

DRAFT  
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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For February 15-16, 2013 Drafting Committee Meeting

*With Prefatory Note and Comments*

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February 7, 2013

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# FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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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. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Sections 8-9 contain provisions relating to the rights of the fiduciary to recover property, and the rights of interested parties to object to fiduciary access. Section 10 addresses relief from liability for compliance. Sections 11-14 address miscellaneous

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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.

issues, including the effective date of the act and similar issues.

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) the definitions of “custodian” and “digital property” set out in Section 2;
- 2) the type and nature of control that can be exercised by a fiduciary, raised initially in Section 4; and
- 3) the process and standards for objecting to a fiduciary’s control that are addressed in Section 9.

1 **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2  
3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Fiduciary

4 Access to Digital Assets Act.

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

6 (1) “Account holder” means a decedent, protected person, principal, or settlor who has a  
7 terms-of-service agreement with a custodian.

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

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

12 (4) “Court” means the [court] in this state having jurisdiction in matters relating to the  
13 content of this [act].

14 (5) “Custodian” means a person that electronically stores digital property of an account  
15 holder or otherwise has control over digital property of the account holder.

16 (6) “Digital account” means an electronic system for creating, generating, sending,  
17 receiving, storing, displaying, or processing information which provides access to a digital asset  
18 or a digital service.

19 (7) “Digital asset” means information created, generated, sent, communicated, received,  
20 or stored by electronic means on a digital service or digital device; the term includes a username,  
21 word, character, code, or contract right under the terms-of-service agreement.

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

24 (9) “Digital property” means the ownership and management of and rights related to a

1 digital account and digital asset.

2 (10) “Digital service” means the delivery of digital information (such as data or content)  
3 and transactional services (such as online forms and benefits applications) across a variety of  
4 platforms, devices and delivery mechanisms (such as websites, mobile applications, and social  
5 media).

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

8 (12) “Fiduciary” includes a personal representative, conservator, agent, or trustee.

9 (13) “Governing instrument” means a will, trust, instrument creating or exercising a  
10 power of attorney, or other dispositive, appointive, or nominative instrument of any similar type.

11 (14) “Information” means data, text, images, sounds, codes, computer programs,  
12 software, databases, or the like.

13 (15) “Interested person” means heirs, devisees, children, spouses, creditors, beneficiaries  
14 and any others having a property right in or claim against a trust estate or the estate of a  
15 decedent, ward or protected person which may be affected by the proceeding. It also includes  
16 persons having priority for appointment as personal representative, and other fiduciaries  
17 representing interested persons. The meaning as it relates to particular persons may vary from  
18 time to time and must be determined according to the particular purposes of, and matter involved  
19 in, any proceeding. In a conservatorship proceeding, it also includes any governmental agency  
20 paying or planning to pay benefits to the ward or protected person and any public or charitable  
21 agency that regularly concerns itself with methods for preventing unnecessary or overly intrusive  
22 court intervention in the affairs of persons for whom protective orders may be sought and that  
23 seeks to participate in the proceedings.

1           (16) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
2 limited liability company, association, joint venture, business or nonprofit entity, public  
3 corporation, government or governmental subdivision, agency, or instrumentality, or any other  
4 legal or commercial entity.

5           (17) “Personal representative” means an executor, administrator, successor personal  
6 representative, special administrator, or a person that performs substantially the same function  
7 under the law of this state other than this act.

8           (18) “Power of attorney” means a writing or other record that grants an agent authority to  
9 act in the place of a principal.

10          (19) “Principal” means an individual who grants authority to an agent in a power of  
11 attorney.

12          (20) “Property” means all property, whether real, personal, or mixed, or tangible or  
13 intangible, or any interest therein. The term includes digital property.

14          (21) “Protected person” means an individual for whom a protective order has been made.

15          (22) “Protective order” means an order appointing a conservator or another order related  
16 to management of a protected person’s property.

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

19          (24) “Terms-of-service agreement” means a contract that controls the relationship  
20 between an account holder and a custodian. The term includes a terms-of-use agreement.

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

23          (26) “Will” means any testamentary instrument and includes a codicil and any



1 testamentary instrument which merely appoints an executor or revokes or revises another will.

