

**UNIFORM FIDUCIARY ACCESS TO  
DIGITAL ASSETS ACT**

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-THIRD YEAR  
SEATTLE, WASHINGTON  
JULY 11 - JULY 17, 2014

WITH PREFATORY NOTE AND COMMENTS

Copyright © 2014  
By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

July 31, 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 Law School, 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](http://www.uniformlaws.org)

**UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

**TABLE OF CONTENTS**

SECTION 1. SHORT TITLE. .... 3  
SECTION 2. DEFINITIONS..... 3  
SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF  
DECEDENT. .... 7  
SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF PROTECTED  
PERSON. .... 9  
SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS OF PRINCIPAL..... 10  
SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS ..... 11  
SECTION 7. FIDUCIARY AUTHORITY..... 12  
SECTION 8. COMPLIANCE..... 19  
SECTION 9. CUSTODIAN IMMUNITY..... 22  
SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION..... 22  
SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND  
NATIONAL COMMERCE ACT..... 23  
SECTION 12. [SEVERABILITY] ..... 23  
SECTION 13. APPLICABILITY ..... 23  
SECTION 14. REPEALS; CONFORMING AMENDMENTS ..... 25  
SECTION 15. EFFECTIVE DATE..... 25



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 in accord with legally-binding fiduciary duties.  
5

6 With regard to the general scope of the act, the act's coverage is inherently limited by the  
7 definition of "digital assets." The act applies only to electronic records, which do not include the  
8 underlying asset or liability unless it is itself an electronic record.  
9

10 The act is divided into fifteen sections. Sections 1-2 contain general provisions and  
11 definitions, including those relating to the scope of the fiduciary's authority.  
12

13 Sections 3-6 establish the rights of personal representatives, conservators, agents acting  
14 pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different opt-in  
15 and default rules based on the presumed intent of the account holder and the applicability of  
16 other state and federal laws. A personal representative is presumed to have access to all of the  
17 decedent's digital assets unless that is contrary to the decedent's will or to other applicable law.  
18 A conservator may access the assets pursuant to a court order. An agent acting pursuant to a  
19 power of attorney is presumed to have access to all of a principal's digital assets not subject to  
20 the protections of other applicable law; if another law protects the asset, then the power of  
21 attorney must explicitly grant access. And a trustee may access any digital asset held by the trust  
22 unless that is contrary to the terms of the trust or to other applicable law.  
23

24 Section 7 contains provisions relating to the rights of the fiduciary to access digital assets.  
25 Section 8 addresses compliance, and Section 9 grants immunity to custodians. Sections 10-15  
26 address miscellaneous topics, including retroactivity, applicability, the effective date of the act,  
27 and similar issues. The act addresses only the rights of the four types of fiduciaries, and it is  
28 designed to 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 with a custodian;

7 and

8                                   (B) a fiduciary for a person described in subparagraph (A).

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

11                   (3) “Carries” means engaging in the transmission of electronic communications.

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

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

17                   (6) “Content of an electronic communication” means information not readily accessible  
18 to the public concerning the substance or meaning of an electronic communication.

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

21                   (8) “Custodian” means a person that carries, maintains, processes, receives, or stores a  
22 digital asset of an account holder.

23                   (9) “Digital asset” means a record that is electronic. The term does not include an

1 underlying asset or liability unless the asset or liability is itself a record that is electronic.

2 (10) “Electronic” means relating to technology having electrical, digital, magnetic,  
3 wireless, optical, electromagnetic, or similar capabilities.

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

8 (12) “Electronic-communication service” means a custodian that provides to the public  
9 the ability to send or receive an electronic communication.

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

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

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

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

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

21 (18) “Power of attorney” means a record that grants an agent authority to act in the place  
22 of a principal.

23 (19) “Principal” means an individual who grants authority to an agent in a power of

1 attorney.

2 (20) “[Protected person]” means an individual for whom a [conservator] has been  
3 appointed. The term includes an individual for whom an application for the appointment of a  
4 [conservator] is pending.

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

7 (22) “Remote-computing service” means a custodian that provides to the public computer  
8 processing services or the storage of digital assets by means of an electronic communications  
9 system, as defined in 18 U.S.C. Section 2510(14)[as amended];

10 (23) “Terms-of-service agreement” means an agreement that controls the relationship  
11 between an account holder and a custodian.

