LEGISLATURE OF NEBRASKA

ONE HUNDRED SEVENTH LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 648

Introduced by Flood, 19.

Read first time January 20, 2021

Committee: Banking, Commerce and Insurance

1 A BILL FOR AN ACT relating to banking and finance; to adopt the

2 　　　Transactions in Digital Assets Act.

3 Be it enacted by the people of the State of Nebraska,

1   Section 1. Sections 1 to 7 of this act shall be known and may be

2 cited as the Transactions in Digital Assets Act.

3   Sec. 2. (1) For purposes of the Transactions in Digital Assets Act:

4   (a) Bank has the same meaning as in section 8-101.03;

5   (b) Custodial services means the safekeeping and management of

6 customer currency and digital assets through the exercise of fiduciary

7 and trust powers under the act as a custodian, and includes fund

8 administration and the execution of customer instructions;

9   (c) Digital asset means a representation of economic, proprietary,

10 or access rights that is stored in a computer readable format and

11 includes digital consumer assets, digital securities, and virtual

12 currency;

13   (d) Digital consumer asset means a digital asset that is used or

14 bought primarily for consumptive, personal, or household purposes and

15 includes:

16   (i) An open blockchain token constituting intangible personal

17 property as otherwise provided by law;

18   (ii) Any other digital asset which does not fall within subdivision

19 (1)(c) or (d) of this subsection;

20   (e) Digital security means a digital asset which constitutes a

21 security, as defined in section 8-1101, but shall exclude digital

22 consumer assets and virtual currency;

23   (f) Director means the Director of Banking and Finance; and

24   (g) Virtual currency means a digital asset that is:

25   (i) Used as a medium of exchange, unit of account, or store of

26 value; and

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

28   (2) The terms in subdivisions (1)(b) through (d) of this section are

29 mutually exclusive.

30   Sec. 3. (1) Digital assets are classified in the following manner:

31   (a) Digital consumer assets are intangible personal property and

1 shall be considered general intangibles, as defined in section 9-102(a)

2 (42), Uniform Commercial Code;

3 (b) Digital securities are intangible personal property and shall be

4 considered securities, as defined in section 8-102(a)(15), Uniform

5 Commercial Code, and investment property, as defined in section 9-102(a)

6 (49), Uniform Commercial Code;

7 (c) Virtual currency is intangible personal property and shall be

8 considered money, notwithstanding section 1-201(a)(24), Uniform

9 Commercial Code.

10 (2) Consistent with section 8-102(a)(9), Uniform Commercial Code, a

11 digital asset may be treated as a financial asset under that subdivision,

12 pursuant to a written agreement with the owner of the digital asset. If

13 treated as a financial asset, the digital asset shall remain intangible

14 personal property.

15 (3) A bank providing custodial services under section 5 of this act

16 shall be considered to meet the requirements of section 8-102(a)(14),

17 Uniform Commercial Code.

18 (4) Classification of digital assets under this section shall be

19 construed in a manner to give the greatest effect to the Transactions in

20 Digital Assets Act, but shall not be construed to apply to any other

21 asset.

22 Sec. 4. (1) Notwithstanding the financing statement requirement

23 specified by section 9-310(a), Uniform Commercial Code, as otherwise

24 applied to general intangibles or any other provision of law, perfection

25 of a security interest in a digital asset may be achieved through

26 control, as defined in subdivision (5)(a) of this section. A security

27 interest held by a secured party having control of a digital asset has

28 priority over a security interest held by a secured party that does not

29 have control of the asset.

30 (2) Before a secured party may take control of a digital asset under

31 this section, the secured party shall enter into a control agreement with

1 the debtor. A control agreement may also set forth the terms under which

2 a secured party may pledge its security interest in the digital asset as

3 collateral for another transaction.

