

D R A F T

FOR APPROVAL

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS

ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS

ACT

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-THIRD YEAR
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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 6, 2014

**DRAFTING COMMITTEE ON UNIFORM FIDUCIARY ACCESS TO DIGITAL
ASSETS ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127, *Chair*

DAVID BIKLEN, 799 Prospect Ave., West Hartford, CT 06105

STEPHEN Y. CHOW, 125 Summer St., Boston, MA 02110-1624

VINCE DELIBERATO, JR., Legislative Reference Bureau, Main Capitol Bldg., Harrisburg,
PA 17120-0033

MARC FEINSTEIN, 431 N. Phillips Ave., Suite 301, Sioux Falls, SD 57104

GENE HENNIG, 500 IDS Center, 80 S. 8th St., Minneapolis, MN 55402-3796

STAN KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903

SUSAN KELLY NICHOLS, 3217 Northampton St., Raleigh, NC 27609-0625

DAN ROBBINS, 15301 Ventura Blvd., Bldg. E, Sherman Oaks, CA 91403

LANE SHETTERLY, 189 SW Academy St., P.O. Box 105, Dallas, OR 97338

NAOMI CAHN, George Washington University School of Law, 2000 H St. NW, Washington,
DC 20052, *Reporter*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-2615, *President*

GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave.,
Bismarck, ND 58502-1013, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

KARIN PRANGLEY, 500 N. Dearborn St., Suite 200, Chicago, IL 60654-3372, *ABA Advisor*

VICKI LEVY ESKIN, 1732 N. Ronald Reagan Blvd., Longwood, FL 32750-3409,
ABA Section Advisor

CHRISTINA KUNZ, 484 Montrose Ln., St. Paul, MN 55116, *ABA Section Advisor*

DAVID SHULMAN, 401 E. Las Olas Blvd., Suite 130-491, Fort Lauderdale, FL 33301-2210,
ABA Section Advisor

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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1 The general goal of the act is to facilitate fiduciary access while respecting the privacy
2 and intent of the account holder. It adheres to the traditional approach of trusts and estates law,
3 which respects the intent of the account holder and promotes the fiduciary’s ability to administer
4 the account holder’s property. With regard to the general scope of the act, the act’s coverage is
5 inherently limited by the definition of “digital assets.” The act applies only to electronic records.
6 The term does not include the underlying asset or liability unless it is itself an electronic record.

7 The act is divided into fifteen sections. Sections 1-2 contain general provisions and
8 definitions, including those relating to the scope of the fiduciary’s authority.

9 Sections 3-6 establish the rights of personal representatives, conservators, agents acting
10 pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different opt-in
11 and default rules based on the presumed intent of the account holder and the applicability of
12 other state and federal laws. A personal representative is presumed to have access to all of the
13 decedent’s digital assets unless that is contrary to the decedent’s will or to other applicable law.
14 A conservator may access the assets pursuant to a court order. An agent acting pursuant to a
15 power of attorney is presumed to have access to all of a principal’s digital assets not subject to
16 the protections of other applicable law; if another law protects the asset, then the power of
17 attorney must explicitly grant access. And a trustee may access any digital asset held by the trust
18 unless that is contrary to the terms of the trust or to other applicable law.

19 Section 7 contains provisions relating to the rights of the fiduciary to access digital assets.
20 Section 8 addresses compliance, and Section 9 grants immunity to custodians. Sections 10-15
21 address miscellaneous topics, including retroactivity, the effective date of the act and similar
22 issues. The act addresses only the rights of the four types of fiduciaries, and it is designed to
23 provide access without changing the ownership of the digital asset.

1 **UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

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

3 Access to Digital Assets Act.

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

5 (1) “Account holder” means:

6 (A) a person that has entered into a terms-of-service agreement; and

7 (B) a fiduciary for a person described in clause (A).

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

10 (3) “Catalogue of electronic communications” means information that identifies each
11 person with which an account holder has had an electronic communication, the time and date of
12 the communication, and the electronic address of the person.

13 (4) “[Conservator]” means a person appointed by a court to manage the estate of a living
14 individual. The term includes a limited [conservator].

15 (5) “Content of an electronic communication” means information not readily accessible
16 to the public concerning the substance or meaning of an electronic communication.

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

19 (7) “Custodian” means a person that carries, maintains, or stores a digital asset of an
20 account holder.

21 (8) “Digital asset” means an electronic record. The term does not include an underlying
22 asset or liability unless the asset or liability is itself an electronic record.

23 (9) “Electronic” means relating to technology having electrical, digital, magnetic,

1 wireless, optical, electromagnetic, or similar capabilities.

2 (10) “Electronic communication” means a digital asset stored by an
3 electronic-communication service or carried or maintained by a remote-computing service. The
4 term includes the catalogue of electronic communications and the content of an electronic
5 communication.

6 (11) “Electronic-communication service” means a custodian that provides to the public
7 the ability to send or receive an electronic communication.

