

D R A F T

FOR DISCUSSION ONLY

# **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR  
BOSTON, MASSACHUSETTS  
JULY 6 - JULY 12, 2013

# **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

*WITH PREFATORY NOTE AND COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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May 31, 2013

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# FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

## Prefatory Note for the Drafting Committee

The purpose of this act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts. It addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees.

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost \$55,000.<sup>1</sup> These assets range from online gaming pieces to photos, to digital music, to client lists, to bank accounts, to bill-paying, etc. There are 30 million Facebook accounts that belong to dead people.<sup>2</sup> The average individual has 25 passwords. Some service providers have explicit policies on what will happen when an individual dies, others do not;<sup>3</sup> even where these policies are included in the terms of service, most consumers click-through these agreements.

Only a minority of states have enacted legislation on fiduciary access to digital assets: Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island. In addition, other states, including Massachusetts, Nebraska, New York, and Oregon, have considered, or are considering, legislation.<sup>4</sup> Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal's death or incapacity is covered.

This draft is for review by the Drafting Committee. While an earlier draft focused on amendments to existing uniform laws in this area, this draft is designed to be a stand-alone act. The draft is divided into eleven sections. Sections 1-3 contain general provisions and definitions, including those relating to the scope of the fiduciary's authority. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Section 8 contains provisions relating to the rights of the fiduciary to recover property. Section 9 addresses relief from liability for compliance. Sections 10-14 address miscellaneous issues, including the effective date of the act and similar issues.

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<sup>1</sup> Kelly Greene, *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012, 8:20 PM), <http://online.wsj.com/article/SB10000872396390443713704577601524091363102.html>.

<sup>2</sup> Craig Blaha, *Over 30 Million Accounts on Facebook Belong to Dead People*, TECHNORATI (March 7, 2012, 11:05 AM), <http://technorati.com/technology/article/over-30-million-accounts-on-facebook>.

<sup>3</sup> For a concise listing, *see, e.g.*, DECEASED ACCOUNT, <http://deceasedaccount.com> (last visited Nov. 7, 2012).

<sup>4</sup> A memo summarizing these laws and legislative proposals is available on the shared Google Drive.

After many of the proposed sections, a Comment to the Committee discusses the drafting of the section and raises issues for Committee consideration. The Comments should be read in conjunction with the proposed statutory text. Some of the major issues for Committee consideration include:

1 **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Fiduciary Access to  
3 Digital Assets Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Account holder” means a person, including a decedent, that has entered into a  
6 terms-of-service agreement.

7 (2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable  
8 power of attorney.

9 (3) “[Conservator]” means a person that is appointed by a court to manage the estate of  
10 an individual. The term includes a limited [conservator].

11 [(4) “Contents,” when used in connection with an electronic communication, means  
12 information concerning the substance, purport, or meaning of the communication.]

13 (5) [“Court” means the [insert name of court in this state having jurisdiction in matters  
14 relating to the content of this [act]].

15 (6) “Custodian” means a person that stores, or has control of, digital property or  
16 electronic communication of an account holder.

17 (7) “Digital account” means an electronic system for creating, generating, sending,  
18 receiving, storing, displaying, or processing information to which the account holder has access.

19 (8) “Digital asset” means information created, generated, sent, communicated, received,  
20 or stored by electronic means on a digital device or system that delivers digital information. The  
21 term includes a contract right.

22 (9) “Digital device” means an electronic device that can receive, store, process, or send  
23 digital information.

1           (10) “Digital property” means the lawful ownership and management of and rights  
2 related to a digital account and digital asset. [The term does not include the contents of an  
3 electronic communication.]

4           (11) “Electronic” means relating to technology having electrical, digital, magnetic,  
5 wireless, optical, electromagnetic, or similar capabilities.

6           (12) “Electronic communication” means a transfer of a sign, signal, writing, image,  
7 sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,  
8 electromagnetic, photoelectronic or photooptical system that affects interstate or foreign  
9 commerce. The term does not include a wire or oral communication; any communication made  
10 through a tone-only paging device; any communication from a tracking device; or electronic  
11 funds transfer information stored by a financial institution in a communications system used for  
12 the electronic storage and transfer of funds.

13           (13) “Electronic communication service” means a person that provides electronic  
14 communications to the public.

15           (14) “Fiduciary” includes a personal representative, [conservator], guardian, agent, or  
16 trustee.