4   (3) A secured party may file a financing statement with the

5 Secretary of State, including to perfect a security interest in proceeds

6 from a digital asset pursuant to section 9-315(d), Uniform Commercial

7 Code.

8   (4) Notwithstanding any other provision of law, including article 9,

9 Uniform Commercial Code, a transferee takes a digital asset free of any

10 security interest two years after the transferee takes the asset for

11 value and does not have actual notice of an adverse claim. This

12 subsection only applies to a security interest perfected by a method

13 other than control.

14   (5) For purposes of this section:

15   (a) Consistent with subsection (6) of this section, control is

16 equivalent to the term possession when used in article 9, Uniform

17 Commercial Code, and means the following:

18   (i) A secured party, or an agent, custodian, fiduciary, or trustee

19 of the party, has the exclusive legal authority to conduct a transaction

20 relating to a digital asset, including by means of a private key or the

21 use of a multi-signature arrangement authorized by the secured party; or

22   (ii) A smart contract created by a secured party which has the

23 exclusive legal authority to conduct a transaction relating to a digital

24 asset. For purposes of this subdivision, smart contract means a

25 transaction conducted or performed, in whole or in part, by electronic

26 means or electronic records, in which the acts or records of one or both

27 parties are not reviewed by an individual in the ordinary course in

28 forming a contract, performing under an existing contract, or fulfilling

29 an obligation required by the transaction or any substantially similar

30 analogue, which is comprised of code, script, or programming language

31 that executes the terms of an agreement, and which may include taking

1   custody of and transferring an asset, or issuing executable instructions

2   for these actions, based on the occurrence or nonoccurrence of specified

3   conditions;

4   (b) Multi-signature arrangement means a system of access control

5   relating to a digital asset for the purposes of preventing unauthorized

6   transactions relating to the asset, in which two or more private keys are

7   required to conduct a transaction or any substantially similar analogue;

8   and

9   (c) Private key means a unique element of cryptographic data, or any

10   substantially similar analogue, which is:

11   (i) Held by a person;

12   (ii) Paired with a unique, publicly available element of

13   cryptographic data; and

14   (iii) Associated with an algorithm that is necessary to carry out an

15   encryption or decryption required to execute a transaction.

16   (6) Perfection by control creates a possessory security interest and

17   does not require physical possession. For purposes of this section, a

18   digital asset is located in Nebraska if the asset is held by a Nebraska

19   custodian, the debtor or secured party is physically located in Nebraska,

20   or the debtor or secured party is incorporated or organized in Nebraska.

21   Sec. 5.   (1) A bank may provide custodial services consistent with

22   this section upon providing sixty days written notice to the director.

23   The provisions of this section are cumulative and not exclusive as an

24   optional framework for enhanced supervision of digital asset custody. If

25   a bank elects to provide custodial services under this section, it shall

26   comply with all provisions of this section.

27   (2) A bank may serve as a qualified custodian, as specified by the

28   United States Securities and Exchange Commission in 17 C.F.R.

29   275.206(4)-2. In performing custodial services under this section, a bank

30   shall:

31   (a) Implement all accounting, account statement, internal control,

1 notice, and other standards specified by applicable state or federal law

2 and rules for custodial services;

3 (b) Maintain information technology best practices relating to

4 digital assets held in custody. The director may specify required best

5 practices by rule and regulation;

6 (c) Fully comply with applicable federal anti-money laundering,

7 customer identification, and beneficial ownership requirements; and

8 (d) Take other actions necessary to carry out this section, which

9 may include exercising fiduciary powers similar to those permitted to

10 national banks and ensuring compliance with federal law governing digital

11 assets classified as commodities.

12 (3) A bank providing custodial services shall enter into an

13 agreement with an independent public accountant to conduct an examination

14 conforming to the requirements of 17 C.F.R. 275.206(4)-2(a)(4) and (6),

15 at the cost of the bank. The accountant shall transmit the results of the

16 examination to the director within one hundred twenty days of the

17 examination and may file the results with the United States Securities

18 and Exchange Commission as its rules may provide. Material discrepancies

19 in an examination shall be reported to the director within one day. The

20 director shall review examination results upon receipt within a

21 reasonable time and during any regular examination conducted under

22 section 8-108.

