HOUSE BILL 1502-FN

AN ACT relative to digital assets and digital securities.


COMMITTEE: Commerce and Consumer Affairs

ANALYSIS

This bill specifies that digital assets are property within the Uniform Commercial Code; authorizes security interests in digital assets, allows banks to provide custodial services for digital asset property and provides procedures for the provision of custodial services.

Explanation: Matter added to current law appears in **bold italics.**
Matter removed from current law appears [in brackets and struckthrough.]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
AN ACT relative to digital assets and digital securities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Digital Assets and Digital Securities. Amend RSA by inserting after chapter 397-B the following new chapter:

CHAPTER 397-C

DIGITAL ASSETS AND DIGITAL SECURITIES

397-C:1 Definitions. In this chapter:

I. "Digital asset" means a representation of economic, proprietary or access rights that is stored in a computer readable format, and includes digital consumer assets, digital securities and virtual currency.

II. "Digital consumer asset" means a digital asset that is used or bought primarily for consumptive, personal or household purposes and includes:

(a) An open blockchain token constituting intangible personal property as otherwise provided by law;

(b) Any other digital asset which does not fall within paragraphs III and IV.

III. "Digital security" means a digital asset which constitutes a security, as defined in RSA 382-A:1-201(a)(35), but shall exclude digital consumer assets and virtual currency.

IV. "Virtual currency" means a digital asset that is:

(a) Used as a medium of exchange, unit of account or store of value; and

(b) Not recognized as legal tender by the United States government.

V. The terms in paragraphs II, III, and IV of this section are mutually exclusive.

397-C:2 Classification of Digital Assets as Property; Applicability to Uniform Commercial Code.

I. Digital assets are classified in the following manner:

(a) Digital consumer assets are intangible personal property and shall be considered general intangibles, as defined in RSA 382-A:9-102(a)(44), only for the purposes of article 9 of the Uniform Commercial Code, RSA 382-A;

(b) Digital securities are intangible personal property and shall be considered securities, as defined in RSA 382-A:8-102(a)(15), and investment property, as defined in RSA 382-A:9-102(a)(49), only for the purposes of articles 8 and 9 of the Uniform Commercial Code, RSA 382-A;

(c) Virtual currency is intangible personal property and shall be considered money only for the purposes of article 9 of the Uniform Commercial Code, RSA 382-A.
II. Consistent with RSA 382-A:8-102(a)(9), a digital asset may be treated as a financial asset under that paragraph, pursuant to a written agreement with the owner of the digital asset. If treated as a financial asset, the digital asset shall remain intangible personal property.

III. A bank providing custodial services shall be considered to meet the requirements of RSA 382-A:8-102(a)(9).

IV. Classification of digital assets under this section shall be construed in a manner to give the greatest effect to this chapter, but shall not be construed to apply to any other asset.

397-C:3 Perfection of Security Interests in Digital Assets; Financing Statements.

I. Notwithstanding the financing statement requirement specified by RSA 382-A:9-310 as otherwise applied to general intangibles or any other provision of law, perfection of a security interest in a digital asset may be achieved through control, as defined in subparagraph V(a) of this section. A security interest held by a secured party having control of a digital asset has priority over a security interest held by a secured party that does not have control of the asset.

II. Before a secured party may take control of a digital asset under this section, the secured party shall enter into a control agreement with the debtor. A control agreement may also set forth the terms under which a secured party may pledge its security interest in the digital asset as collateral for another transaction.

III. A secured party may file a financing statement with the secretary of state, including to perfect a security interest in proceeds from a digital asset pursuant to RSA 382-A:9-315.

IV. Notwithstanding any other provision of law, including article 9 of the Uniform Commercial Code, RSA 382-A, a transferee takes a digital asset free of any security interest 2 years after the transferee takes the asset for value and does not have actual notice of an adverse claim. This paragraph only applies to a security interest perfected by a method other than control.

V. As used in this section:

(a) Consistent with paragraph VI, "control" is equivalent to the term "possession" when used in article 9 of RSA 382-A and means the following:

(1) A secured party, or an agent, custodian, fiduciary or trustee of the party, has the exclusive legal authority to conduct a transaction relating to a digital asset, including by means of a private key or the use of a multi-signature arrangement authorized by the secured party;

(2) A smart contract created by a secured party which has the exclusive legal authority to conduct a transaction relating to a digital asset. As used in this subparagraph, "smart contract" means an automated transaction, or any substantially similar analogue, which is comprised of code, script or programming language that executes the terms of an agreement, and which may include taking custody of and transferring an asset, or issuing executable instructions for these actions, based on the occurrence or nonoccurrence of specified conditions.
(b) "Multi-signature arrangement" means a system of access control relating to a digital asset for the purposes of preventing unauthorized transactions relating to the asset, in which 2 or more private keys are required to conduct a transaction, or any substantially similar analogue.

