

## Legal Update

*The Financial Services and Markets Bill 2022 and what it means for Singapore-based Virtual Asset Service Providers*

16 February 2022

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UPDATE

# In this Update

The Financial Services and Markets Bill 2022 (“**FSM Bill**” or “**Bill**”) was moved for first reading in Parliament on 14 February 2022. The FSM Bill complements the Monetary Authority of Singapore’s (“**MAS**”) existing entity- and activity-based regulatory framework, and is intended to enhance MAS’s agility and effectiveness in addressing financial-sector wide risks in an increasingly integrated environment.

This update highlights the key features proposed in the FSM Bill that impact Singapore-based digital token (“**DT**”) service providers providing DT services outside Singapore. This follows on from our earlier legal update published on 3 September 2020, pertaining to the introduction of a new omnibus Act for the financial sector, and which is accessible at this [link](#).

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## INTRODUCTION

### KEYPOINT

*This focus of this article will be on key features of the FSM Bill which are likely to affect Singapore-based virtual asset service providers (“VASPs”), including digital payment tokens service providers.*

The FSM Bill is an omnibus bill that consolidates and expands MAS’s supervisory powers on a financial sector-wide basis. As discussed in our previous article, the FSM Bill serves to align Singapore legislation with the enhanced standards adopted by the Financial Action Task Force (“**FATF**”) in June 2019. The FATF standards require jurisdictions to regulate VASPs for money laundering and terrorism financing risks. In this regard, they require that jurisdictions at least license or register VASPs in the jurisdiction(s) where they are created, thereby mitigating risks of regulatory arbitrage, which is especially pertinent in a borderless, globalized and digital world.

Most VASPs in Singapore are regulated under existing legislation, such as the Payment Services Act 2019 (“**PS Act**”), Securities and Futures Act 2001 (“**SFA**”) and Financial Advisers Act 2001 (“**FAA**”). However, the FSM Bill imposes licensing requirements on VASPs that provide certain “**DT services**” (as defined in the next section) wholly outside of Singapore, a category which may fall outside the ambit of existing legislation.

## KEY FEATURES OF THE FSM BILL IMPACTING VASPS

### Definition of DT services

Under the FSM Bill, the activity of concern for a VASP is the provision of “**DT services**”, which covers:

- (a) dealing in digital tokens (“**DTs**”, and defined in more detail below);
- (b) facilitating the exchange of DTs;
- (c) accepting DTs for the purposes of transferring, or arranging for the transfer of, the DTs or arranging for the transmission of DTs (where the service provider does not come into possession of the DTs);

- (d) inducing or attempting to induce any person to enter into or to offer to enter into any agreement for or with a view to buying or selling any DTs in exchange for any money or any other DTs (whether of the same or a different type);
- (e) safeguarding or administration of a DT or DT instrument, where the service provider has control over the DT or the DT associated with the DT instrument; and
- (f) advisory services, either directly or through publications, writings, research analyses or research reports, relating to any DTs.

The actual definitions of activities (a) to (e) set out in the FSM Bill is aligned with the **expanded definition** of what constitutes a digital payment token service in the Payment Services (Amendment) Act 2021 (which is not yet in force), while (f) echoes the language of the definition of “financial advisory service” set out in the FAA. We touched on the proposed amendments to the PS Act in a separate article which you may access at this [link](#).

The FSM Bill also provides specific exclusions from the definition of a DT service. These include:

- (a) DT services provided in respect of any central bank digital token by any central bank or financial institution;
- (b) DT services provided in respect of any limited purpose digital payment token; and
- (c) technical services provided by any technical service provider which supports the provision of any DT service, but that does not at any time enter into possession of any money or digital token under that DT service.

MAS has also clarified in the “Response to Feedback Received – Consultation Paper on a New Omnibus Act for the Financial Sector” published by the MAS on 14 February 2022 (“**MAS Responses**”) that it does not seek to regulate persons that are solely involved in technical activities such as development of software applications, blockchain mining or operation of validator nodes. Generally, these exemptions are limited, and are in line with the aim to scope in DT services that would otherwise be regulated under the existing regulatory framework had the DT services been conducted in Singapore.

### **Definition of DTs**

The definition of “DT” under the FSM Bill covers:

- (a) digital payment tokens (as defined in the PS Act); and
- (b) digital representations of capital markets products (as defined in the SFA), which (i) can be transferred, stored or traded electronically and (ii) satisfies such other characteristics as MAS may prescribe,

but does not include excluded classes of DTs. The MAS has indicated that they do not intend to exclude any DTs from the scope of the definition yet, but they will continue to assess this as the space involves.

In line with the MAS’s forward-looking approach of being ready to adapt to rapidly changing risks in the financial sector, the limb where a digital representation of a capital markets product “satisfies additional characteristics as MAS may prescribe” also gives MAS the flexibility to act in a timely way to impose requirements commensurate with new and emerging risks.

It is possible that a token is neither a digital payments token (as defined in the PS Act) nor a capital markets product (as defined in the SFA). If so, given that the definition of “DT” is restricted to digital payment tokens and representations of capital markets products, if a token falls into neither category, it will not be regulated as a DT under the FSM Bill.

### **Scope of FSM Bill**

The FSM Bill prohibits:

- (a) an individual or a partnership from carrying on a business of providing any type of DT service outside Singapore, from a place of business in Singapore; and/or
- (b) a Singapore corporation from carrying on a business, whether from Singapore or elsewhere, of providing any type of digital token service outside Singapore,

without a licence issued under the FSM Bill.