23 (4) Digital assets held in custody under this section are not

24 depository liabilities or assets of the bank. A bank, or a subsidiary,

25 may register as an investment adviser, investment company, or broker

26 dealer as necessary. A bank shall maintain control over a digital asset

27 while in custody. A customer shall elect, pursuant to a written agreement

28 with the bank, one of the following relationships for each digital asset

29 held in custody:

30 (a) Custody under a bailment as a nonfungible or fungible asset.

31 Assets held under this subdivision shall be strictly segregated from

1 other assets; or

2   (b) Custody under a bailment pursuant to subsection (5) of this

3 section.

4   (5) If a customer makes an election under subdivision (4)(b) of this

5 section, the bank may, based only on customer instructions, undertake

6 transactions with the digital asset. A bank maintains control pursuant to

7 subsection (4) of this section by entering into an agreement with the

8 counterparty to a transaction which contains a time for return of the

9 asset. The bank shall not be liable for any loss suffered with respect to

10 a transaction under this subsection, except for liability consistent with

11 fiduciary and trust powers as a custodian under this section.

12   (6) A bank and a customer shall agree in writing regarding the

13 source code version the bank will use for each digital asset and the

14 treatment of each asset under the Uniform Commercial Code, if necessary.

15 Any ambiguity under this subsection shall be resolved in favor of the

16 customer.

17   (7) A bank shall provide clear, written notice to each customer and

18 require written acknowledgement of the following:

19   (a) Prior to the implementation of any updates, material source code

20 updates relating to digital assets held in custody, except in emergencies

21 which may include security vulnerabilities;

22   (b) The heightened risk of loss from transactions under subsection

23 (5) of this section;

24   (c) That some risk of loss as a pro rata creditor exists as the

25 result of custody as a fungible asset or custody under subdivision (4)(b)

26 of this section;

27   (d) That custody under subdivision (4)(b) of this section may not

28 result in the digital assets of the customer being strictly segregated

29 from other customer assets; and

30   (e) That the bank is not liable for losses suffered under subsection

31 (5) of this section, except for liability consistent with fiduciary and

1   trust powers as a custodian under this section.

2   (8) A bank and a customer shall agree in writing to a time period

3   within which the bank must return a digital asset held in custody under

4   this section. If a customer makes an election under subdivision (4)(b) of

5   this section, the bank and the customer may also agree in writing to the

6   form in which the digital asset shall be returned.

7   (9) All ancillary or subsidiary proceeds relating to digital assets

8   held in custody under this section shall accrue to the benefit of the

9   customer, except as specified by a written agreement with the customer.

10 The bank may elect not to collect certain ancillary or subsidiary

11 proceeds, as long as the election is disclosed in writing. A customer who

12 makes an election under subdivision (4)(a) of this section may withdraw

13 the digital asset in a form that permits the collection of the ancillary

14 or subsidiary proceeds.

15   (10) A bank shall not authorize or permit rehypothecation of digital

16 assets under this section and shall not engage in any activity to use or

17 exercise discretionary authority relating to a digital asset except based

18 on customer instructions.

19   (11) A bank shall not take any action under this section which would

20 likely impair the solvency or the safety and soundness of the bank, as

21 determined by the director after considering the nature of custodial

22 services customary in the banking industry.

23   (12) To offset the costs of supervision and administration of this

24 section, a bank which provides custodial services under this section

25 shall pay the assessment as provided for in sections 8-601 and 8-605 and

26 the costs of any examination or investigation as provided in sections

27 8-108 and 8-606.

28   Sec. 6.   The director may adopt and promulgate rules and regulations

29 to implement the Transactions in Digital Assets Act.

30   Sec. 7.   The courts of Nebraska shall have jurisdiction to hear

31 claims in both law and equity relating to digital assets, including those

1   arising under the Transactions in Digital Assets Act and the Uniform

2   Commercial Code.