8 (12) “Fiduciary” means a person that is an original, additional, or successor personal
9 representative, [conservator], agent, or trustee.

10 (13) “Governing instrument” means a will, trust, instrument creating a power of attorney,
11 or other dispositive or nominative instrument.

12 (14) “Information” means data, text, images, videos, sounds, codes, computer programs,
13 software, databases, or similar intelligence of any nature.

14 (15) “Person” means an individual, estate, business or nonprofit entity, public
15 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
16 entity.

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

19 (17) “Power of attorney” means a record that grants an agent authority to act in the place
20 of a principal.

21 (18) “Principal” means an individual who grants authority to an agent in a power of
22 attorney.

23 (19) “Protected person” means an individual for whom a [conservator] has been

1 appointed.

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

4 (21) “Remote-computing service” means a custodian that provides to the public computer
5 processing services or the storage of digital assets by means of an electronic communications
6 system, as defined in 18 U.S.C. Section 2510(14);

7 (22) “Terms-of-service agreement” means an agreement that controls the relationship
8 between an account holder and a custodian.

9 (23) “Trustee” means a fiduciary with legal title to an asset pursuant to an agreement or
10 declaration that creates a beneficial interest in others.

11 (24) “Will” includes a codicil, testamentary instrument that only appoints an executor,
12 and instrument that revokes or revises a testamentary instrument.

13 *Legislative Note: States should insert the appropriate court in subsection (6) that would have*
14 *jurisdiction over matters relating to this act.*

15 **Comments**

16 Many of the definitions are based on those in the Uniform Probate Code: agent (UPC
17 Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic
18 (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC
19 Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC
20 Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC
21 Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC
22 Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57)). Many of
23 the other definitions are new for this act.

24 An account holder includes any person who entered into a terms-of-service agreement,
25 including a deceased individual who entered into the agreement during the individual’s lifetime.
26 A fiduciary is defined as a person, and a fiduciary can be an account holder when the fiduciary
27 opens the account.

28 The act includes a definition for “catalogue of electronic communications.” This is
29 designed to cover log-type information about an electronic communication. The term “content
30 of an electronic communication” is adapted from 18 U.S.C. Section 2510(8), but it refers only to

1 information that is not readily accessible to the public because, if the information were readily
2 accessible to the public, it would not be subject to the privacy protections of federal law under
3 the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 et seq. See S. Rep.
4 No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the
5 content of an electronic communication, the act’s legislative history notes the requirements for
6 disclosure: “Either the sender or the receiver can directly or through authorized agents authorize
7 further disclosures of the contents of their electronic communication.” S. Rep. No. 99-541, at 37
8 (1986).

9 ECPA does not apply to private e-mail service providers, such as employers and
10 educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz,
11 Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and*
12 *State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404
13 (2014) (available at: <http://goo.gl/T9jX1d>).

14 A custodian includes any Internet service provider as well as any other entity that
15 provides or stores electronic data of an account holder. The term “carries” means engaging in
16 the transmission or switching of electronic communications. See 47 U.S.C. Section 1001(8). A
17 custodian does not include most employers because an employer typically does not have a
18 terms-of-service agreement with an employee. Any digital assets created through employment
19 generally belong to the employer.

20 *Example – Fiduciary access to an employee e-mail account.* D dies, employed by
21 Company Y. Company Y has an internal e-mail communication system, available only to Y’s
22 employees. D’s personal representative, R, believes that D used Company Y’s e-mail system for
23 some financial transactions that R cannot find through other means. R requests access from
24 Company Y to the e-mails.

25 Company Y is not a custodian subject to the act. Under Section 2(7), a custodian must
26 carry, maintain or store an account holder’s digital assets. An account holder, in turn, is defined
27 under Section 2(1) as someone who has entered into a terms-of-service agreement. Company Y,
28 like most employers, did not enter into a terms-of-service agreement with D, so D was not an
29 account holder.

30 “Digital assets” include products currently in existence and yet to be invented that are
31 available only electronically. Digital assets include electronically-stored information, such
32 as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto
33 websites, ranging from photos to documents; and 3) rights in digital property, such as domain
34 names or digital entitlements associated with online games. See Lamm, et al, supra, at
35 388. Both the catalogue and content of an electronic communication are covered by the term
36 “digital assets.”

37 The fiduciary’s access to a record defined as a “digital asset” does not mean that the
38 fiduciary is entitled to “own” the asset or otherwise engage in transactions with the
39 asset. Consider, for example, funds in a bank account or securities held with a broker or other
40 custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar

1 presence. This act affects records concerning the bank account or securities, but does not affect
2 the authority to engage in transfers of title or other commercial transactions in the funds or
3 securities, even though such transfers or other transactions might occur electronically. UFADAA
4 simply reinforces the right of the fiduciary to access all relevant electronic communications and
5 the online account that provides evidence of ownership or similar rights. An entity may not
6 refuse to provide access to online records any more than the entity can refuse to provide the
7 fiduciary with access to hard copy records.