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

14 (25) “Will” includes a codicil, testamentary instrument that only appoints an executor,  
15 and instrument that revokes or revises a testamentary instrument.

16 **Legislative Note:** *States should insert the appropriate term for a conservatorship or comparable*  
17 *state proceeding in subsection (5), the appropriate court in subsection (7), and the appropriate*  
18 *term for the individual that would be subject to a conservatorship or comparable state*  
19 *proceeding in subsection (20).*

20 *In states in which the constitution, or other law, does not permit the phrase “as amended” when*  
21 *federal statutes are incorporated into state law, the phrase should be deleted in subsection (22).*

## 22 **Comments**

23 Many of the definitions are based on those in the Uniform Probate Code: agent (UPC  
24 Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic  
25 (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC  
26 Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC  
27 Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC  
28 Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC



1 Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57). The  
2 definition of “information” is based on that in the Uniform Electronic Transactions Act,  
3 Section 2, subsection (11). Many of the other definitions are either drawn from federal law, as  
4 discussed below, or are new for this act.

5  
6 An account holder includes any person who entered into a terms-of-service agreement,  
7 including a deceased individual who entered into the agreement during the individual’s lifetime.  
8 A fiduciary is defined as a person, and a fiduciary can be an account holder when the fiduciary  
9 opens the account.

10  
11 The definitions of carries is drawn from federal law, 47 U.S.C. Section 1001(8).

12  
13 The act includes a definition for “catalogue of electronic communications.” This is  
14 designed to cover log-type information about an electronic communication. The term “content  
15 of an electronic communication” is adapted from 18 U.S.C. Section 2510(8), but it refers only to  
16 information that is not readily accessible to the public because, if the information were readily  
17 accessible to the public, it would not be subject to the privacy protections of federal law under  
18 the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 *et seq.* See S. Rep.  
19 No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the  
20 content of an electronic communication, the act’s legislative history notes the requirements for  
21 disclosure: “Either the sender or the receiver can directly or through authorized agents authorize  
22 further disclosures of the contents of their electronic communication.” S. Rep. No. 99-541, at 37  
23 (1986).

24  
25 ECPA does not apply to private e-mail service providers, such as employers and  
26 educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz,  
27 Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and*  
28 *State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404  
29 (2014) (available at: <http://goo.gl/T9jX1d>).

30  
31 A custodian includes any Internet service provider as well as any other entity that  
32 provides or stores electronic data of an account holder. A custodian does not include most  
33 employers because an employer typically does not have a terms-of-service agreement with an  
34 employee. The treatment of digital assets of an employer used by an employee in the ordinary  
35 course of the employer’s business is discussed in Section 13.

36  
37 The definition of a digital asset specifies that it is “a record that is electronic.” Because  
38 records may exist in both electronic and non-electronic formats, this definition clarifies the scope  
39 of the act and the limitation on the type of records to which it applies. The term includes  
40 products currently in existence and yet to be invented that are available only electronically. It  
41 refers to any type of electronically-stored information, such as: 1) any information stored on a  
42 computer and other digital devices; 2) content uploaded onto websites, ranging from photos to  
43 documents; and 3) rights in digital property, such as domain names or digital entitlements  
44 associated with online games. See Lamm, *et al, supra*, at 388. Both the catalogue and content of  
45 an electronic communication are covered by the term “digital assets.”

1 The fiduciary’s access to a record defined as a “digital asset” does not mean that the  
2 fiduciary is entitled to “own” the asset or otherwise engage in transactions with the  
3 asset. Consider, for example, funds in a bank account or securities held with a broker or other  
4 custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar  
5 presence. This act affects records concerning the bank account or securities, but does not affect  
6 the authority to engage in transfers of title or other commercial transactions in the funds or  
7 securities, even though such transfers or other transactions might occur electronically.  
8 UFADAA simply reinforces the right of the fiduciary to access all relevant electronic  
9 communications and the online account that provides evidence of ownership or similar  
10 rights. An entity may not refuse to provide access to online records any more than the entity can  
11 refuse to provide the fiduciary with access to hard copy records.  
12

13 The definition of “electronic communication” is adapted from the language of 18 U.S.C.  
14 Sections 2510(12) and 2702(a)(1) and (2), the definition of “electronic-communication service”  
15 is drawn from 18 U.S.C. Section 2510(15), and the definition of “remote-computing service” is  
16 adapted from 18 U.S.C. Section 2711(2), to help ensure the act’s compliance with federal law.  
17 Electronic communication is a subset of digital assets and covers only the category of digital  
18 assets subject to the privacy protections of the Electronic Communications Privacy Act. For  
19 example, material stored on a computer’s hard drive is a digital asset but not an electronic  
20 communication.  
21