17           (15) “Governing instrument” means a will, trust, instrument creating a power of attorney,  
18 or trust or other dispositive or nominative instrument.

19           (16) “Information” means data, text, images, sounds, codes, computer programs,  
20 software, databases or similar intelligence of any nature.

21           (17) “Person” means an individual, estate, business or nonprofit entity, public  
22 corporation, government or governmental subdivision, agency, or instrumentality, or other legal  
23 entity.

1           (18) “Personal representative” means an executor, administrator, successor personal  
2 representative, special administrator, or a person that performs substantially the same function  
3 under law of this state other than this [act].

4           [(19) “Power of attorney” means a record that grants an agent authority to act in the place  
5 of a principal with respect to digital property.]

6           (20) “Principal” means an individual who grants authority to an agent in a power of  
7 attorney.

8           (21) “Protected person” means an individual for whom a protective order has been  
9 entered.

10          (22) “Protective order” means an order appointing a [conservator] or related to  
11 management of a protected person’s digital property.

12          (23) “Record” means information that is inscribed on a tangible medium or that is stored  
13 in an electronic or other medium and is retrievable in perceivable form.

14          (24) “Remote computing service” means a person that stores electronic records or  
15 provides computer processing services to the public by means of an electronic communication  
16 service.

17          (25) “Terms-of-service agreement” means an agreement that controls the relationship  
18 between an account holder and a custodian. The term includes a terms-of-use agreement, a  
19 license agreement, and a privacy policy.

20          (26) “Trustee” means a fiduciary with legal title to assets pursuant to an agreement or  
21 declaration that creates a beneficial interest in others.

22          (27) “Will” means a testamentary instrument. The term includes a codicil and a  
23 testamentary instrument that only appoints an [executor] or revokes or revises another will.



1 **Comments for the Committee**

2 The definitions of agent, conservator, court, electronic, fiduciary, governing instrument,  
3 information, person, personal representative, power of attorney, principal, property, protected  
4 person, protective order, record, and will are based on those in the Uniform Probate Code. The  
5 other definitions are new for this act, although the definition of digital service comes from the  
6 White House Digital Government Strategy:  
7 [http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-  
9 strategy.pdf](http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-<br/>8 strategy.pdf). The definition of “contents” is taken from 18 U.S.C. § 2510(8), the definition of  
10 “electronic communication” tracks the language of 18 U.S.C. § 2510(12), the definition of  
11 “electronic communication service” is drawn from 18 U.S.C. 2510(15), and the definition of  
12 “remote computing service” is adapted from 18 U.S.C. § 2711(2), to help ensure the Act’s  
compliance with federal law.

13 A custodian does not include an employer because an employer typically does not have a  
14 terms-of-service agreement with an employee. Any digital property created through employment  
15 generally belongs to the employer.

16 **SECTION 3. FIDUCIARY AUTHORITY.**

17 (a) This [act] applies only to a grant of authority to a fiduciary.

18 (b) A fiduciary with [legal] authority over digital property of an account holder has the  
19 same authority as the account holder. The exercise of authority by a fiduciary over digital  
20 property is not a transfer of the property. The rights of the account holder are subject to copyright  
21 and other law as well as any applicable and enforceable terms of service agreement.

22 (c) A fiduciary with authority over digital property of an account holder has the lawful  
23 consent of the account holder and is an authorized user of the account.

24 (d) A fiduciary with authority over a digital device of a decedent, protected person,  
25 principal, or settlor may access any record stored on the digital device.

26 **Comment**

27 This section distinguishes the authority of fiduciaries over digital property subject to this  
28 act from any other efforts to access the digital property. Family members or friends may seek  
29 access to the digital property of others, but such efforts are subject to other laws and are not  
30 covered by this act. Moreover, the fiduciary exercises authority only on behalf of the account  
31 holder.

32 Subsection (b) clarifies that the fiduciary has the same authority as the account holder.

1 This issue potentially arises in two situations: 1) the fiduciary obtains access to a password  
2 directly from the account holder, as would be true in various circumstances such as for the  
3 trustee of a trust or someone who has stored passwords with a digital locker; and 2) the fiduciary  
4 has obtained access pursuant to this act. The fiduciary does not, however, obtain power over any  
5 digital property if that property was illegally obtained by the account holder. The section also  
6 provides that control by a fiduciary should not be considered a transfer that would violate the  
7 anti-transfer terms of a terms-of-service agreement.