(c) "Private key" means a unique element of cryptographic data, or any substantially similar analogue, which is:

1. Held by a person;
2. Paired with a unique, publicly available element of cryptographic data; and
3. Associated with an algorithm that is necessary to carry out an encryption or decryption required to execute a transaction.

VI. Perfection by control creates a possessory security interest and does not require physical possession. For purposes of article 9 of RSA 382-A and this section, a digital asset is located in New Hampshire if the asset is held by a New Hampshire custodian, the debtor or secured party is physically located in New Hampshire or the debtor or secured party is incorporated or organized in New Hampshire.

397-C:4 Digital Asset Custodial Services.

I. A bank may provide custodial services consistent with this section upon providing 60 days written notice to the commissioner. The provisions of this section are cumulative and not exclusive as an optional framework for enhanced supervision of digital asset custody. If a bank elects to provide custodial services under this section, it shall comply with all provisions of this section.

II. A bank may serve as a qualified custodian, as specified by the United States securities and exchange commission in 17 C.F.R. section 275.206(4)-2. In performing custodial services under this section, a bank shall:

(a) Implement all accounting, account statement, internal control, notice and other standards specified by applicable state or federal law and rules for custodial services;

(b) Maintain information technology best practices relating to digital assets held in custody. The commissioner may specify required best practices by rule;

(c) Fully comply with applicable federal anti-money laundering, customer identification and beneficial ownership requirements; and

(d) Take other actions necessary to carry out this section, which may include exercising fiduciary powers similar to those permitted to national banks and ensuring compliance with federal law governing digital assets classified as commodities.

III. A bank providing custodial services shall enter into an agreement with an independent public accountant to conduct an examination conforming to the requirements of 17 C.F.R. sections 275.206(4)-2(a)(4) and (6), at the cost of the bank. The accountant shall transmit the results of the examination to the commissioner within one hundred 120 days of the examination and may file the results with the United States securities and exchange commission as its rules may provide. Material discrepancies in an examination shall be reported to the commissioner within one day. The
IV. Digital assets held in custody under this section are not depository liabilities or assets of the bank. A bank, or a subsidiary, may register as an investment adviser, investment company or broker dealer as necessary. A bank shall maintain control over a digital asset while in custody. A customer shall elect, pursuant to a written agreement with the bank, one of the following relationships for each digital asset held in custody:

(a) Custody under a bailment as a nonfungible or fungible asset. Assets held under this paragraph shall be strictly segregated from other assets; or

(b) Custody under a bailment pursuant to paragraph V of this section.

V. If a customer makes an election under subparagraph IV(b), the bank may, based on customer instructions, undertake transactions with the digital asset. A bank maintains control pursuant to paragraph IV by entering into an agreement with the counterparty to a transaction which contains a time for return of the asset. The bank shall not be liable for any loss suffered with respect to a transaction under this paragraph, except for liability consistent with fiduciary and trust powers as a custodian under this section.

VI. A bank and a customer shall agree in writing regarding the source code version the bank will use for each digital asset, and the treatment of each asset under the Uniform Commercial Code, RSA 382-A. Any ambiguity under this subsection shall be resolved in favor of the customer.

VII. A bank shall provide clear, written notice to each customer, and require written acknowledgment, of the following:

(a) Prior to the implementation of any updates, material source code updates relating to digital assets held in custody, except in emergencies which may include security vulnerabilities;

(b) The heightened risk of loss from transactions under paragraph V;

(c) That some risk of loss as a pro rata creditor exists as the result of custody as a fungible asset or custody under subparagraph IV(b);

(d) That custody under subparagraph IV(b) may not result in the digital assets of the customer being strictly segregated from other customer assets; and

(e) That the bank is not liable for losses suffered under paragraph V, except for liability consistent with fiduciary and trust powers as a custodian under this section.

VIII. A bank and a customer shall agree in writing to a time period within which the bank must return a digital asset held in custody under this section. If a customer makes an election under subparagraph IV(b), the bank and the customer may also agree in writing to the form in which the digital asset shall be returned.

IX. All ancillary or subsidiary proceeds relating to digital assets held in custody under this section shall accrue to the benefit of the customer, except as specified by a written agreement with the customer. The bank may elect not to collect certain ancillary or subsidiary proceeds, as long as
the election is disclosed in writing. A customer who makes an election under subparagraph IV(a) may withdraw the digital asset in a form that permits the collection of the ancillary or subsidiary proceeds.

X. A bank shall not authorize or permit rehypothecation of digital assets under this section. The bank shall not engage in any activity to use or exercise discretionary authority relating to a digital asset except based on customer instructions.

XI. A bank shall not take any action under this section which would likely impair the solvency or the safety and soundness of the bank, as determined by the commissioner after considering the nature of custodial services customary in the banking industry.

XII. To offset the costs of supervision and administration of this section, the commissioner shall charge a bank which provides custodial services under this section a supervision fee equal to two-tenths of one mill on the dollar ($0.0002) relating to assets held in custody under this section as of December 31 of each year, with payment of the supervision fee made on or before the following January 31. Banks providing custodial services outside of this section shall not be required to pay this supervision fee.

XIII. The commissioner may adopt rules under RSA 541-A to implement this section.

XIV. In this section:

(a) "Commissioner" means the bank commissioner.

(b) "Custodial services" means the safekeeping and management of customer currency and digital assets through the exercise of fiduciary and trust powers under this section as a custodian, and includes fund administration and the execution of customer instructions.

2 Effective Date. This act shall take effect January 1, 2023.
AN ACT relative to digital assets and digital securities.

FISCAL IMPACT:  [X] State  [ ] County  [ ] Local  [ ] None

<table>
<thead>
<tr>
<th>STATE:</th>
<th>Estimated Increase / (Decrease)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FY 2022</td>
</tr>
<tr>
<td>Appropriation</td>
<td>$0</td>
</tr>
<tr>
<td>Revenue</td>
<td>$0</td>
</tr>
<tr>
<td>Expenditures</td>
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Funding Source:  [ ] General  [ ] Education  [ ] Highway  [X] Other -
Assessment of Chartered Entities and Examination fees, and Supervision fees.

METHODOLOGY:

This bill specifies that digital assets are property within the Uniform Commercial Code; authorizes security interests in digital assets, allows banks to provide custodial services for digital asset property and provides procedures for the provision of custodial services.

The Banking Department assumes this bill would be accomplished through the use of Special Purpose Depository Institution Charters. The establishment of Special Purpose Depository Institutions in State law would be also necessary to implement the provisions of this bill. The Banking Department is self-funded. The Banking Department’s costs and expenses, including personnel, are paid by fees, fines, and assessments of licensed and chartered entities. The Department assumes in order to charter and regulate Special Purpose Depository Institutions (“SPDI”) in a safe and sound manner it would require the development of an SPDI Division within the Department. The Department developed the assumptions and fiscal estimates below based on discussions with Wyoming which currently has an SPDI statute.

- The Department estimates it will need to establish 7 positions and will incur the expenses as shown in table below:

<table>
<thead>
<tr>
<th>Estimated minimum costs</th>
<th>FY 2022</th>
<th>FY 2023</th>
<th>FY 2024</th>
<th>FY 2025</th>
</tr>
</thead>
<tbody>
<tr>
<td>One Division Director (LG 34)</td>
<td>$ -</td>
<td>$ 125,000</td>
<td>$ 126,000</td>
<td>$ 134,000</td>
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<tr>
<td>Three Bank Examiner IVs (LG 32)</td>
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<td>$ 351,000</td>
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<td>2024</td>
<td>2025</td>
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<td>----------------------------------------------------------------------------</td>
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<tr>
<td>Total Personnel Costs:</td>
<td></td>
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</tr>
<tr>
<td>Development of a SPDI-specific examination manual</td>
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<td>$ 850,000</td>
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<td>Initial and ongoing Training for SPDI Division</td>
<td>$</td>
<td>$ 20,000</td>
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<td>Third-party contract with a suspicious cryptocurrency transaction alerts and compliance solution company, to assist in the monitoring of SPDIs.</td>
<td>$</td>
<td>$ 80,000</td>
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<tr>
<td><strong>Total Expenditures:</strong></td>
<td>$</td>
<td>$ 1,740,000</td>
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</table>

*Note: The costs for the 7 positions include salary, benefits, office space, equipment and general office expenses based on the average Banking Department employee.*

- The Department assumes that it will charge all SPDIs an assessment as it does all state-chartered banks which it examines. The amount of the assessment charged to each SPDI is based on each SPDI’s assets proportionally. Therefore, the amount of assessment charged to each SPDI is indeterminable at this time.

- The Banking Department assumes it will be able to bill each SPDI for each examination it conducts under RSA 383:9-d. The Department assumes it would charge the per diem rate per examiner, as set by RSA 383:11. For purposes of this Fiscal Note, the Banking Department used the current per diem rate for period of 40 days, as based upon an average exam length, noting some examinations can extend a long as 50 more days. If problems are discovered during the course of the examination, more time will be required. Based upon the complexity of the SPDI, additional examination staff and time may be required. Based on these assumptions, the cost of an average examination would be $37,773 in FY 2023 and increase annually by about 4% due to inflation.

- Regarding the supervision fees to offset the cost of supervision and administration, the Banking Department indicates the revenue impact is indeterminable and states such a fee is not consistent with the current statutory mechanism for funding the Banking Department in RSA 383:11.

**AGENCIES CONTACTED:**

Banking Department