

JAN 17 2020

A BILL FOR AN ACT

RELATING TO DIGITAL ASSETS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to title 22 to be appropriately designated
3 and to read as follows:

4 "CHAPTER

5 DIGITAL ASSETS

6 § -1 Definitions. (a) As used in this chapter:

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

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

14 (1) An open blockchain token constituting intangible
15 personal property as otherwise provided by law; and

16 (2) Any other digital asset that is not deemed to be a
17 "digital security" or a "virtual currency."



1 "Digital security" means a digital asset that constitutes a
2 security, as defined in section 485A-102, but excludes digital
3 consumer assets and virtual currency.

4 "Virtual currency" means a digital asset that is:

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

7 (2) Not recognized as legal tender by the United States
8 government.

9 (b) The terms defined in subsection (a) are mutually
10 exclusive.

11 **§ -2 Classification of digital assets as property;**
12 **applicability to Uniform Commercial Code.** (a) Digital assets
13 shall be classified in the following manner:

14 (1) Digital consumer assets are intangible personal
15 property and shall be considered general intangibles,
16 as defined in section 490:9-102, only for the purposes
17 of article 9 of chapter 490;

18 (2) Digital securities are intangible personal property
19 and shall be considered securities, as defined in
20 section 490:8-102, and investment property, as defined



1 in section 490:9-102, only for the purposes of
2 articles 8 and 9 of chapter 490; and

3 (3) Virtual currency is intangible personal property and
4 shall be considered money, notwithstanding section
5 490:1-201, only for the purposes of article 9 of
6 chapter 490.

7 (b) Consistent with section 490:8-102, a digital asset may
8 be treated as a financial asset under that section pursuant to a
9 written agreement with the owner of the digital asset. If
10 treated as a financial asset, the digital asset shall remain
11 intangible personal property.

12 (c) A bank providing custodial services under chapter 556A
13 shall be considered to meet the requirements of section 490:8-
14 102 with regard to a "securities intermediary."

15 (d) Classification of digital assets under this section
16 shall be construed in a manner to give the greatest effect to
17 this chapter but shall not be construed to apply to any other
18 asset.

19 § -3 Perfection of security interests in digital assets;
20 financing statements. (a) Notwithstanding the financing
21 statement requirement specified by section 490:9-310(a) as



1 otherwise applied to general intangibles or any other provision
2 of law, perfection of a security interest in a digital asset may
3 be achieved through control, as defined in subsection (e). A
4 security interest held by a secured party having control of a
5 digital asset has priority over a security interest held by a
6 secured party that does not have control of the asset.

7 (b) Before a secured party may take control of a digital
8 asset under this section, the secured party shall enter into a
9 control agreement with the debtor. A control agreement may also
10 set forth the terms under which a secured party may pledge its
11 security interest in the digital asset as collateral for another
12 transaction.

13 (c) A secured party may file a financing statement with
14 the office described under section 490:9-501, including to
15 perfect a security interest in proceeds from a digital asset
16 pursuant to section 490:9-315(d).

17 (d) Notwithstanding any other provision of law, including
18 article 9 of chapter 490, a transferee takes a digital asset
19 free of any security interest two years after the transferee
20 takes the asset for value and does not have actual notice of an



1 adverse claim. This subsection shall apply only to a security
2 interest perfected by a method other than control.

3 (e) As used in this section:

4 "Control," consistent with subsection (f), is equivalent to
5 the term "possession" when used in article 9 of chapter 490, and
6 means the following:

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

13 (2) A smart contract created by a secured party that has
14 the exclusive legal authority to conduct a transaction
15 relating to a digital asset. As used in this
16 paragraph, "smart contract" means an automated
17 transaction, as defined in section 489E-2, or any
18 substantially similar analogue, which comprises code,
19 script, or programming language that executes the
20 terms of an agreement, and which may include taking
21 custody of and transferring an asset, or issuing



1 executable instructions for these actions, based upon
2 the occurrence or nonoccurrence of specified
3 conditions.

4 "Multi-signature arrangement" means a system of access
5 control relating to a digital asset for the purposes of
6 preventing unauthorized transactions relating to the asset, in
7 which two or more private keys are required to conduct a
8 transaction, or any substantially similar analogue.

9 "Private key" means a unique element of cryptographic data,
10 or any substantially similar analogue, that is:

- 11 (1) Held by a person;
- 12 (2) Paired with a unique, publicly available element of
13 cryptographic data; and
- 14 (3) Associated with an algorithm that is necessary to
15 carry out an encryption or decryption required to
16 execute a transaction.

17 (f) Perfection by control creates a possessory security
18 interest and does not require physical possession. For purposes
19 of article 9 of chapter 490 and this section, a digital asset is
20 located in the State if:



- 1 (1) The asset is held by a custodian incorporated or
- 2 organized in the State;
- 3 (2) The debtor or secured party is physically located in
- 4 the State; or
- 5 (3) The debtor or secured party is incorporated or
- 6 organized in the State.