8 Subsection (c) is designed to establish that the fiduciary is authorized to exercise control  
9 over digital property in accordance with other applicable laws. The language mirrors that used in  
10 Title II of the Electronic Communications Privacy Act of 1986 (ECPA), known as the Stored  
11 Communications Act (SCA), 18 U.S.C. § 2701 *et seq.* The subsection clarifies that the fiduciary  
12 is “authorized” under the two federal statutes that prohibit unauthorized access to computers and  
13 computer data, the SCA and the Computer Fraud and Abuse Act,<sup>5</sup> as well as pursuant to any  
14 comparable state laws criminalizing unauthorized access.<sup>6</sup>

15 The Stored Communications Act contains two potentially relevant prohibitions.

16 1) 18 U.S.C. § 2701(a), which concerns access to the digital property, makes it a crime  
17 for anyone to “intentionally access [] without authorization a facility through which an electronic  
18 communication service is provided” as well as to “intentionally exceed [] an authorization to  
19 access that facility.” Thus, someone who has authorization to access the facility is not engaging  
20 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user  
21 of that service with respect to a communication of or intended for that user.”<sup>7</sup>

22 2) 18 U.S.C. § 2702, “Voluntary disclosure of customer communications or records,”  
23 concerns actions by the service provider. It prohibits an electronic communication service or a  
24 remote computing service from knowingly divulging the contents of a communication that is  
25 stored by or carried or maintained on that service unless disclosure is made (among other  
26 exceptions) “to an addressee or intended recipient of such communication or an agent of such  
27 addressee or intended recipient” or “with the *lawful consent* of the originator or an addressee or  
28 intended recipient of such communication, or the subscriber in the case of remote computing  
29 service.” 18 U.S.C. § 2702(b)(1), (3) (emphasis added). The statute permits disclosure of  
30 “customer records” that do not include content, either with lawful consent from the customer or  
31 “to any person other than a governmental entity.” 18 U.S.C. § 2702(c)(2) and (6). Thus, unlike  
32 the contents, the provider is permitted to disclose the non-content “records” of the electronic

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<sup>5</sup> Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

<sup>6</sup> *See Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), <http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx>; Christina Kunz, Peter Rademacher & Lucie O’Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive).

<sup>7</sup> 18 U.S.C. §§ 2701(a), (c)(2).

1 communications to anyone except the government, and may disclose to the government with the  
2 customer's lawful consent or in certain emergencies.

3 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.  
4 18 U.S.C. § 1030. Like the SCA, the CFAA similarly protects against anyone who “intentionally  
5 accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. § 1030(a).

6 State laws vary in their coverage, but typically prohibit unauthorized access.

7 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to  
8 access the files under the *first* section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA;  
9 and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can  
10 voluntarily disclose the files pursuant to the *second* relevant provision of the SCA, 18 U.S.C.  
11 § 2702. Moreover, this language should be adequate to avoid liability under the state  
12 unauthorized access laws.

13 Subsection (d) is designed to clarify that the fiduciary is authorized to access material  
14 stored on the digital device of the decedent, protected person, principal, or settlor, thereby  
15 superseding state laws on unauthorized access to the device.

16 **Alternative A**

17 **SECTION 4. CONTROL OF DIGITAL PROPERTY AND ACCESS TO**

18 **COMMUNICATIONS OF DECEDENT BY PERSONAL REPRESENTATIVE.** Except as  
19 a decedent otherwise provided by will or unless otherwise prohibited by a court, and subject to  
20 Section 3, a personal representative may:

21 (1) exercise control over digital property of the decedent;

22 (2) to the extent not inconsistent with 18 U.S.C. Section 2702(b)(3), obtain access to the  
23 contents of each record controlled by an electronic communication service or a remote  
24 computing service sent to or received by the decedent; and

25 (3) obtain other records of the decedent controlled by an electronic communication  
26 service or a remote computing service, including a log of the electronic address of each party  
27 with whom the decedent communicated.

**Alternative B**

**SECTION 4. AUTHORITY OVER DIGITAL PROPERTY OF DECEDENT BY  
PERSONAL REPRESENTATIVE.**

(a) Subject to Section 3 and except as otherwise provided in subsection (b), a personal representative may access, manage, deactivate, and delete the digital property of the decedent.

(b) A personal representative may not exercise authority over digital property of a decedent if prohibited by:

- (1) the will of the decedent;
- (2) a court order; or
- (3) law of this state other than this [act].

