; or*
 - (ii) to hold all funds, digital assets or other property of a client of that person, or of others, in the person's possession or control in trust for a receiver, receiver-manager, trustee or liquidator appointed under an*

Under Section 19 of the DARE Act, the Commission may suspend or revoke the registration of a digital asset business, including but not limited to:

- (i) if the suspension or revocation would be in the public interest; or*
- (ii) if the digital asset business is declared bankrupt or goes into liquidation or makes a composition with its creditors or is otherwise dissolved; or*
- (iii) at the request of another competent regulatory authority which is carrying out regulatory functions in relation to the digital asset business.*

The Commission has also been clothed with the power under the DARE Act to apply to the Supreme Court of The Bahamas for an Order that a registrant under the DARE Act be wound up or dissolved, or court supervision of any application by the registrant for winding up or dissolution.

Currently, the Government also intends to make further amendments to the DARE Act which will include rules requiring digital asset businesses to disclose the risks to investors from digital assets held on behalf of customers. Further, the Securities Commission will likely require the digital asset businesses holding digital assets on behalf of customers to hold the assets 'off balance sheet' regarding the accounting and treatment of digital assets. Additionally, it is proposed that networks including exchanges that offer staking activities may be required to provide certain disclosures for participants in the staking program.

As a result of such legislative developments, it will be interesting to see the interplay between the protective measures the Commission has as it relates to engaging in insolvency proceedings to protect the rights of investors, as well as the development of case law in this area in years to come.

Authors



Sophia Rolle-Kapousouzoglou
Partner, Lennox Paton



Valdere Murphy
Associate, Lennox Paton