22 A “fiduciary” under this act occupies a status recognized by state law, and a fiduciary’s  
23 powers under this act are subject to the relevant limits established by other state laws. The  
24 definition of fiduciary specifically applies to “each person” in order to cover co-fiduciaries.  
25

26 The term “record” includes information available in both tangible and electronic media.  
27 The act applies only to electronic records.  
28

29 The “terms-of-service agreement” definition relies on the definition of “agreement”  
30 found in UCC Section 1-201(b)(3) (“the bargain of the parties in fact, as found in their language  
31 or inferred from other circumstances, including course of performance, course of dealing, or  
32 usage of trade”). It refers to any agreement that controls the relationship between an account  
33 holder and a custodian, even though it might be called a terms-of-use agreement, a click-wrap  
34 agreement, a click-through license, or a similar term. State and federal law determine capacity to  
35 enter into a binding terms-of-service agreement.  
36

### 37 **SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL**

38 **ASSETS OF DECEDENT.** Subject to Section 7(b) and unless otherwise provided by the court  
39 or the will of a decedent, a personal representative of the decedent has the right to access:

40 (1) the content of an electronic communication sent or received by the decedent if the  
41 electronic-communication service or remote-computing service is permitted to disclose the

1 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
2 amended];

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

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

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

8 **Comments**

9 This section is modeled on the formulation of the personal representative’s default power  
10 set out in UPC Section 3-715. The phrase, “Unless otherwise provided by the will,” is intended  
11 to indicate that a will controls the personal representative’s authority. As is true more generally  
12 with respect to interpretation of wills, public policy can override the explicit terms of a will.  
13

14 The section clarifies the difference between fiduciary authority over digital assets other  
15 than the content of an electronic communication protected by ECPA and authority over  
16 ECPA-covered content of an electronic communication. For the content of an electronic  
17 communication, subsections (1) and (2) establish procedures that cover: first, the ECPA-covered  
18 content of communications and, second, the catalogue (logs and records) that electronic  
19 communications service providers may release without consent under the ECPA. Federal law  
20 distinguishes between the permissible disclosure of the “content” of an electronic  
21 communication, covered in 18 U.S.C. Section 2702(b), and of “a record or other information  
22 pertaining to a” subscriber or customer, covered in 18 U.S.C. Section 2702(c); *see* Matthew J.  
23 Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105  
24 (2009).  
25

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

1 this draft defines as the “catalogue of electronic communications.” (Further discussion of this  
2 issue and examples are set out in the Comments to Section 7, *infra*.)

3  
4 **SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF**

5 **PROTECTED PERSON.** Subject to Section 7(b), the court, after an opportunity for hearing  
6 under [state conservatorship law], may grant a [conservator] the right to access:

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

11 (2) the catalogue of electronic communications sent or received by the [protected person];

12 and

13 (3) any other digital asset in which the [protected person] has a right or interest.

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

17 **Comments**

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

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

1 The section refers to an individual or a protected person because a conservator may be  
2 appointed for a single transaction or without a finding that the person is a protected person.  
3

4 State law will establish the criteria for when a court will grant power to the conservator.  
5 For example, UPC Section 5-411(c) requires the court to consider the decision the protected  
6 person would have made as well as a list of other factors. Existing state law may also set out the  
7 requisite standards for a conservator's actions. Under Section 7, the conservator has the same  
8 power over digital assets as the account holder. The conservator must exercise authority in the  
9 interests of the protected person.  
10

## 11 SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS OF PRINCIPAL.

12 (a) To the extent a power of attorney expressly grants authority to an agent over the  
13 content of an electronic communication of the principal and subject to Section 7(b), the agent has  
14 the right to access the content of an electronic communication sent or received by the principal if  
15 the electronic-communication service or remote-computing service is permitted to disclose the  
16 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
17 amended].