2 **Comments for the Committee**

3 The definitions of agent, conservator, court, electronic, fiduciary, governing instrument,  
4 information, interested person, person, personal representative, power of attorney, principal,  
5 property, protected person, protective order, record, and will are based on those in the Uniform  
6 Probate Code. The other definitions are new for this act, although the definition of digital  
7 service comes from the White House Digital Government Strategy:  
8 [http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-  
strategy.pdf](http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-<br/>9 strategy.pdf).

10 The Committee indicated it would like to reconsider the definitions of digital assets and  
11 digital accounts, as well as the necessity of a separate definition for digital property. There are  
12 important issues concerning what rights can be obtained by the authorized when it comes to  
13 digital property; for example, what about licensing agreements governed by Terms of Use that  
14 prevent transferability?

15 The definition of “custodian” is an issue that the Committee may want to consider. The  
16 definition potentially goes well beyond internet service providers. For example, some employers  
17 might be considered custodians, because they provide employees with e-mail addresses. If the  
18 Committee decides to retain the existing definition, then this may affect Section 8, which sets out  
19 the standards for obtaining digital property from custodians.

20 **SECTION 3. APPLICABILITY.** This [act] applies to a grant of authority over digital  
21 property only to a fiduciary.

22 **Comment**

23 This section distinguishes the authority over digital property of fiduciaries, which are  
24 subject to this act, from any other efforts to access the digital property. Family members or  
25 friends may seek access to the digital property of others, but such efforts are subject to other laws  
26 and are not covered by this act.

27 **SECTION 4. CONTROL OF DIGITAL PROPERTY OF DECEDENT BY**  
28 **PERSONAL REPRESENTATIVE.** Except as a testator otherwise provided by will or until a  
29 court otherwise orders, a personal representative, acting reasonably for the benefit of the  
30 interested persons, may exercise control over the decedent’s digital property to the extent  
31 permitted under applicable law and a terms-of-service agreement.

1 **Comments for the Committee**

2 This section establishes the default rule that the personal representative is authorized to  
3 administer the decedent’s digital property. It is modeled on the formulation of the personal  
4 representative’s default power set out in UPC Sec. 3-715.

5 The Committee has a variety of issues to consider when it comes to the personal  
6 representative’s authority. First, does the section cover any personal representative, whether  
7 appointed pursuant to formal or informal probate? With formal probate proceedings, a personal  
8 representative is appointed pursuant to a court order issued by a judge. E.g., UPC  
9 Sections 3-401-402. Through informal probate, by contrast, a personal representative may be  
10 appointed by the Registrar (a judge or a court clerk, see UPC Section 1-307), or similar  
11 nonjudicial officer. In either case, an additional subsection may need to specify the meaning of  
12 the personal representative’s obligations as a fiduciary. For example, UPC Section 3-703 states  
13 that the personal representative “is a fiduciary who shall observe the standards of care applicable  
14 to trustees. A personal representative is under a duty to settle and distribute the estate of the  
15 decedent in accordance with the terms of any probated and effective will and this [code], and as  
16 expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the  
17 authority conferred upon him by this [code], the terms of the will, if any, and any order in  
18 proceedings to which he is party for the best interests of successors to the estate.”

19 Second, what does “exercise control” mean? This may need to be defined in the general  
20 definitions section at the beginning of the act because it is an issue for all fiduciaries. It could  
21 include everything from a simple request for information to maintaining ongoing access to  
22 terminating the digital property. If, for example, an account holder has stored a governing  
23 instrument on the internet, then the fiduciary may only want access to that. Or does access to  
24 assets stored under a licensing agreement enable the fiduciary to copy the assets or to control and  
25 dispose of them?

26 **SECTION 5. CONTROL OF DIGITAL PROPERTY OF PROTECTED PERSON**  
27 **BY CONSERVATOR.**

28 (a) At the initial hearing on an application to appoint a conservator, or later application  
29 by a conservator, the court may expressly authorize the conservator to do one or more of the  
30 following, subject to the provisions of the applicable terms-of-service agreement:

- 31 (1) exercise control over digital property of the protected person;  
32 (2) exercise a right in digital property of the protected person; and  
33 (3) change a governing instrument affecting the digital property of the protected  
34 person.

1 (b) In authorizing a conservator’s powers under subsection (a), the court shall consider  
2 the protected person’s intent with respect to those powers to the extent that intent can be  
3 ascertained.

4 **Comments for the Committee**

5 This section establishes that the conservator must be specifically authorized by the court  
6 to access the protected person’s digital property. Each of the three different levels of access  
7 must be specifically granted by court order. As with the other types of fiduciaries covered by the  
8 act, the Committee needs to consider what specific rights are granted through the terms “exercise  
9 control” and “exercise rights.” These may need to be defined in the general definitions section at  
10 the beginning of the act. We need to insure that the requirement in Section 5 for express  
11 authority over digital property does not limit the fiduciary’s authority over the underlying “bricks  
12 and mortar” asset, such as a bank account.

13 Subsection (b) repeats the introductory language in UPC Section 5-411(c), and is  
14 designed to clarify that decision by the court to grant powers to the conservator under this  
15 section must be based primarily on the decision that the protected person would have made, if of  
16 full capacity. The protected person’s personal values and expressed desires, past and present, are  
17 to be considered when making decisions about the conservator’s authority. Existing state law  
18 may also set out the requisite standards for a conservator’s actions, and the bracketed language  
19 allows for reference to those laws.

20 **SECTION 6. CONTROL OF DIGITAL PROPERTY BY AGENT UNDER**  
21 **POWER OF ATTORNEY.** If a power of attorney grants authority to an agent and exercise of  
22 authority is not otherwise prohibited by a terms-of-service agreement or governing instrument to  
23 which the digital property of the principal is subject, the agent may:

- 24 (1) exercise control over the digital property;
- 25 (2) exercise any right in the digital property; and
- 26 (3) change a governing instrument affecting the digital property.

27 **Comments for the Committee**

28 This section establishes that the agent must be specifically authorized by the principal to  
29 access the principal’s digital property, and it is modeled on UPC Sec. 5B-201(a).

30 Each of the three different levels of access must be specifically granted by the power. An  
31 affirmative grant of authority to an agent is required because of the risk those acts pose to the

1 principal's property and estate plan, and it is consistent with the agent's lack of supervision by a  
2 court. As with the other types of fiduciaries covered by the act, what specific rights are granted  
3 through the terms "exercise control" and "exercise rights"? These may need to be defined in the  
4 general definitions section at the beginning of the act.

5 Do we want to restrict an agent's access to a bank or financial account that is accessible  
6 online? Because of the danger of fraud and influence inherent in the use of powers of attorney,  
7 we should discuss whether or not an agent's control should differ from that granted to other  
8 fiduciaries.

9 **SECTION 7. CONTROL OF DIGITAL PROPERTY BY TRUSTEE.** A trustee may  
10 exercise control over and rights in any digital property according to the terms of the trust.

11 **Comment**

12 The Committee needs to consider what, if any, limits can be imposed on the trustee's  
13 actions.

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

15 (a) A fiduciary with authority over digital property of another individual under the act  
16 has the lawful consent of the account holder and is an authorized user under all applicable state  
17 and federal statutes.

18 (b) On receipt of a written request by a fiduciary for access to digital property,  
19 ownership of digital property, or a copy of a digital asset, a custodian with control of the digital  
20 property or asset shall provide the fiduciary the requested access, ownership, or copy, if the  
21 fiduciary complies with subsection (c).

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

23 (1) by a personal representative, the request must be accompanied by a certified  
24 copy of the letter of appointment of the personal representative which grants authority over the  
25 digital property;

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

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

3 (4) by a trustee, the request must be accompanied by a certified copy of the trust  
4 instrument that authorizes the trustee to exercise authority over the digital property.

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

8 (e) A certified copy of a trust or power of attorney means a copy accompanied by an  
9 affidavit by which the affiant attests that the copy is a true, exact, complete and unaltered  
10 photocopy of the original, and that to the best of the affiant’s knowledge, said document remains  
11 in full force and effect.