8 The definition of “electronic communication” is adapted from the language of 18 U.S.C.
9 Section 2510(12) and 2702(a)(1) and (2), the definition of “electronic-communication service” is
10 drawn from 18 U.S.C. Section 2510(15), and the definition of “remote-computing service” is
11 adapted from 18 U.S.C. Section 2711(2), to help ensure the act’s compliance with federal law.
12 Electronic communication is a subset of digital assets and covers only the category of digital
13 assets subject to the privacy protections of the Electronic Communications Privacy Act. For
14 example, material stored on a computer’s hard drive is a digital asset but not an electronic
15 communication.

16 A “fiduciary” under this act occupies a status recognized by state law, and fiduciaries’
17 powers under the act are subject to the relevant limits established by other state laws. The
18 definition of fiduciary specifically applies to “each person” in order to cover co-fiduciaries.

19 The “terms-of-service agreement” (TOSA) definition relies on the definition of
20 “agreement” found in UCC Section 1-201(b)(3) (“the bargain of the parties in fact, as found in
21 their language or inferred from other circumstances, including course of performance, course of
22 dealing, or usage of trade”). It refers to any agreement that controls the relationship between an
23 account holder and a custodian, even though it might be called a terms-of-use agreement, a
24 click-wrap agreement, a click-through license, or a similar term. State and federal law determine
25 capacity to enter into a binding TOSA.

26 **SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL**

27 **ASSETS OF DECEDENT.** Unless otherwise provided by the court or the will of a decedent, a
28 personal representative of the decedent may access:

29 (1) the content of an electronic communication sent or received by the decedent only if
30 the electronic-communication service or remote-computing service is permitted to disclose the
31 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as
32 amended];

33 (2) the catalogue of electronic communications sent or received by the decedent; and

34 (3) any other digital asset in which the decedent at death had a right or interest.

1 **Legislative Note:** *In states in which the constitution, or other law, does not permit the phrase*
2 *“as amended” when federal statutes are incorporated into state law, the phrase should be*
3 *deleted in subsection (1).*

4 **Comments**

5 This section is modeled on the formulation of the personal representative’s default power
6 set out in UPC Section 3-715. The phrase, “Unless otherwise provided by the will,” is intended
7 to indicate that a will controls the personal representative’s authority. As is true more generally
8 with respect to interpretation of wills, public policy can override the explicit terms of a will.

9 The section clarifies the difference between fiduciary authority over digital assets other
10 than the content of an electronic communication protected by ECPA and authority over
11 ECPA-covered content of an electronic communication. For the content of an electronic
12 communication, subsections (1) and (2) establish procedures that cover: first, the ECPA-covered
13 content of communications and, second, the catalogue (logs and records) that electronic
14 communications service providers may release without consent under the ECPA. Federal law
15 distinguishes between the permissible disclosure of the “content” of an electronic
16 communication, covered in 18 U.S.C. Section 2702(b), and of “a record or other information
17 pertaining to a” subscriber or customer, covered in 18 U.S.C. Section 2702(c); *see* Matthew J.
18 Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105
19 (2009).

20 Content-based material can, in turn, be divided into two types of communications: those
21 received by the account holder and those sent. Material when the account holder is the
22 “addressee or intended recipient” can be disclosed either to that individual or to an agent for that
23 person, 18 U.S.C. Section 2702(b)(1), and it can also be disclosed to third parties with the
24 “lawful consent” of the addressee or intended recipient. 18 U.S.C. Section 2702(b)(3). Material
25 for which the account holder is the “originator” can be disclosed to third parties only with the
26 account holder’s “lawful consent.” 18 U.S.C. Section 2702(b)(3). (Note that, when the account
27 holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or
28 (b)(3), but that when the account holder is the originator, lawful consent is required under
29 (b)(3).) See the Comments concerning the definitions of the “content of an electronic
30 communication” after Section 2. By contrast to content-based material, non-content material can
31 be disclosed either with the lawful consent of the account holder or to any person (other than a
32 governmental entity) even without lawful consent. This information includes material about any
33 communication sent, such as the addressee, sender, date/time, and other subscriber data, which
34 this draft defines as the “catalogue of electronic communications.” (Further discussion of this
35 issue and examples are set out in the Comments to Section 7, *infra*.)

36 **SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF**
37 **PROTECTED PERSON.** The court, after an opportunity for hearing under [state
38 conservatorship law], may authorize a [conservator] to access:

1 (1) the content of an electronic communication sent or received by the individual or
2 protected person only if the electronic-communication service or remote-computing service is
3 permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C.
4 Section 2702(b) [as amended];

5 (2) the catalogue of electronic communications sent or received by the individual or
6 protected person; and

7 (3) any other digital asset in which the individual or protected person has a right or
8 interest.

9 **Legislative Note:** *In states in which the constitution, or other law, does not permit the phrase*
10 *“as amended” when federal statutes are incorporated into state law, the phrase should be*
11 *deleted in subsection (1).*

12 **Comments**

13 Section 4 establishes that the conservator must be specifically authorized by the court to
14 access the protected person’s digital assets. Each of the different levels of access to the content
15 of an electronic communication, to the catalogue of electronic communications, and to any other
16 digital assets must be specifically granted by court order. The requirement in Section 4 for
17 express authority over digital assets does not limit the fiduciary’s authority over the underlying
18 “brick-and-mortar” assets, such as a bank account. The meaning of the term “hearing” will vary
19 from state to state, as it will vary under state law and procedures.

20 Section 4 is comparable to Section 3. It responds to the concerns of Internet service
21 providers who believe that the act should be structured to clarify the difference between fiduciary
22 authority over digital assets other than the content of an electronic communication protected by
23 federal law (the Electronic Communications Privacy Act (ECPA)), and fiduciary authority over
24 ECPA-protected content of an electronic communication. Consequently, this draft sets out
25 procedures that cover all digital assets as well as the catalogue of electronic communications
26 (logs and records) that relevant service providers may release without consent under ECPA, and
27 then it addresses ECPA-covered content of an electronic communication separately.

28 The section refers to an individual or a protected person because a conservator may be
29 appointed for a single transaction or without a finding that the person is a protected person.

30 State law will establish the criteria for when a court will grant power to the conservator.
31 For example, UPC Section 5-411(c) requires the court to consider the decision the protected
32 person would have made as well as a list of other factors. Existing state law may also set out the
33 requisite standards for a conservator’s actions. Under Section 7, the conservator has the same

1 power over digital assets as the account holder. The conservator must exercise authority in the
2 interests of the protected person.

3 **SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS OF PRINCIPAL.**

4 (a) To the extent a power of attorney expressly grants authority to an agent over the
5 content of an electronic communication of the principal, the agent may access the content of an
6 electronic communication sent or received by the principal if the electronic-communication
7 service or remote-computing service is permitted to disclose the content under the Electronic
8 Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended].

9 (b) Unless otherwise provided by a power of attorney or the court, an agent may access:

10 (1) the catalogue of electronic communications sent or received by the principal;

11 and

12 (2) any other digital asset in which the principal has a right or interest.

13 *Legislative Note: In states in which the constitution, or other law, does not permit the phrase*
14 *“as amended” when federal statutes are incorporated into state law, the phrase should be*
15 *deleted in subsection (a).*

16 **Comments**

17 This section establishes that the agent has default authority over all of the principal’s
18 digital assets, other than the content of the principal’s electronic communications. When the
19 principal does not want the agent to exercise this authority, then the power of attorney must
20 explicitly prevent an agent from doing so.

21 The situation is different with respect to the content of an electronic communication. In
22 that case, the principal must specifically authorize the agent to access the content of the
23 principal’s electronic communications. This provision is modeled on UPC Section 5B-201(a).
24 Because a power of attorney contains the consent of the account holder, ECPA should not
25 prevent the agent from exercising authority over the content of an electronic communication.
26 See the Comments concerning the definitions of the “content of an electronic communication”
27 after Section 2. There should be no question that an explicit delegation of authority in a power
28 of attorney constitutes authorization from the account holder to access digital assets and provides
29 “lawful consent” to allow disclosure of the content of an electronic communication from an
30 electronic-communication service or a remote-computing service pursuant to applicable law.
31 Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with
32 intentional access without authorization and 18 U.S.C. Section 2702 allows a service provider to

1 disclose with lawful consent.

2 States may need to amend their power of attorney forms to include this power.

3 **SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS.** Unless otherwise

4 provided by the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

5 (1) that is an original account holder may access each digital asset held in trust, including
6 the catalogue of electronic communications sent or received by the trustee and the content of an
7 electronic communication; and

8 (2) that is not an original account holder may access:

9 (A) the content of an electronic communication sent or received by the original or
10 any successor account holder only if the electronic-communication service or remote-computing
11 service is permitted to disclose the content under the Electronic Communications Privacy Act,
12 18 U.S.C. Section 2702(b) [as amended];

13 (B) the catalogue of electronic communications sent or received by the original or
14 any successor account holder; and

15 (C) any other digital asset of the original or any successor account holder.

16 **Legislative Note:** *In states in which the constitution, or other law, does not permit the phrase*
17 *“as amended” when federal statutes are incorporated into state law, the phrase should be*
18 *deleted in subsection (2)(A).*

19 **Comments**

20 Access to digital assets, including the content of electronic communications, is presumed
21 with respect to assets for which the trustee is the initial account holder. A trustee may have title
22 to digital assets when the trustee opens an account as trustee.

23 Subsection (2) addresses situations involving an inter vivos transfer of a digital asset into
24 a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other governing
25 instrument of a digital asset into a trust. In those situations, a trustee becomes a successor
26 account holder when the settlor transfers a digital asset into the trust. There should be no
27 question that the trustee with legal title to the digital asset was authorized by the settlor to access
28 the digital assets so transferred, including both the catalogue and content of an electronic

1 communication, and this provides “lawful consent” to allow disclosure of the content of an
2 electronic communication from an electronic-communication service or a remote-computing
3 service pursuant to applicable law. See the Comments concerning the definitions of the “content
4 of an electronic communication” after Section 2. Nonetheless, subsection (2) distinguishes
5 between the catalogue and content of an electronic communication in case there are any
6 questions about whether the form in which property transferred into a trust is held constitutes
7 lawful consent. Both authorization and lawful consent are important because 18 U.S.C.
8 Section 2701 deals with intentional access without authorization and because 18 U.S.C.
9 Section 2702 allows a service provider to disclose with lawful consent.

10 The underlying trust documents and default trust law will supply the allocation of
11 responsibilities between and among trustees.

12 **SECTION 7. FIDUCIARY AUTHORITY.**

13 (a) A fiduciary that is an account holder or has the right to access a digital asset of an
14 account holder:

15 (1) subject to the terms-of-service agreement and copyright or other applicable
16 law, may take any action concerning the asset to the extent of the account holder’s authority and
17 the fiduciary’s powers under [the law of this state];

18 (2) has, under applicable electronic privacy laws, the lawful consent of the
19 account holder for the custodian to divulge the content of an electronic communication to the
20 fiduciary; and

21 (3) is, under applicable computer fraud and unauthorized access laws, including
22 [this state’s law on unauthorized computer access], an authorized user.

23 (b) If a provision in a terms-of-service agreement limits a fiduciary’s access to the digital
24 assets of the account holder, the provision is void as against the strong public policy of this state,
25 unless the account holder, after [the effective date of this [act]], agreed to the provision by an
26 affirmative act separate from the account holder’s assent to other provisions of the
27 terms-of-service agreement.

28 (c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a

1 fiduciary acting under this [act] to the extent the provision designates law that enforces a
2 limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

3 (d) A fiduciary's access under this act to a digital asset does not violate a terms-of-service
4 agreement, notwithstanding a provision of the agreement which limits third-party access or
5 requires notice of change in the account holder's status.

6 (e) If tangible personal property of a decedent, protected person or other individual under
7 Section 4, principal, or settlor can receive, store, process, or send a digital asset, a fiduciary with
8 authority over the property may access the property and any digital asset stored in it. The
9 fiduciary is an authorized user for purposes of any applicable computer fraud and unauthorized
10 access laws.

11 **Legislative Note:** *States with a computer trespass statutes should add the appropriate reference*
12 *in Section 7(a)(3), and may want to amend those statutes to be in accord with this act.*

13 **Comment**

14 This issue concerning the parameters of the fiduciary's authority potentially arises in two
15 situations: 1) the fiduciary obtains access to a password or the like directly from the account
16 holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or
17 someone who has stored passwords in a written or electronic list and those passwords are then
18 transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.

19 This section clarifies that the fiduciary has the same authority as the account holder if the
20 account holder were the one exercising the authority (note that, where the account holder has
21 died, this means that the fiduciary has access as of the hour before the account holder's death).
22 This means that the fiduciary's authority to access the digital asset is the same as the account
23 holder except where, pursuant to subsection (b), the account holder has explicitly opted out of
24 fiduciary access. In exercising its responsibilities, the fiduciary is subject to the duties and
25 obligations established pursuant to state fiduciary law and is liable for breach of those duties.
26 Note that even if the digital asset were illegally obtained by the account holder, the fiduciary
27 would still need access in order to handle that asset appropriately. There may, for example, be
28 tax consequences that the fiduciary would be obligated to report.

29 In exercising its responsibilities, the fiduciary is subject to the same limitations as the
30 account holder more generally. For example, a fiduciary cannot delete an account if this would
31 be fraudulent. Similarly, if the account holder could challenge provisions in a TOSA, then the
32 fiduciary is also able to do so. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

1 Subsection (a) is designed to establish that the fiduciary is authorized to exercise control
2 over digital assets in accordance with other applicable laws. The language mirrors that used in
3 Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the
4 Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A*
5 *User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*,
6 72 GEO. WASH. L. REV. 1208 (2004). The subsection clarifies that state law treats the fiduciary
7 as “authorized” under the two federal statutes that prohibit unauthorized access to computers and
8 computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any
9 comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act,
10 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra*. (State law may be useful to federal courts
11 interpreting these statutes.)

12 ECPA contains two potentially relevant prohibitions. The first, 18 U.S.C. Section
13 2701(a), defines the crime of unlawful access to stored communications, which applies to a
14 person who “(1) intentionally accesses without authorization a facility through which an
15 electronic communication service is provided; or (2) intentionally exceeds an authorization to
16 access that facility . . .” Thus, someone who has authorization to access the facility is not
17 engaging in criminal behavior. Moreover, this section does not apply to “conduct authorized . . .
18 by a user of that service with respect to a communication of or intended for that user.” 18 U.S.C.
19 Section 2701(a), (c)(2).

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

35 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.
36 18 U.S.C. Section 1030. Like ECPA, the CFAA similarly protects against anyone who
37 “intentionally accesses a computer without authorization or exceeds authorized access.”
38 18 U.S.C. Section 1030(a).

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

40 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization under
41 applicable law to access the digital assets under the *first* relevant provision of ECPA, 18 U.S.C.

1 Section 2701, as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the
2 originator/subscriber under applicable law so that the service provider can voluntarily disclose
3 the digital assets pursuant to the *second* relevant provision of ECPA, 18 U.S.C. Section 2702,
4 including the content of an electronic communication. Moreover, this language should be
5 adequate to avoid liability under the state unauthorized computer access laws.

6 Subsection (b) addresses whether account holders can opt out of the rules in this act and
7 whether Internet service providers can prevent fiduciary access. First, a TOSA in which an
8 account holder has made an affirmative choice to limit a fiduciary’s right to access will
9 supersede any contrary provision in a will, trust, protective order, or power of attorney. Second,
10 the subsection provides that any other term in a TOSA that bars fiduciary access is void as
11 against the state’s strong public policy. While all of a state’s laws could be considered that
12 state’s public policy, the phrase “strong public policy” is to be construed under conflict of laws
13 principles to protect fiduciary access to digital assets under this act, notwithstanding a contrary
14 TOSA provision and even if the TOSA chooses the law of another state or country to govern its
15 contractual rights and duties. See Restatement (Second) Conflict of Laws § 90 and § 187 cmt. g.
16 See also Uniform Trust Code § 107(1). However, a TOSA provision for which an account
17 holder has made an affirmative choice, separate from the account holder’s assent to other
18 provisions of the TOSA, to limit a fiduciary’s access to the account holder’s digital assets is not
19 voided by this act and will supersede any contrary provision in a will, protective order, power of
20 attorney, or trust. (See Example 5).

21
22 Subsection (c) supports the importance of fiduciary access by providing that any choice
23 of law governing the effect of a TOSA that prevents fiduciary access is unenforceable.

24 Subsection (d) reinforces the concept that the fiduciary “steps into the shoes” of the
25 account holder, with no more – and no fewer – rights. For example, the TOSA controls the
26 rights of the account holder (settlor, principal, incapacitated person, decedent). The act does not
27 permit the account holder’s fiduciary to override the TOSA in order to make a digital asset or
28 collection of digital assets “descendible,” although it does preserve the rights of the fiduciary to
29 make the same claims as the account holder. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604
30 (Mass. 2013); David Horton, *Indescendibility*, 102 Calif. L. Rev. 543 (2014).

31 Under subsection (d), access by a fiduciary should not be considered a transfer or other
32 use that would violate the anti-transfer terms or other terms of a TOSA.

33 Subsection (e) clarifies that the fiduciary is authorized to access digital assets stored on
34 tangible personal property, such as laptops, computers, smartphones or storage media of the
35 decedent, protected person, principal, or settlor, exempting fiduciaries from application for
36 purposes of state or federal laws on unauthorized computer access. For criminal law purposes,
37 this clarifies that the fiduciary is authorized to access all of the account holder’s digital assets,
38 whether held locally or remotely.

39 *Example 1 – Access to digital assets by personal representative.* D dies with a will that is
40 silent with respect to digital assets. D has a bank account for which D received only electronic
41 statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account

1 with a company that provides electronic-communication services to the public. The personal
2 representative of D’s estate needs access to the electronic bank account statements, the photo
3 account, and e-mails.

4 The personal representative of D’s estate has the authority to access D’s electronic
5 banking statements and D’s photo account, which both fall under the act’s definition of a “digital
6 asset.” This means that, if these accounts are password-protected or otherwise unavailable to the
7 personal representative, then the bank and the photo account service must give access to the
8 personal representative when the request is made in accordance with Section 8. If the TOSA
9 permits D to transfer the accounts electronically, then the personal representative of D’s estate
10 can use that procedure for transfer as well.

11 The personal representative of D’s estate is also able to request that the e-mail account
12 service provider grant access to e-mails sent or received by D; ECPA permits the service
13 provider to release the catalogue to the personal representative. The service provider also must
14 provide the personal representative access to the content of an electronic communication sent or
15 received by D if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose
16 the content. The bank may release the catalogue of electronic communications or content of an
17 electronic communication for which it is the originator or the addressee because the bank is not
18 subject to the ECPA.

19 *Example 2 – Access to digital assets by conservator.* C is seeking appointment as the
20 conservator for P. P has a bank account for which P received only electronic statements, P has
21 stored photos in a cloud-based Internet account, and P has an e-mail account with a company that
22 provides electronic communication services to the public. C needs access to the electronic bank
23 account statements, the photo account, and e-mails.