18 (b) Except as provided in subsection (a) and unless otherwise provided by a power of  
19 attorney or the court, an agent has the right, subject to Section 7(b), to access:

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

21 and

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

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

### 26 Comments

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

1           The situation is different with respect to the content of an electronic communication. In  
2 that case, the principal must specifically authorize the agent to access the content of the  
3 principal’s electronic communications. This provision is modeled on UPC Section 5B-201(a).  
4 Because a power of attorney contains the consent of the account holder, ECPA should not  
5 prevent the agent from exercising authority over the content of an electronic communication.  
6 See the Comments concerning the definitions of the “content of an electronic communication”  
7 after Section 2. There should be no question that an explicit delegation of authority in a power  
8 of attorney constitutes authorization from the account holder to access digital assets and provides  
9 “lawful consent” to allow disclosure of the content of an electronic communication from an  
10 electronic-communication service or a remote-computing service pursuant to applicable law.  
11 Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with  
12 intentional access without authorization and 18 U.S.C. Section 2702 allows a service provider to  
13 disclose with lawful consent. Federal courts have not yet interpreted how ECPA affects a  
14 fiduciary’s efforts to access the content of an electronic communication. E.g., *In re*  
15 *Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

16  
17           States may need to amend their power of attorney statutes and forms to include this  
18 power.

19  
20           **SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS.** Subject to

21 Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a  
22 trustee or a successor of the trustee:

23           (1) that is an original account holder has the right to access each digital asset held in trust,  
24 including the catalogue of electronic communications sent or received by the trustee and the  
25 content of an electronic communication; and

26           (2) that is not an original account holder has the right to access:

27                   (A) the content of an electronic communication sent or received by the original or  
28 any successor account holder if the electronic-communication service or remote-computing  
29 service is permitted to disclose the content under the Electronic Communications Privacy Act,  
30 18 U.S.C. Section 2702(b) [as amended];

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

1 (C) any other digital asset in which the original or any successor account holder  
2 has a right or interest.

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

6 Comments: Subsection (1) clarifies that access to digital assets, including the content of  
7 electronic communications, is presumed with respect to assets for which the trustee is the initial  
8 account holder. A trustee may have title to digital assets when the trustee opens an account as  
9 trustee; under those circumstances, the trustee can access the content of each digital asset that is  
10 in an account for which the trustee is the original account holder, although not necessarily each  
11 digital asset held in the trust.

12  
13 Subsection (2) addresses situations involving an inter vivos transfer of a digital asset into  
14 a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other governing  
15 instrument of a digital asset into a trust. In those situations, a trustee becomes a successor  
16 account holder when the settlor transfers a digital asset into the trust. There should be no  
17 question that the trustee with legal title to the digital asset was authorized by the settlor to access  
18 the digital assets so transferred, including both the catalogue and content of an electronic  
19 communication, and this provides “lawful consent” to allow disclosure of the content of an  
20 electronic communication from an electronic-communication service or a remote-computing  
21 service pursuant to applicable law. See the Comments concerning the definitions of the “content  
22 of an electronic communication” after Section 2. Nonetheless, subsection (2) distinguishes  
23 between the catalogue and content of an electronic communication in case there are any  
24 questions about whether the form in which property transferred into a trust is held constitutes  
25 lawful consent. Both authorization and lawful consent are important because 18 U.S.C.  
26 Section 2701 deals with intentional access without authorization and because 18 U.S.C.  
27 Section 2702 allows a service provider to disclose with lawful consent.

28  
29 The underlying trust documents and default trust law will supply the allocation of  
30 responsibilities between and among trustees.

31  
32 **SECTION 7. FIDUCIARY AUTHORITY.**

33 (a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of  
34 this [act] to access a digital asset of an account holder:

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

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

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

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

11                   (c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a  
12 fiduciary acting under this [act] to the extent the provision designates law that enforces a  
13 limitation on a fiduciary’s access to digital assets which limitation is void under subsection (b).

14                   (d) Except as provided in subsection (b), a fiduciary’s access under this [act] to a digital  
15 asset does not violate a terms-of-service agreement, notwithstanding a provision of the  
16 agreement which limits third-party access or requires notice of change in the account holder’s  
17 status.

18                   (e) As to tangible personal property capable of receiving, storing, processing, or sending  
19 a digital asset, a fiduciary with authority over the property of a decedent, [protected person,]  
20 principal, or settlor:

21                   (1) has the right to access the property and any digital asset stored in it; and

22                   (2) is an authorized user for purposes of any applicable computer fraud and  
23 unauthorized access laws, including [this state’s law on unauthorized computer access].



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

### 3 **Comment**

4 This issue concerning the parameters of the fiduciary’s authority potentially arises in two  
5 situations: 1) the fiduciary obtains access to a password or the like directly from the account  
6 holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or  
7 someone who has stored passwords in a written or electronic list and those passwords are then  
8 transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.  
9

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

21 In exercising its responsibilities, the fiduciary is subject to the same limitations as the  
22 account holder more generally. For example, a fiduciary cannot delete an account if this would  
23 be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service  
24 agreement, then the fiduciary is also able to do so. *See Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604  
25 (Mass. 2013).  
26

27 Subsection (a) is designed to establish that the fiduciary is authorized to exercise control  
28 over digital assets in accordance with other applicable laws. The language mirrors that used in  
29 Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the  
30 Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr,  
31 *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*,  
32 72 GEO. WASH. L. REV. 1208 (2004). The subsection clarifies that state law treats the fiduciary  
33 as “authorized” under the two federal statutes that prohibit unauthorized access to computers and  
34 computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any  
35 comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act,  
36 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra*. (State law may be useful to federal courts  
37 interpreting these statutes.)  
38

39 ECPA contains two potentially relevant prohibitions. The first, 18 U.S.C.  
40 Section 2701(a), defines the crime of unlawful access to stored communications, which applies  
41 to a person who “(1) intentionally accesses without authorization a facility through which an  
42 electronic communication service is provided; or (2) intentionally exceeds an authorization to  
43 access that facility....” Thus, someone who has authorization to access the facility is not  
44 engaging in criminal behavior. Moreover, this section does not apply to “conduct authorized . . .

1 by a user of that service with respect to a communication of or intended for that user.” 18 U.S.C.  
2 Section 2701(a), (c)(2).

3  
4 The second, 18 U.S.C. Section 2702, entitled “Voluntary disclosure of customer  
5 communications or records,” concerns actions by the service provider. It prohibits an  
6 electronic-communication service or a remote-computing service from knowingly divulging the  
7 content of an electronic communication that is stored by or carried or maintained on that service  
8 unless disclosure is made (among other exceptions) “to an addressee or intended recipient of  
9 such communication or an agent of such addressee or intended recipient” or “with the *lawful*  
10 *consent* of the originator or an addressee or intended recipient of such communication, or the  
11 subscriber in the case of remote-computing service.” 18 U.S.C. Section 2702(b)(1), (3)  
12 (emphasis added). See the Comments concerning the definitions of the “content of an electronic  
13 communication” after Section 2. The statute permits disclosure of “customer records” that do  
14 not include content, either with lawful consent from the customer or “to any person other than a  
15 governmental entity.” 18 U.S.C. Section 2702(c)(2) and (6). Thus, in contrast to its restrictions  
16 on the release of content, the electronic-communication or remote-computing service provider is  
17 permitted to disclose the catalogue of electronic communications to anyone except the  
18 government.

19  
20 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.  
21 18 U.S.C. Section 1030. Like ECPA, the CFAA similarly protects against anyone who  
22 “intentionally accesses a computer without authorization or exceeds authorized access.”  
23 18 U.S.C. Section 1030(a).

24  
25 State laws vary in their coverage, but typically prohibit unauthorized computer access.

26  
27 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization under  
28 applicable law to access the digital assets under the *first* relevant provision of ECPA, 18 U.S.C.  
29 Section 2701, as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the  
30 originator/subscriber under applicable law so that the service provider can voluntarily disclose  
31 the digital assets pursuant to the *second* relevant provision of ECPA, 18 U.S.C. Section 2702,  
32 including the content of an electronic communication. Moreover, this language should be  
33 adequate to avoid liability under the state unauthorized computer access laws.

34  
35 Subsection (b) addresses whether account holders can opt out of the rules in this act and  
36 whether Internet service providers can prevent fiduciary access. First, a terms-of-service  
37 agreement in which an account holder has made an affirmative choice to limit a fiduciary’s right  
38 to access will supersede any contrary provision in a will, trust, protective order, or power of  
39 attorney. The affirmative act must clearly demonstrate the account holder’s deliberate intent to  
40 prevent fiduciary access. Second, the subsection provides that any other term in a  
41 terms-of-service agreement that bars fiduciary access is void as against the state’s strong public  
42 policy. While all of a state’s laws could be considered that state’s public policy, the phrase  
43 “strong public policy” is to be construed under conflict of laws principles to protect fiduciary  
44 access to digital assets under this act, notwithstanding a contrary terms-of-service agreement  
45 provision and even if the terms-of-service agreement chooses the law of another state or country

1 to govern its contractual rights and duties. See Restatement (Second) Conflict of Laws § 90 and  
2 § 187 cmt. G; see also Uniform Trust Code § 107(1). However, a terms-of-service agreement  
3 provision for which an account holder has made an affirmative choice, separate from the account  
4 holder’s assent to other provisions of the terms-of-service agreement, to limit a fiduciary’s access  
5 to the account holder’s digital assets is not voided by this act and will supersede any contrary  
6 provision in a will, or trust. (See Example 5).

7  
8 Subsection (c) supports the importance of fiduciary access by providing that any choice  
9 of law governing the effect of a terms-of-service agreement that prevents fiduciary access is  
10 unenforceable.

11  
12 Subsection (d) reinforces the concept that the fiduciary “steps into the shoes” of the  
13 account holder, with no more – and no fewer – rights. For example, the terms-of-service  
14 agreement controls the rights of the account holder (settlor, principal, incapacitated person,  
15 decedent). The act does not permit the account holder’s fiduciary to override the  
16 terms-of-service agreement in order to make a digital asset or collection of digital assets  
17 “descendible,” although it does preserve the rights of the fiduciary to make the same claims as  
18 the account holder. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton,  
19 *Indescendibility*, 102 Calif. L. Rev. 543 (2014).

20  
21 Under subsection (d), access by a fiduciary should not be considered a transfer or other  
22 use that would violate the anti-transfer terms or other terms of a terms-of-service agreement.

23  
24 Subsection (e) clarifies that the fiduciary is authorized to access digital assets stored on  
25 tangible personal property, such as laptops, computers, smartphones or storage media of the  
26 decedent, protected person, principal, or settlor, exempting fiduciaries from application for  
27 purposes of state or federal laws on unauthorized computer access. For criminal law purposes,  
28 this clarifies that the fiduciary is authorized to access all of the account holder’s digital assets,  
29 whether held locally or remotely.

30  
31 *Example 1 – Access to digital assets by personal representative.* D dies with a will that is  
32 silent with respect to digital assets. D has a bank account for which D received only electronic  
33 statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account  
34 with a company that provides electronic-communication services to the public. The personal  
35 representative of D’s estate needs access to the electronic bank account statements, the photo  
36 account, and e-mails.

37  
38 The personal representative of D’s estate has the authority to access D’s electronic  
39 banking statements and D’s photo account, which both fall under the act’s definition of a “digital  
40 asset.” This means that, if these accounts are password-protected or otherwise unavailable to the  
41 personal representative, then the bank and the photo account service must give access to the  
42 personal representative when the request is made in accordance with Section 8. If the  
43 terms-of-service agreement permits D to transfer the accounts electronically, then the personal  
44 representative of D’s estate can use that procedure for transfer as well.

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

9  
10 *Example 2 – Access to digital assets by conservator.* C is seeking appointment as the  
11 conservator for P. P has a bank account for which P received only electronic statements, P has  
12 stored photos in a cloud-based Internet account, and P has an e-mail account with a company that  
13 provides electronic communication services to the public. C needs access to the electronic bank  
14 account statements, the photo account, and e-mails.

15  
16 Without a court order that explicitly grants access to P’s digital assets, including  
17 electronic communications, C has no authority pursuant to this act to access the electronic bank  
18 account statements, the photo account, or the e-mails. Based on law outside of this act, the bank  
19 may release the catalogue of electronic communications or content of an electronic  
20 communication for which it is the originator or the addressee because the bank is not subject to  
21 the ECPA.

22  
23 *Example 3 – Access to digital assets by agent.* X creates a power of attorney designating  
24 A as X’s agent. The power of attorney expressly grants A authority over X’s digital assets,  
25 including the content of an electronic communication. X has a bank account for which  
26 X receives only electronic statements, X has stored photos in a cloud-based Internet account, and  
27 X has a game character and in-game property associated with an online game. X also has an  
28 e-mail account with a company that provides electronic-communication services to the public.

29  
30 A has the authority to access X’s electronic bank statements, the photo account, the game  
31 character and in-game property associated with the online game, all of which fall under the act’s  
32 definition of a “digital asset.” This means that, if these accounts are password-protected or  
33 otherwise unavailable to A as X’s agent, then the bank, the photo account service provider, and  
34 the online game service provider must give access to A when the request is made in accordance  
35 with Section 8. If the terms-of-service agreement permits X to transfer the accounts  
36 electronically, then A as X’s agent can use that procedure for transfer as well.

37  
38 As X’s agent, A is also able to request that the e-mail account service provider grant  
39 access to e-mails sent or received by X; ECPA permits the service provider to release the  
40 catalogue. The service provider also must provide A access to the content of an electronic  
41 communication sent or received by X if the service provider is permitted under 18 U.S.C.  
42 Section 2702(b) to disclose the content. The bank may release the catalogue of electronic  
43 communications or content of an electronic communication for which it is the originator or the  
44 addressee because the bank is not subject to the ECPA.

1           *Example 4 – Access to digital assets by trustee.* T is the trustee of a trust established  
2 by S. As trustee of the trust, T opens a bank account for which T receives only electronic  
3 statements. S transfers into the trust to T as trustee (in compliance with a terms-of-service  
4 agreement) a game character and in-game property associated with an online game and a  
5 cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in  
6 compliance with the terms-of-service agreement) an e-mail account with a company that  
7 provides electronic-communication services to the public.  
8

9           T is an original account holder with respect to the bank account that T opened, and T has  
10 the ability to access the electronic banking statements. T, as successor account holder to S, may  
11 access the game character and in-game property associated with the online game and the photo  
12 account, which both fall under the act’s definition of a “digital asset.” This means that, if these  
13 accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the  
14 photo account service provider, and the online game service provider must give access to T when  
15 the request is made in accordance with Section 8. If the terms-of-service agreement permits the  
16 account holder to transfer the accounts electronically, then T as trustee can use that procedure for  
17 transfer as well.  
18

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

28           *Example 5 – Access notwithstanding terms in a terms-of-service agreement.* D, who is  
29 domiciled in state X, dies. D was a professional photographer who stored valuable digital photos  
30 in an online storage account provided by C. P is appointed by a court in state X to  
31 administer D’s estate. P needs access to D’s online storage account to inventory and  
32 appraise D’s estate assets and to file D’s estate tax return. During D’s lifetime, D entered into a  
33 terms-of-service agreement with C for the online storage account. The choice-of-law provision  
34 selects the law of state Y to govern the contractual rights and duties under the terms-of-service  
35 agreement. A provision of the terms-of-service agreement prohibits fiduciary access to the  
36 digital assets of an account holder, but D did not agree to that provision by an affirmative act  
37 separate from D’s assent to other provisions of the terms-of-service agreement. UFADAA has  
38 been enacted by state X but not by state Y. Because P’s access to D’s assets is fundamental to  
39 carrying out P’s fiduciary duties, a court should apply subsections (b) and (c) of this act under  
40 the law of state X to void the terms-of-service agreement provision prohibiting P’s access to D’s  
41 online account, even though the terms-of-service agreement selected the law of state Y to govern  
42 the contractual rights and duties under the terms-of-service agreement.

1           **SECTION 8. COMPLIANCE.**

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

5                   (1) access to the asset;

6                   (2) control of the asset; and

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

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

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

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

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

19                   (4) a trustee with the right of access under Section 6, the request must be  
20 accompanied by a certified copy of the trust instrument[, or a certification of the trust under [cite  
21 trust-certification statute, such as Uniform Trust Code Section 1013],] that authorizes the trustee  
22 to exercise authority over the digital asset.

23           (c) A custodian shall comply with a request made under subsection (a) not later than

1 [60] days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for  
2 an order directing compliance.

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

5 (1) must contain the following information:

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

7 (B) the identity of the settlor;

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

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

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

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

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

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

18 and

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

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

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

23 (f) A custodian that acts in reliance on a certification under subsection (d) without

1 knowledge that the representations contained in it are incorrect is not liable to any person for so  
2 acting and may assume without inquiry the existence of facts stated in the certification.

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

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

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

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

17 **Comment**

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

30  
31 *Example – Fiduciary control over a digital asset.* D dies with a will disposing of all D’s  
32 assets to D’s spouse, S. E is the personal representative for D’s estate. D left a bank account, for  
33 which D only received online statements, and a blog.



1 E as personal representative of D's estate has access to both of D's accounts and can  
2 request the passwords from the custodians of both accounts. If D's agreement with the bank  
3 requires that transferring the underlying title to the account be done in person, through a hard  
4 copy signed by the account holder and the bank manager, then E must comply with those  
5 procedures (signing as the account holder) and cannot transfer the funds in the account  
6 electronically. If the terms-of-service agreement for the blog permitted D to transfer the blog  
7 electronically, then E can make the transfer electronically as well.  
8

9 Subsection (c) establishes 60 days as the appropriate time for compliance. This is true  
10 regardless of the procedure for supplying the requisite trust instrument. If applicable law other  
11 than this act does not prohibit the custodian from complying, then the custodian must grant  
12 access to comply. This provision should be read in conjunction with the state's power of  
13 attorney act.  
14

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

#### 17 **Comment**

18

19 This section establishes that custodians are protected from liability when they act in  
20 accordance with the procedures of this act and in good faith. The types of actions covered  
21 include disclosure as well as transfer of copies. The critical issue in conferring immunity is the  
22 source of the liability. Direct liability is not subject to immunity; indirect liability is subject to  
23 immunity.  
24

25 Direct liability could only arise from noncompliance with a judicial order issued under  
26 section 8. Upon determination of a right of access under sections 4, 5, 6, or 7, a court may issue  
27 an order to grant access under section 8. Noncompliance with that order would give rise to  
28 liability for contempt. There is no immunity from this liability.  
29

30 Indirect liability could arise from granting a right of access under this act. Access to a  
31 digital asset might invade the privacy or the harm the reputation of the protected person, might  
32 harm the family or business of the protected person, and might harm other persons. The grantor  
33 of access to the digital asset is immune from liability arising out of any of these circumstances if  
34 the grantor acted in good faith to comply with this act. If there is a judicial order under section 8,  
35 compliance with the order establishes good faith. Absent a judicial order under section 8, good  
36 faith must be established by the grantor's assessment of the requirements of this act.  
37

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

1           **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
2 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic  
3 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not  
4 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
5 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
6 Section 7003(b).

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

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

13  
14           **SECTION 13. APPLICABILITY.**

15           (a) Subject to subsection (b), this [act] applies to:

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

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

20                   (3) a [conservatorship] proceeding, whether pending in a court or commenced  
21 before, on, or after [the effective date of this [act]]; and

22                   (4) a trustee acting under a trust created before, on, or after [the effective date of  
23 this [act]].

24           (b) This [act] does not apply to a digital asset of an employer used by an employee in the

1 ordinary course of the employer’s business.

2 **Comment**

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

8  
9 Subsection (a)(2) covers the situations in which a decedent dies intestate, so it falls  
10 outside of subsection (a)(1), as well as the situations in which a state’s procedures for small  
11 estates are used.

12  
13 Subsection (b) clarifies that the act does not apply to a fiduciary’s access to an  
14 employer’s internal email system.

15  
16 *Example 1 – Fiduciary access to an employee e-mail account.* D dies, employed by  
17 Company Y. Company Y has an internal e-mail communication system, available only to Y’s  
18 employees, and used by them in the ordinary course of Y’s business. D’s personal  
19 representative, R, believes that D used Company Y’s e-mail system to effectuate some financial  
20 transactions that R cannot find through other means. R requests access from Company Y to the  
21 e-mails.

22  
23 Company Y is not a custodian subject to the act. Under Section 2(7), a custodian must  
24 carry, maintain or store an account holder’s digital assets. An account holder, in turn, is defined  
25 under Section 2(1) as someone who has entered into a terms-of-service agreement. Company Y,  
26 like most employers, did not enter into a terms-of-service agreement with D, so D was not an  
27 account holder.

28  
29 *Example 2 – Employee of electronic-communication service provider.* D dies, employed  
30 by Company Y. Company Y is an electronic-communication service provider. Company Y has  
31 an internal e-mail communication system, available only to Y’s employees and used by them in  
32 the ordinary course of Y’s business. D used the internal Company Y system. When not at work,  
33 D also used an electronic-communication service system that Y provides to the public. D’s  
34 personal representative, R, believes that D used Company Y’s internal e-mail system as well as  
35 Company Y’s electronic-communication system available to the public to effectuate some  
36 financial transactions. R seeks access to both communication systems.

37  
38 As is true in Example 1, Company Y is not a custodian subject to the act for purposes of  
39 the internal email system. The situation is different with respect to R’s access to Y’s system that  
40 is available to the public. Assuming that Y can disclose the communications under federal law,  
41 then Y must disclose them to R.

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

2           (a) ....

3           (b) ....

4           (c) ....

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