However, taking into consideration the parallel regimes under the SFA, PS Act and FAA, the FSM Bill also provides for the following exemptions from licensing (subject to any regulations which may be prescribed by the MAS), for a person who carries on a business of providing a DT service:

(a) that is:

- (i) required to be licensed, approved or recognised under the SFA; or
- (ii) exempted from licensing, approval or recognition under the SFA,

in respect of the carrying on of a business in a capital markets product regulated activity;

(b) that is:

- (i) required to be licensed under the FAA; or
- (ii) exempted from licensing under the FAA,

in respect of the carrying on of a business of providing a financial advisory service; or

(c) that is:

- (i) required to be licensed under the PS Act; or
- (ii) exempted from licensing under the PS Act,

in respect of the carrying on of a business of providing any digital payment token service.

Based on the statements in the MAS Responses, the FSM Bill is sufficiently broad to include individuals or partnerships who from a place of business in Singapore, carry on a business of providing DT services, but the DT services are provided overseas, and such services are provided by someone other than the individual or partnership in Singapore.

There is also a presumption in the FSM Bill which applies, such that a person providing any type of DT service while carrying on any primary business, is presumed to be carrying on a secondary business of providing that type of DT service, regardless of whether the provision of that type of DT service is related or incidental to the primary business. This presumption is also not rebutted by proof that provision of that type of DT service is related or incidental or both related and incidental to the primary business. This echoes the presumption set out in the PS Act and suggests that a licence under the FSM Bill should be obtained for provision of DT services even where such DT services are considered a secondary business offered by such person.



VASPs which are providers of DT services, will thus be regulated and licensed as a new class of financial institutions alongside MAS's existing financial regulatory framework.

### **Ongoing licensee requirements**

A licensee is required to meet, inter alia, the following ongoing operational obligations:

- (a) have a permanent place of business in Singapore;
- (b) ensure that an individual must be present at the permanent place of business for the hours as specified by the MAS, to answer to any queries relating to anti-money laundering / countering the financing of terrorism ("**AML/CFT**"), or complaints from any DT service user that uses any DT service provided by the licensee;
- (c) notify MAS of certain events as soon as is practicable, including:
  - (i) civil or criminal proceedings instituted against the licensee, in Singapore or elsewhere;
  - (ii) any event that materially impedes or impairs the licensee's operations;
  - (iii) the licensee being or becoming, or being likely to become, insolvent or unable to meet any of its financial, statutory, contractual or other obligations;
  - (iv) any disciplinary action taken against the licensee by a regulatory authority (except MAS), in Singapore or elsewhere; and
  - (v) appoint an auditor on an annual basis to carry out an audit of the transactions in relation to the DT services provided by the licensee and submit a report of such audit to the MAS as required.

In relation to the requirement to have a permanent place of business in Singapore, this is narrower than the equivalent requirement for PS Act licensees, which requires a permanent place of business or a registered office in Singapore. As explained in the MAS Responses, as the DT services are provided outside of Singapore, a fixed location used to carry on business that ensures a licensee's meaningful presence in Singapore is therefore a pertinent requirement. An example of a permanent place of business would be having a dedicated, segregated space where records of transactions, customer

risk assessments, and documentation of mitigation measures can be kept securely and readily accessible.

In addition to the above, there are also controls on changes of ownership of licensees, to ensure that MAS's supervisory oversight is not evaded, and controls on the appointment of individual to leadership positions. For instance, MAS approval is required to:

- (a) allow a person to become a 20% controller of the licensee without first obtaining the approval of MAS; and
- (b) allow an individual to be appointed as a chief executive officer ("CEO") of a licensee that is a corporation, or a manager or partner of a licensee that is a limited liability partnership, or a partner of licensee that is a partnership.

Similarly, MAS may require that a CEO, director, partner or manager of a licensed entity be removed where the MAS is satisfied that such person is not a fit and proper person.

In addition, the FSM Bill includes general powers to conduct AML/CFT inspections and render assistance to domestic authorities or foreign AML/CFT supervisory counterparts. It is also the MAS's intention that AML/CFT requirements imposed on VASPs will be aligned with the requirements for digital payment token service providers under the PS Act. The MAS has expressed that it does not expect that there will be any low-risk exemptions in respect of DT services. Hence such licensees will be subject to the full set of AML/CFT requirements applicable to PS Act licensees.

### **No transitional arrangements**

MAS has indicated that it does not intend to provide a transitional arrangement for DT service providers under the FSM Bill. This means that once the FSM Bill is passed and comes into force, VASPs providing DT services outside of Singapore may be required to suspend or cease operations, until they obtain a licence under the FSM Bill from MAS.

## **CONCLUDING REMARKS**

As the FSM Bill has only been introduced in Parliament, there will be at least two further readings in Parliament before it can be voted on to be passed into law. Presidential assent will also be required. Hence, it is anticipated that there is still a period of time before the FSM Bill is passed into law and subsequently comes into force.



That said, in view of the lack of a transitional arrangement for DT service providers, and given the time that will be required to apply for and obtain any relevant licences, Singapore-based VASPs carrying on DT services outside of Singapore should consider if their operations and scope of business offerings fall within the ambit of the FSM Bill and start preparing for compliance therewith.

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If you have any questions or comments on this article, please contact:



**Chua Tju Liang**

Director, Corporate & Finance  
Head, Blockchain & Digital Assets

T: +65 6531 4101

E: [tjuliang.chua@drewnapier.com](mailto:tjuliang.chua@drewnapier.com)

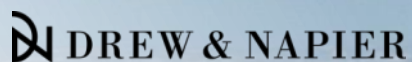


**Benjamin Gaw**

Director, Corporate and Mergers & Acquisitions

T: +65 6531 2393

E: [benjamin.gaw@drewnapier.com](mailto:benjamin.gaw@drewnapier.com)



**Drew & Napier LLC**

10 Collyer Quay  
#10-01 Ocean Financial Centre  
Singapore 049315

**[www.drewnapier.com](http://www.drewnapier.com)**

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906