**End of Alternatives**

**Comments for the Committee**

The Committee has included two different versions of Section 4. The first version responds to the concerns of internet service providers who believe that the act should be structured to clarify the difference between fiduciary authority over digital property other than electronic communications protected by federal law (the Electronic Communications Privacy Act (ECPA)), and authority over ECPA-covered electronic communications. For electronic communications, the Committee had agreed that this next draft would set out procedures that cover: first, logs and records that providers may release without consent under ECPA; and second, ECPA-covered communications. As detailed in the comments to Section 3 (above), federal law distinguishes between the permissible disclosure of the “contents” of a communication, covered in 18 U.S.C. § 2702(b), and of “a record or other information pertaining to” a subscriber or customer, covered in 18 U.S.C. § 2702(c). The first, content-based material, can be divided into two types of communications: those received by the account holder and those sent. Material when the account holder is the “addressee or intended recipient” can be disclosed either to that individual or to an agent for that person. 18 U.S.C. § 2702(b)(1). Material for which the account holder is the “originator” (as well as an addressee or intended recipient) can be disclosed with the account holder’s “lawful consent.” 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is required. By contrast to content-based material, non-content material can be disclosed not only with the lawful consent of the account holder but also to any person other than a governmental entity (which would presumably include fiduciaries).

The second version of Section 4 establishes the default rule that the personal

1 representative is authorized to administer all of the decedent’s digital property, regardless of  
2 whether it is covered by ECPA. The section is modeled on the formulation of the personal  
3 representative’s default power set out in UPC Sec. 3-715. The basis for this authority over all  
4 digital property is that, under Section 3, the personal representative is deemed to have the lawful  
5 consent of the decedent and to be an authorized user so that ECPA would not prevent fiduciary  
6 access.

7 **Comment**

8 The term, “otherwise provided by will,” is intended to indicate that a will controls the  
9 personal representative’s authority. As is true more generally with respect to interpretation of  
10 wills, public policy can override the explicit terms of a will.

11 **Alternative A**

12 **SECTION 5. CONTROL OF DIGITAL PROPERTY AND ACCESS TO**  
13 **COMMUNICATIONS OF PROTECTED PERSON BY [CONSERVATOR].** Subject to  
14 Section 3, at the initial hearing on an application to appoint a [conservator] for an individual or  
15 on later application by a [conservator] of a protected person, a court may authorize a  
16 [conservator] to:

- 17 (1) exercise control over digital property of the individual or protected person;  
18 (2) to the extent not inconsistent with 18 U.S.C. Section 2702(b)(3), obtain access to the  
19 contents of each record controlled by an electronic communication service or a remote  
20 computing service sent to or received by the individual or protected person; and  
21 (3) obtain other records of the individual or protected person controlled by an electronic  
22 communication service or a remote computing service, including a log of the electronic address  
23 of each party with whom the individual or protected person communicated.

24 **Alternative B**

25 **SECTION 5. AUTHORITY OVER DIGITAL PROPERTY OF PROTECTED**  
26 **PERSON BY [CONSERVATOR].**

- 27 (a) Subject to Section 3, at the initial hearing on an application to appoint a [conservator]

1 for an individual or on later application by a [conservator] of a protected person, the court may  
2 authorize the [conservator] to access, manage, deactivate or delete the digital property of the  
3 individual or protected person.

4 (b) In granting authority to a [conservator] under subsection (a), the court shall consider  
5 intent of the protected person with respect to the authority granted to the extent that intent can be  
6 ascertained.

7 **End of Alternatives**

8 **Comments for the Committee**

9 Section 5 establishes that the conservator must be specifically authorized by the court to  
10 access the protected person’s digital property. Each of the different levels of access must be  
11 specifically granted by court order. The Committee may need to clarify that the requirement in  
12 Section 5 for express authority over digital property does not limit the fiduciary’s authority over  
13 the underlying “bricks and mortar” asset, such as a bank account.

14 The two versions of Section 5 are comparable to the two versions of Section 4. The first  
15 version responds to the concerns of internet service providers who believe that the act should be  
16 structured to clarify the difference between fiduciary authority over digital property other than  
17 electronic communications protected by federal law, the Electronic Communications Privacy  
18 Act (ECPA), and authority over ECPA-protected electronic communications. For electronic  
19 communications, the Committee had agreed that this next draft would set out procedures that  
20 cover: first, logs and records that providers may release without consent under ECPA; and  
21 second, ECPA-covered communications.