7 **§ -4 Digital asset custodial services.** (a) A bank may
8 provide custodial services consistent with this section upon
9 providing sixty days written notice to the commissioner. The
10 provisions of this section are cumulative and not exclusive as
11 an optional framework for enhanced supervision of digital asset
12 custody. If a bank elects to provide custodial services under
13 this section, it shall comply with all provisions of this
14 section.

15 (b) A bank may serve as a qualified custodian, as
16 specified by the United States Securities and Exchange
17 Commission in 17 C.F.R. section 275.206(4)-2. In performing
18 custodial services under this section, a bank shall:

- 19 (1) Implement all accounting, account statement, internal
- 20 control, notice, and other standards specified by



1 applicable state or federal law and rules for
2 custodial services;

3 (2) Maintain information technology best practices
4 relating to digital assets held in custody. The
5 commissioner may specify required best practices by
6 rule;

7 (3) Fully comply with applicable federal anti-money
8 laundering, customer identification, and beneficial
9 ownership requirements; and

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

15 (c) A bank providing custodial services shall enter into
16 an agreement with, and pay for, an independent public accountant
17 to conduct an examination conforming to the requirements of 17
18 C.F.R. section 275.206(4)-2(a)(4) and (6). The accountant shall
19 transmit the results of the examination to the commissioner
20 within one hundred twenty days of the examination and may file
21 the results with the United States Securities and Exchange



1 Commission as its rules may provide. Material discrepancies in
2 an examination shall be reported to the commissioner within one
3 day. The commissioner shall review examination results upon
4 receipt within a reasonable time and during any regular
5 examination conducted under section 412:2-200.

6 (d) Digital assets held in custody under this section are
7 not depository liabilities or assets of the bank. A bank, or a
8 subsidiary, may register as an investment adviser, investment
9 company, or broker dealer as necessary. A bank shall maintain
10 control over a digital asset while in custody. A customer shall
11 elect, pursuant to a written agreement with the bank, one of the
12 following relationships for each digital asset held in custody:

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

16 (2) Custody under a bailment pursuant to subsection (e).

17 (e) If a customer makes an election under subsection
18 (d)(2), the bank may, based only upon customer instructions,
19 undertake transactions with the digital asset. A bank maintains
20 control pursuant to subsection (d) by entering into an agreement
21 with the counterparty to a transaction that contains a time for



1 return of the asset. The bank shall not be liable for any loss
2 suffered with respect to a transaction under this subsection,
3 except for liability consistent with fiduciary and trust powers
4 as a custodian under this section.

5 (f) A bank and a customer shall agree in writing regarding
6 the source code version that the bank will use for each digital
7 asset and the treatment of each asset under chapter 490 if
8 necessary. Any ambiguity under this subsection shall be
9 resolved in favor of the customer.

10 (g) A bank shall provide clear, written notice to each
11 customer and require written acknowledgement of the following:

12 (1) Prior to the implementation of any updates, material
13 source code updates relating to digital assets held in
14 custody, except in emergencies that may include
15 security vulnerabilities;

16 (2) The heightened risk of loss from transactions under
17 subsection (e);

18 (3) That some risk of loss as a pro rata creditor exists
19 as the result of custody as a fungible asset or
20 custody under a bailment pursuant to subsection

21 (d) (2);



1 (4) That custody under subsection (d)(2) may not result in
2 the digital assets of the customer being strictly
3 segregated from other customer assets; and

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

8 (h) A bank and a customer shall agree in writing to a time
9 period within which the bank shall return a digital asset held
10 in custody under this section. If a customer makes an election
11 under subsection (d)(2), the bank and the customer may also
12 agree in writing to the form in which the digital asset shall be
13 returned.

14 (i) All ancillary or subsidiary proceeds relating to
15 digital assets held in custody under this section shall accrue
16 to the benefit of the customer, except as specified by a written
17 agreement with the customer. The bank may elect not to collect
18 certain ancillary or subsidiary proceeds; provided that the
19 election is disclosed in writing. A customer who makes an
20 election under subsection (d)(2) may withdraw the digital asset



1 in a form that permits the collection of the ancillary or
2 subsidiary proceeds.

3 (j) A bank may not authorize or permit rehypothecation of
4 digital assets under this section. The bank may not engage in
5 any activity to use or exercise discretionary authority relating
6 to a digital asset except as based upon customer instructions.

7 (k) A bank may not take any action under this section that
8 would likely impair the solvency or the safety and soundness of
9 the bank, as determined by the commissioner after considering
10 the nature of custodial services customary in the banking
11 industry.

12 (l) A bank that provides custodial services under this
13 section shall pay a supervision fee equal to \$1 relating to
14 assets held in custody under this section as of December 31 of
15 each year, with payment of the supervision fee made on or before
16 the following January 31. The supervision fee shall be
17 deposited by the commissioner into the compliance resolution
18 fund established under section 26-9(o) and may be expended for
19 any purpose authorized for that fund. Banks providing custodial
20 services outside of this section shall not be required to pay
21 this supervision fee.