24 Without a court order that explicitly grants access to P’s digital assets, including
25 electronic communications, C has no authority pursuant to this act to access the electronic bank
26 account statements, the photo account, or the e-mails. Based on law outside of this act, the bank
27 may release the catalogue of electronic communications or content of an electronic
28 communication for which it is the originator or the addressee because the bank is not subject to
29 the ECPA.

30 *Example 3 – Access to digital assets by agent.* X creates a power of attorney designating
31 A as X’s agent. The power of attorney expressly grants A authority over X’s digital assets,
32 including the content of an electronic communication. X has a bank account for which
33 X receives only electronic statements, X has stored photos in a cloud-based Internet account, and
34 X has a game character and in-game property associated with an online game. X also has an
35 e-mail account with a company that provides electronic-communication services to the public.

36 A has the authority to access X’s electronic bank statements, the photo account, the game
37 character and in-game property associated with the online game, all of which fall under the act’s
38 definition of a “digital asset.” This means that, if these accounts are password-protected or
39 otherwise unavailable to A as X’s agent, then the bank, the photo account service provider, and
40 the online game service provider must give access to A when the request is made in accordance

1 with Section 8. If the TOSA permits X to transfer the accounts electronically, then A as X's
2 agent can use that procedure for transfer as well.

3 As X's agent, A is also able to request that the e-mail account service provider grant
4 access to e-mails sent or received by X; ECPA permits the service provider to release the
5 catalogue. The service provider also must provide A access to the content of an electronic
6 communication sent or received by X if the service provider is permitted under 18 U.S.C.
7 Section 2702(b) to disclose the content. The bank may release the catalogue of electronic
8 communications or content of an electronic communication for which it is the originator or the
9 addressee because the bank is not subject to the ECPA.

10 *Example 4 – Access to digital assets by trustee.* T is the trustee of a trust established
11 by S. As trustee of the trust, T opens a bank account for which T receives only electronic
12 statements. S transfers into the trust to T as trustee (in compliance with a TOSA) a game
13 character and in-game property associated with an online game and a cloud-based Internet
14 account in which S has stored photos. S also transfers to T as trustee (in compliance with the
15 TOSA) an e-mail account with a company that provides electronic-communication services to
16 the public.

17 T is an original account holder with respect to the bank account that T opened, and T has
18 the ability to access the electronic banking statements. T, as successor account holder to S, may
19 access the game character and in-game property associated with the online game and the photo
20 account, which both fall under the act's definition of a "digital asset." This means that, if these
21 accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the
22 photo account service provider, and the online game service provider must give access to T when
23 the request is made in accordance with Section 8. If the TOSA permits the account holder to
24 transfer the accounts electronically, then T as trustee can use that procedure for transfer as well.

25 T as successor account holder of the e-mail account for which S was previously the
26 account holder is also able to request that the e-mail account service provider grant access to
27 e-mails sent or received by S; the ECPA permits the service provider to release the catalogue.
28 The service provider also must provide T access to the content of an electronic communication
29 sent or received by S if the service provider is permitted under 18 U.S.C. Section 2702(b) to
30 disclose the content. The bank may release the catalogue of electronic communications or
31 content of an electronic communication for which it is the originator or the addressee because the
32 bank is not subject to the ECPA.

33 *Example 5 – Access notwithstanding terms in a TOSA.* D, who is domiciled in state X,
34 dies. D was a professional photographer who stored valuable digital photos in an online storage
35 account provided by C. P is appointed by a court in state X to administer D's estate. P needs
36 access to D's online storage account to inventory and appraise D's estate assets and to file D's
37 estate tax return. During D's lifetime, D entered into a TOSA with C for the online storage
38 account. The choice-of-law provision selects the law of state Y to govern the contractual rights
39 and duties under the TOSA. A provision of the TOSA prohibits fiduciary access to the digital
40 assets of an account holder, but D did not agree to that provision by an affirmative act separate
41 from D's assent to other provisions of the TOSA. UFADAA has been enacted by state X but not

1 by state Y. Because P's access to D's assets is fundamental to carrying out P's fiduciary duties,
2 a court should apply subsections (b) and (c) of this act under the law of state X to void the TOSA
3 provision prohibiting P's access to D's online account, even though the TOSA selected the law
4 of state Y to govern the contractual rights and duties under the TOSA.
5

6 **SECTION 8. COMPLIANCE.**

7 (a) If a fiduciary with a right under this [act] to access a digital asset of an account holder
8 complies with subsection (b), the custodian shall comply with the fiduciary's request in a record
9 for:

10 (1) access to the asset;

11 (2) control of the asset; and

12 (3) a copy of the asset to the extent permitted by copyright law.

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

14 (1) a personal representative with a right of access under Section 3, the request
15 must be accompanied by a certified copy of [the letter of appointment of the representative or a
16 small-estate affidavit or other court order];

17 (2) a [conservator] with the right of access under Section 4, the request must be
18 accompanied by a certified copy of the court order that gives the [conservator] authority over the
19 digital asset;

20 (3) an agent with the right of access under Section 5, the request must be
21 accompanied by an original or a copy of the power of attorney that authorizes the agent to
22 exercise authority over the digital asset and a certification of the agent, under penalty of perjury,
23 that the power of attorney is in effect; and

24 (4) a trustee with the right of access under Section 6, the request must be
25 accompanied by a certified copy of the trust instrument[, or a certification of the trust under [cite
26 trust-certification statute, such as Uniform Trust Code Section 1013],] which authorizes the

1 trustee to exercise authority over the digital asset.

2 (c) A custodian shall comply with a request made under subsection (a) not later than [60]
3 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an
4 order directing compliance.

5 (d) [Instead of furnishing a copy of the trust instrument under subsection (b)(4), the
6 trustee may provide the certification of trust. The certification:

7 (1) must contain the following information:

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

9 (B) the identity of the settlor;

10 (C) the identity and address of the trustee;

11 (D) that there is nothing inconsistent in the trust with respect to the
12 trustee's powers over digital assets;

13 (E) whether the trust is revocable and the identity of any person holding a
14 power to revoke the trust; and

15 (F) whether a cotrustee has authority to sign or otherwise authenticate, and
16 whether all or fewer than all cotrustees are required to exercise powers of the trustee;

17 (2) must be signed or otherwise authenticated by a trustee;

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

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

22 (e) A custodian that receives a certification of trust under subsection (d) may require the
23 trustee to provide copies of excerpts from the original trust instrument and later amendments

1 which designate the trustee and confer on the trustee the power to act in the pending transaction.

2 (f) A custodian that acts in reliance on a certification under subsection (d) without
3 knowledge that the representations contained in it are incorrect is not liable to any person for so
4 acting and may assume without inquiry the existence of facts stated in the certification.

5 (g) A person that in good faith enters into a transaction in reliance on a certification of
6 trust under subsection (d) may enforce the transaction against the trust property as if the
7 representations contained in the certification were correct.

8 (h) A person that demands the trust instrument in addition to a certification of trust under
9 subsection (d) or excerpts under subsection (e) is liable for damages if the court determines that
10 the person did not act in good faith in demanding the trust instrument.

11 (i)] This section does not limit the right of a person to obtain a copy of a trust instrument
12 in a judicial proceeding concerning the trust.

13 *Legislative Note: The bracketed material in subsections (d)-(i) allows states that have already*
14 *enacted the Uniform Trust Code or a similar law permitting a certification of trust in lieu of*
15 *furnishing a complete copy of the trust instrument to use the shorter version when setting out*
16 *procedures concerning a trustee’s request. Those states that have not adopted the Uniform Trust*
17 *Code or a certification of trust procedure may choose to include the bracketed material, which is*
18 *a slight modification of the language in Uniform Trust Code Section 1013.*

19 **Comment**

20 Subsection (a) allows a fiduciary to request access, control, or a copy of the digital asset.
21 The term “control” means only the ability to move (unless prohibited by copyright law) or delete
22 that particular asset. A fiduciary’s control over a digital asset is not equivalent to a transfer of
23 ownership or a laundering of illegally obtained material. Thus, this subsection grants the
24 fiduciary the ability to access electronic records, and the disposition of those records is subject to
25 other laws. For example, where the account holder has an online securities account or has a
26 game character and in-game property associated with an online game, then the fiduciary’s ability
27 to sell the securities, the game character, or the in-game property is controlled by traditional
28 probate law. The act is only granting access and “control” in the sense of enabling the fiduciary
29 to do electronically what the account holder could have done electronically. Thus, if a TOSA
30 precludes online transfers, then the fiduciary is unable to make those transfers electronically as
31 well.

1 any person or circumstance is held invalid, the invalidity does not affect other provisions or
2 applications of this [act] which can be given effect without the invalid provision or application,
3 and to this end the provisions of this [act] are severable.]

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

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

7 (1) a fiduciary or agent acting under a will, trust, or power of attorney executed before,
8 on, or after [the effective date of this [act]];

9 (2) a personal representative acting for a decedent who died before, on, or after [the
10 effective date of this [act]]; and

11 (3) a conservatorship proceeding, whether pending in a court or commenced before, on,
12 or after [the effective date of this [act]].

13 **Comment**

14
15 This act does not change the substantive rules of other law, such as agency, banking,
16 conservatorship, contract, copyright, criminal, fiduciary, privacy, probate, property, security,
17 trust, or other applicable law except to vest fiduciaries with authority, according to the provisions
18 of this act, to access, control, or copy digital assets of a decedent, protected person (or other
19 individual under Section 4), principal, settlor, or trustee.

20 Subsection (2) covers the situations in which a decedent dies intestate, so it falls outside
21 of subsection (1), as well as the situations in which a state's procedures for small estates are
22 used.

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

24 (a)

25 (b)

26 (c)

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