22 In the second version, the conservator is authorized to access all digital property of the  
23 protected person, regardless of whether it is ECPA-covered. The basis for this authority over all  
24 digital property is that, under Section 3, the conservator is deemed to have the lawful consent of  
25 the protected person and to be an authorized user so that ECPA would not prevent fiduciary  
26 access.

27 Subsection (b) of the second version repeats the introductory language in UPC  
28 Section 5-411(c), and is designed to clarify that a decision by the court to grant powers to the  
29 conservator under this section must be based primarily on the decision that the protected person  
30 would have made, if of full capacity. The protected person’s personal values and expressed  
31 desires, past and present, are to be considered when making decisions about the conservator’s  
32 authority. Existing state law may also set out the requisite standards for a conservator’s actions,  
33 and the bracketed language allows for reference to those laws. Under Section 3, the conservator  
34 has the same power over digital property as the account holder. The conservator must exercise  
35 authority in the interests of the protected person.

1 **SECTION 6. CONTROL OF DIGITAL PROPERTY BY AGENT UNDER**  
2 **POWER OF ATTORNEY.** Subject to Section 3 of this act, if a power of attorney grants  
3 authority to an agent over digital property of a principal, and exercise of the authority is not  
4 otherwise prohibited by a governing instrument, the agent may[:  
5 (1)] access, manage, deactivate, and delete the property[; and  
6 (2) change a governing instrument affecting the property].

7 **Comments for the Committee**

8 This section establishes that the agent must be specifically authorized by the principal to  
9 access the principal's digital property, and it is modeled on UPC Sec. 5B-201(a). The American  
10 College of Trusts and Estates Counsel's State Laws Committee recently asked the Committee to  
11 consider whether the authority should be a default power, instead.

12 Each of the different levels of access must be specifically granted by the power. An  
13 affirmative grant of authority to an agent is required because of the risk those acts pose to the  
14 principal's property and estate plan, and it is consistent with the agent's lack of supervision by a  
15 court.

16 Subsection 2 is bracketed to indicate each state will need to decide whether an agent can  
17 change a governing instrument. Because of the danger of fraud and influence inherent in the use  
18 of powers of attorney, we may want to discuss further whether or not an agent's control should  
19 differ from that granted to other fiduciaries.

20 There should be no question that an explicit delegation of authority in a power of attorney  
21 constitutes authorization from the account holder to access digital property, and provides "lawful  
22 consent" to allow disclosure of electronic communications from an electronic communications  
23 service or a remote computing service pursuant to applicable law. Both authorization and lawful  
24 consent are important because 18 U.S.C. § 2701 deals with intentional access without  
25 authorization and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

26 **SECTION 7. CONTROL OF DIGITAL PROPERTY BY TRUSTEE.** Subject to  
27 Section 3, a trustee may access, manage, deactivate, and delete digital property held in the trust  
28 in accordance with the terms of the trust.

29 **Comments for the Committee**

30 There should be no question that holding property in trust form constitutes authorization  
31 from the account holder to access digital property, and that it provides "lawful consent" to allow  
32 disclosure of electronic communications from an electronic communications service or a remote

1 computing service pursuant to applicable law. Both authorization and lawful consent are  
2 important because 18 U.S.C. § 2701 deals with intentional access without authorization, and  
3 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

4 **SECTION 8. DIGITAL PROPERTY RECOVERY FROM CUSTODIAN.**

5 (a) “Certified copy of a power of attorney” means a record accompanied by an affidavit  
6 in which the affiant attests that the record is an accurate record of the original of the power and  
7 that, to the best of the affiant’s knowledge, the power remains in effect.

8 (b) If the fiduciary of an account holder complies with subsection (c) and makes a request  
9 in a record to a custodian of digital property or electronic communications of the account holder  
10 for access to the property and communications [, other than the contents of the communications]  
11 or ownership or a copy of the property or communications, the custodian shall comply with the  
12 request.

13 (c) If a request under subsection (b) is made:

14 (1) by a personal representative, the request must be accompanied by a certified  
15 copy of the letter of appointment of the representative;

16 (2) by a [conservator], the request must be accompanied by a certified copy of the  
17 court order that gives the [conservator] authority over the digital property;

18 (3) by an agent, the request must be accompanied by a certified copy of the power  
19 of attorney that authorizes the agent to exercise authority over the digital property; or

20 (4) by a trustee, the request must be accompanied by a certified copy of the trust  
21 instrument [pursuant to Uniform Trust Code Section 1013] that authorizes the trustee to exercise  
22 authority over the digital property.