1 (m) The commissioner may adopt rules to implement this
2 section.

3 (n) As used in this section:

4 "Bank" has the meaning ascribed to it in section 412:5-100.

5 "Commissioner" has the meaning ascribed to it in section
6 412:1-109.

7 "Custodial services" means the safekeeping and management
8 of customer currency and digital assets through the exercise of
9 fiduciary and trust powers under this section as a custodian and
10 includes fund administration and the execution of customer
11 instructions.

12 § -5 Jurisdiction of courts. The courts of this State
13 shall have jurisdiction to hear claims in both law and equity
14 relating to digital assets including those arising from this
15 chapter and chapter 490."

16 SECTION 2. Section 412:5-205, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "§412:5-205 Authority to engage in trust business. (a) A
19 bank may not engage in any activity requiring a charter as a
20 trust company under article 8 of this chapter, including without
21 limitation serving as trustee, personal representative,



1 registrar or transfer agent for stocks and bonds, guardian,
2 agent, assignee, or receiver, or in any other fiduciary
3 capacity, unless it has received the approval of the
4 commissioner under this section. If approved, the trust
5 business may be conducted through a subsidiary, division or
6 department of the bank.

7 (b) The bank shall file an application for such approval
8 with the commissioner on a form prescribed by the commissioner,
9 together with an application fee assessed pursuant to section
10 412:2-105.2. The application shall contain the following
11 information:

- 12 (1) Appropriate board resolutions authorizing the
13 establishment of a trust company, division, or
14 department;
- 15 (2) Employment history, education, management experience,
16 and other biographical information for all executive
17 officers, trust officers, and managers of the trust
18 company, division, or department;
- 19 (3) Proposed policies concerning common trust funds,
20 overdrafts, disaster recovery plans, dividends,
21 management of assets and liabilities, conflicts of



1 interest, investments, and fee schedules. The
2 commissioner may consider any existing bank policies
3 that will be adapted and used for its trust business;

4 (4) A business plan and financial projections regarding
5 profitability of the proposed trust business;

6 (5) Evidence that the bank has or will have the financial
7 ability, responsibility, and experience to engage in
8 the trust business; and

9 (6) Any other information that the commissioner may
10 require.

11 (c) If the proposed trust business will be conducted in a
12 subsidiary of a bank, the application shall contain the
13 following additional information:

14 (1) The name of the subsidiary, the location of its
15 principal office, and any lease agreements for such
16 principal office;

17 (2) Employment history, education, management experience,
18 and other biographical information for all directors
19 of the subsidiary; and

20 (3) A proposed capital plan.



1 (d) A bank engaging in the trust business shall establish
2 and maintain the same amount of capital and surplus required of
3 a trust company under article 3, in addition to any capital and
4 surplus required to engage in the business of a bank under this
5 article. A bank engaging in the trust business shall also
6 maintain the reserves required of a trust company under section
7 412:8-202.

8 (e) The commissioner's decision shall be in the form of a
9 written order, and if approved, may contain such conditions and
10 restrictions as may be in the public interest. The application
11 shall be approved only if the commissioner is satisfied that the
12 proposed trust business will not jeopardize the safety and
13 soundness of the bank; that the applicant has sufficient
14 capital, surplus, and cash reserves; that the proposed
15 management of the trust business is financially responsible,
16 honest, and qualified; and that the trust business will be
17 carried on in a safe and sound manner. If the commissioner
18 grants approval to a bank to carry on its trust business through
19 a subsidiary, the commissioner shall issue a trust charter to
20 such subsidiary.



1 (f) Any bank [~~which~~] that is authorized to engage in the
2 trust business through a division or department of the bank
3 shall maintain books, records, and accounts for its trust
4 business that are separate from its banking business.

5 (g) A bank [~~which~~] that is authorized to engage in the
6 trust business through a subsidiary shall not be considered a
7 trust holding company under this chapter.

8 (h) Any bank that is authorized to engage in the trust
9 business under this section with respect to such trust business
10 shall also be subject to all the provisions applicable to trust
11 companies under article 8; provided that if there is any
12 conflict between the provisions of article 8 and this article
13 with respect to the operation of a trust business, the
14 provisions of article 8 shall control with respect to such trust
15 business.

16 (i) Any bank that is authorized to engage in the trust
17 business under this section may exercise all the powers
18 enumerated under section -4."

19 SECTION 3. Statutory material to be repealed is bracketed
20 and stricken. New statutory material is underscored.



S.B. NO. 2594

1 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY:

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Kurt Favella
[Signature]
[Signature]
[Signature]



S.B. NO. 2594

Report Title:

Digital Assets; Investment Securities; Secured Transactions;
Banks

Description:

Classifies digital assets under the Uniform Commercial Code. Specifies the manner of perfecting a security interest in digital assets. Authorizes banks to hold digital assets in their custody. Authorizes courts to hear claims relating to digital assets.

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