12 Subsection (a) is designed to establish that that the fiduciary is authorized to exercise  
13 control over digital property in accordance with other applicable laws. The language mirrors that  
14 used in the Stored Communications Act (SCA), 18 U.S.C. Section 2701 *et seq.*, and clarifies that  
15 the fiduciary is “authorized” under the two federal statutes that prohibit unauthorized access to  
16 computers and computer data, the SCA and the Computer Fraud and Abuse Act,<sup>5</sup> as well as  
17 pursuant to any comparable state laws criminalizing unauthorized access.<sup>6</sup>

18 The Stored Communications Act contains two relevant prohibitions.

19 1) 18 USC Sec. 2701(a), which concerns access to the digital property, makes it a crime  
20 for anyone to “intentionally access[] without authorization a facility through which an electronic  
21 communication service is provided” as well as to “intentionally exceed[] an authorization to  
22 access that facility.” Thus, someone who has authorization to access the facility is not engaging  
23 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user

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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).

1 of that service with respect to a communication of or intended for that user.”<sup>7</sup>

2 2) 18 USC Sec. 2702, “Voluntary disclosure of customer communications or records,”  
3 concerns actions by the service provider. It prohibits an electronic communication service or a  
4 remote computing service from knowingly divulging the contents of a communication that is  
5 stored by or carried or maintained on that service unless disclosure is made “with the lawful  
6 consent of the originator or an addressee or intended recipient of such communication, or the  
7 subscriber in the case of remote computing service.”<sup>8</sup>

8 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.  
9 18 U.S.C. 1030.<sup>9</sup>

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

11 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to  
12 access the files under the *first* section of the SCA, 18 U.S.C. 2701 as well as under the CFAA;  
13 and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can  
14 voluntarily disclose the files pursuant to the *second* relevant provision of the SCA,  
15 18 U.S.C. 2702.<sup>10</sup> Moreover, this language should be adequate to avoid liability under the state  
16 unauthorized access laws.

17 For an example of a certification procedure that would not require that the entire trust or  
18 power of attorney be produced, see Uniform Trust Code Section 1013.

19 **SECTION 9. OBJECTION TO RECOVERY OF FIDUCIARY’S DIGITAL**  
20 **PROPERTY BY FIDUCIARY.**

21 (a) An interested party may file with the court with jurisdiction over the account holder  
22 or the fiduciary [under applicable state law] a written objection to the fiduciary’s request for

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

<sup>8</sup> 18 U.S.C. Section 2702(b) provides: (b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

...

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”

<sup>9</sup> Like the SCA, the CFAA similarly protects against anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. 1030(a).

<sup>10</sup> 18 U.S.C. Section 2702.

1 control over or the fiduciary's exercise of continued control over digital property.

2 (b) On the filing of an objection under subsection (a), the court shall order a hearing on  
3 the objection at least [15] days and not later than [60] days after the filing.

4 (c) At a hearing under subsection (b), the court shall consider the objection and may  
5 order the fiduciary not to exercise control or any other right over the digital property.

6 **Comments for the Committee**

7 This section is modeled on C.G.S.A. § 45a-343 (2012). The goal of the section is to  
8 protect the account holder's intent by preventing the fiduciary, at least in limited situations, from  
9 accessing the digital property. Note that this section includes only court-appointed fiduciaries,  
10 so agents and trustees are excluded.

11 The Committee may want to provide guidance on when a court might preclude access,  
12 including evidentiary standards and the type of evidence to be considered. In the absence of any  
13 explicit statement, the evidentiary standard is preponderance of the evidence. For example, what  
14 if a will provides that the digital property is to be destroyed upon death; under what  
15 circumstances, based, for example, on public policy against burning Rembrandts, could the court  
16 override the will?

17 **SECTION 10. CUSTODIAN IMMUNITY.**

18 (a) A custodian is immune from liability for an action done in compliance with this [act].

19 (b) A custodian acting in good faith is immune from civil liability for the custodian's  
20 accidental destruction of any digital property subject to this act.

21 **Comment**

22 This section establishes that custodians are protected from liability when they act in  
23 accordance with the procedures of this act and in good faith.

24 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

25 applying and construing this uniform act, consideration must be given to the need to promote  
26 uniformity of the law with respect to its subject matter among states that enact it.

27 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

28 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal

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

5 **SECTION 13. REPEALS; CONFORMING AMENDMENTS.**

6 (a)

7 (b)

8 (c)

9 **SECTION 14. EFFECTIVE DATE.** This [act] takes effect ....