23 (d) A custodian shall comply with a request made under subsection (b) not later than  
24 [60] days after receipt of the request. If the custodian fails to comply, the fiduciary may apply to  
25 the court for an order directing compliance.



1            [(e) Instead of furnishing a copy of a trust instrument under subsection (c)(4), the trustee  
2 may furnish a certification of trust. A certification of trust:

3            (1) must contain the following information:

4                    (A) that the trust exists and the date the trust instrument was executed;

5                    (B) the identity of the settlor;

6                    (C) the identity and address of the currently acting trustee;

7                    (D) the powers of the trustee;

8                    (E) the revocability or irrevocability of the trust and the identity of any  
9 person holding a power to revoke the trust;

10                    (F) the authority of a co-trustee to sign or otherwise authenticate, and  
11 whether all or less than all co-trustees are required to exercise powers of the trustee;

12                    (G) the trust's taxpayer identification number; and

13                    (H) the manner of taking title to trust property;

14            (2) may be signed or otherwise authenticated by any trustee;

15            (3) must state that the trust has not been revoked, modified or amended in a  
16 manner that would cause the representations contained in the certification of trust to be incorrect;  
17 and

18            (4) need not contain the dispositive terms of a trust.

19            (f) A recipient of a certification of trust under subsection (e) may require the trustee to  
20 furnish copies of excerpts from the original trust instrument and later amendments which  
21 designate the trustee and confer on the trustee the power to act in the pending transaction.

22            (g) A custodian that acts in reliance on a certification under subsection (e) without  
23 knowledge that the representations contained in it are incorrect is not liable to any person for so

1 acting and may assume without inquiry the existence of the facts contained in the certification.

2 (h) A person that in good faith enters a transaction in reliance on a certification of trust  
3 under subsection (e) may enforce the transaction against the trust property as if the  
4 representations contained in the certification were correct.

5 (i) A person that demands the trust instrument in addition to a certification of trust under  
6 subsection (e) or excerpts under subsection (f) is liable for damages if the court determines that  
7 the person did not act in good faith in demanding the trust instrument.]

8 (j) This section does not limit the right of a person to obtain a copy of a trust instrument  
9 in a judicial proceeding concerning the trust.

10 **Comment**

11 The bracketed material allows states that have already enacted the UTC to use the shorter  
12 version. Those states that have not adopted the UTC may choose to include the bracketed  
13 material, which is a slight modification of the language in Uniform Trust Code Section 1013.

14 Under subsection (d), the custodian must comply within a certain period of time. The  
15 Committee may want to discuss, at Style's suggestion, whether to include an expedited time  
16 period.

17 **SECTION 9. CUSTODIAN IMMUNITY.** A custodian and its officers, employees,  
18 and agents are immune from liability for any action done in compliance with this [act].

19 **Comment**

20 This section establishes that custodians are protected from liability when they act in  
21 accordance with the procedures of this act and in good faith. The types of actions covered  
22 include disclosure as well as transfer of copies.

23 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
24 applying and construing this uniform act, consideration must be given to the need to promote  
25 uniformity of the law with respect to its subject matter among states that enact it.

26 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
27 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic

1 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not  
2 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
3 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
4 Section 7003(b).

5 **[SECTION 12. SEVERABILITY.** If any provision of this [act] or its application to  
6 any person or circumstance is held invalid, the invalidity does not affect other provisions or  
7 applications of this [act] which can be given effect without the invalid provision or application,  
8 and to this end the provisions of this [act] are severable.]

9 *Legislative Note: Include this section only if this state lacks a general severability statute or a*  
10 *decision by the highest court of this state stating a general rule of severability.*

11  
12 **SECTION 13. APPLICABILITY.** This [act] applies to:

13 (1) each will executed on or after the effective date of this [act]; and

14 (2) each proceeding pending in court or commenced after the effective date of this [act],  
15 unless the court determines that it is not feasible to apply the [act] or, in the interests of justice,  
16 the [act] should not apply.

17 **SECTION 14. REPEALS; CONFORMING AMENDMENTS.**

18 (a) ...

19 (b) ...

20 (c) ...

21 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect....