

D R A F T  
FOR DISCUSSION ONLY

# FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 21 – 22, 2014 Drafting Committee Meeting

*WITH PREFATORY NOTE AND COMMENTS*

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ON UNIFORM STATE LAWS

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March 3, 2014

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# FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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# FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

## Prefatory Note for the Drafting Committee

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

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

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

This draft is for review by the Drafting Committee at our March meeting. The draft is divided into sixteen sections. Sections 1-3 contain general provisions and definitions, including those relating to the scope of the fiduciary's authority. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Section 8 contains provisions relating to the rights of the fiduciary to recover property. Section 9 addresses compliance, and Section 10 grants immunity to custodians. Sections 11-16 address miscellaneous topics, including the effective date of the Act and similar issues. The act

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

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

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

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

addresses only the rights of the four types of fiduciaries, and it is designed solely to provide access without changing the ownership of the underlying asset.

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

1 **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

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

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

5 (1) “Account holder” means an individual who has entered into a terms-of-service  
6 agreement. The term includes a deceased individual who entered into the agreement during the  
7 individual’s lifetime.

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 the record of the name of each  
11 person with which an account holder communicated, the time and date of the communication,  
12 and the electronic address of each person in an electronic communication that is controlled by an  
13 electronic communication service or a remote computing service.

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

16 (5) “Content of electronic communications” means information concerning the substance,  
17 or meaning of an electronic communication that is controlled by an electronic communication  
18 service or a remote computing service that is not readily accessible to the public.

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

21 (7) “Custodian” means a person that stores, or has control of, a digital asset or electronic  
22 communication of an account holder.

23 (8) “Digital asset” means an electronic record. The term includes the catalogue of

1 electronic communications and the content of electronic communications.

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

4 (10) “Electronic communication” means an electronic record while in electronic storage  
5 by an electronic communication service and an electronic record which is carried or maintained  
6 by a remote computing service.

7 (11) “Electronic communication service” means any service that provides to the public  
8 the ability to send or receive electronic communications.

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

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

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

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

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

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

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

1 (19) “Protected person” means an individual for whom a [conservator] has been  
2 appointed.

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

5 (21) “Remote computing service” means any service that provides to the public computer  
6 processing services or storage of electronic records by means of an electronic communication  
7 system.

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

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

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

14 **Comments for the Committee**

15 The definitions of agent, conservator, court, electronic, fiduciary, governing instrument,  
16 information, person, personal representative, power of attorney, principal, property, protected  
17 person, protective order, record, and will are based on those in the Uniform Probate Code or the  
18 Uniform Power of Appointment Act. The other definitions are new for this act, although the  
19 definition of digital service comes from the White House Digital Government Strategy:  
20 [http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-  
22 strategy.pdf](http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-<br/>21 strategy.pdf). The definition of “contents” is adapted from 18 U.S.C. § 2510(8), the definition of  
23 “electronic communication” is adapted from the language of 18 U.S.C. §§ 2510(12) and  
24 2702(a)(1) and (2), the definition of “electronic communication service” is drawn from 18  
25 U.S.C. 2510(15), and the definition of “remote computing service” is adapted from 18 U.S.C.  
§ 2711(2), to help ensure the Act’s compliance with federal law.

26 An account holder is an individual not acting in a fiduciary capacity.

27 This newest draft includes a definition for “catalogue of electronic communications.”  
28 Past drafts had referred to these as “records,” limited to log-type information about an electronic  
29 communication; because “record” has a different definition under the Act, the new term should  
30 clarify the distinction between the catalogue and the content of an electronic communication.

1 A custodian does not include an employer because an employer typically does not have a  
2 terms-of-service agreement with an employee. Any digital assets created through employment  
3 generally belong to the employer. A custodian includes an electronic service provider as well as  
4 any other entity that provides or stores electronic data.

5 Digital assets include digital currency and similar products currently in existence and yet  
6 to be invented. Digital assets do not include any material that the account holder has not  
7 obtained legally, such as pirated media.

8 The definition of “electronic communication” is designed to cover only those records that  
9 are subject to the privacy protections of federal law under the Electronic Communications  
10 Privacy Act, 18 U.S.C. §§ 2510 et seq. Electronic communication is a subcategory of “digital  
11 assets.”  
12

13 A “fiduciary” under this Act occupies a status recognized by state law, and fiduciaries’  
14 powers under the Act are subject to the relevant limits established by other state laws.  
15

16 The terms-of-service agreement definition relies on the definition found in UCC § 1-201  
17 (3). It refers to any agreement that controls the relationship between an account holder and a  
18 custodian, even though it might be called a terms-of-use agreement, a click-through license, or a  
19 similar term.  
20

21 **SECTION 3. SCOPE.** This [act] applies only to a grant of authority to a fiduciary who  
22 is acting lawfully in accordance with fiduciary obligations and duties.

### 23 **Comment**

24 Section 3 is critical because it establishes that the act applies only to fiduciaries that act in  
25 compliance with their fiduciary obligation. The section distinguishes the authority of fiduciaries,  
26 who exercise authority subject to this act only on behalf of the account holder, from any other  
27 efforts to access the digital assets and electronic communications. Family members or friends  
28 may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and  
29 are not covered by this Act.  
30

31 **SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER**  
32 **DIGITAL ASSETS OF A DECEDENT.** Unless prohibited by the will of a decedent, a court,  
33 law of this state other than this [act], or federal law, a personal representative of the decedent  
34 may access:

35 (1) any digital asset of the decedent, other than the content of an electronic  
36 communication;

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

2 (3) the content of electronic communications described in subsection (2) if the electronic

3 communication service or remote computing service is permitted under 18 U.S.C. Section

4 2702(b) to disclose the content.

### 5 **Comments for the Committee**

6 Subsection (1) establishes the default rule that the personal representative is authorized to  
7 administer all of the decedent’s digital assets other than material covered by the Electronic  
8 Communications Privacy Act (ECPA). It is modeled on the formulation of the personal  
9 representative’s default power set out in UPC Sec. 3-715.

10 The subsection clarifies the difference between fiduciary authority over digital assets  
11 other than electronic communications protected by ECPA, and authority over ECPA-covered  
12 electronic communications. For electronic communications, subsections (a)(2) and (3) establish  
13 procedures that cover: first, the catalogue (logs and records) that providers may release without  
14 consent under ECPA; and second, ECPA-covered communications. Federal law distinguishes  
15 between the permissible disclosure of the “contents” of a communication, covered in 18 U.S.C.  
16 § 2702(b), and of “a record or other information pertaining to a” subscriber or customer, covered  
17 in 18 U.S.C. § 2702(c); see Matthew J. Tokson, *The Content/Envelope Distinction in Internet*  
18 *Law*, 50 Wm. & Mary L. Rev. 2105 (2009).

19  
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. § 2702(b)(1), and it can also be disclosed to third parties with the “lawful  
24 consent” of the addressee or intended recipient. 18 U.S.C. § 2702(b)(3). Material for which the  
25 account holder is the “originator” can only be disclosed to third parties with the account holder’s  
26 “lawful consent.” 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the addressee  
27 or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the  
28 account holder is the originator, lawful consent is required.) By contrast to content-based  
29 material, non-content material can be disclosed not only with the lawful consent of the account  
30 holder but also to any person other than a governmental entity (which would presumably include  
31 fiduciaries). This information includes material about any communication sent, such as the  
32 addressee, sender, date/time, and other subscriber data, what this draft defines as the “catalogue  
33 of electronic communication”. (Further discussion of this issue is set out in the Comments to  
34 Section 8, *infra*.)

### 35 **Comment**

36 The phrase, “Unless prohibited by the will,” is intended to indicate that a will controls the  
37 personal representative’s authority. As is true more generally with respect to interpretation of  
38 wills, public policy can override the explicit terms of a will.



1 This section is designed to clarify that a decision by the court to grant powers to the  
2 conservator under this section must be based primarily on the decision that the individual or  
3 protected person would have made, if of full capacity. Subsection (b) draws on UPC Section 5-  
4 411. The individual’s personal values and expressed desires, past and present, are to be  
5 considered when making decisions about the conservator’s authority. Existing state law may  
6 also set out the requisite standards for a conservator’s actions, and the bracketed language allows  
7 for reference to those laws. Under Section 8, the conservator has the same power over digital  
8 assets as the account holder. The conservator must exercise authority in the interests of the  
9 protected person.

10 **SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS.**

11 (a) Unless prohibited by a power of attorney, an agent may access any digital assets of  
12 the principal, including the catalogue of electronic communications sent or received by the  
13 principal, but not including the content of those electronic communications.

14 (b) If a power of attorney expressly grants authority to an agent over electronic  
15 communications of the principal, the agent may access the content of electronic communications  
16 sent or received by the principal, if the electronic communication service or remote computing  
17 service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

18 **Comments for the Committee**

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

23 The situation is different with respect to the contents of electronic communications. In  
24 that case, the agent must be specifically authorized by the principal to access the contents of the  
25 principal’s electronic communications. This provision is modeled on UPC Sec. 5B-201(a).  
26 Because a power of attorney contains the consent of the account holder, ECPA should not  
27 prevent the agent from exercising authority over the content of electronic communications. There  
28 should be no question that an explicit delegation of authority in a power of attorney constitutes  
29 authorization from the account holder to access digital assets, and provides “lawful consent” to  
30 allow disclosure of electronic communications from an electronic communication service or a  
31 remote computing service pursuant to applicable law. Both authorization and lawful consent are  
32 important because 18 U.S.C. § 2701 deals with intentional access without authorization and  
33 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

34 The American College of Trusts and Estates Counsel’s State Laws Committee and others  
35 asked the Committee to consider whether the authority over digital assets and electronic

1 communications should be a default power. The Committee has decided that the power to access  
2 the contents of electronic communications must be expressly granted, because when expressed  
3 and not default, it satisfies the lawful consent requirement of ECPA. The agent has default  
4 authority over other digital assets under (a). States may need to amend their power of attorney  
5 forms to include this power.

6 **SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS.**

7 (a) Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial  
8 account holder may access each digital asset, including the catalogue of electronic  
9 communications sent or received by the account holder and the content of those electronic  
10 communications, held in the trust.

11 (b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor  
12 account holder, the trustee may access:

13 (1) the digital assets, including the catalogue of electronic communications sent or  
14 received by the account holder, but not including the content of those electronic  
15 communications, held in the trust; and

16 (2) the content of electronic communications described in subsection (b)(1) if the  
17 electronic communication service or the remote computing service is permitted under 18 U.S.C.  
18 Section 2702(b) to disclose the content.

19 **Comments for the Committee**

20 Access to digital assets, including the contents of the electronic communications is  
21 presumed with respect to assets for which the trustee is the initial account holder. A trustee may  
22 have title to digital assets and electronic communications when the trust itself becomes the  
23 account holder of a digital asset held by the trust, and when the trustee becomes an account  
24 holder for trustee business, situations addressed in subsection (a).

25 Subsection (b) addresses situations involving either an inter vivos transfer of a digital  
26 asset into a trust, or transfer via a pourover will of a digital asset into a trust. There should be no  
27 question that holding property in trust form constitutes authorization from the account holder for  
28 the trustee to access digital assets, including both the catalogue and contents of the electronic  
29 communications, and this provides “lawful consent” to allow disclosure of electronic  
30 communications from an electronic communication service or a remote computing service  
31 pursuant to applicable law. Nonetheless, subsection (b) distinguishes between the catalogue and

1 contents of electronic communications in case there are any questions about whether the form in  
2 which property – transferred into a trust - is held constitutes lawful consent. Both authorization  
3 and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without  
4 authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

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

7 **SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.**

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

10 (1) may take actions concerning the asset to the extent of the account holder’s  
11 authority and the fiduciary’s powers under law of this state other than this [act], subject to  
12 copyright and other law and the terms-of-service agreement;

13 (2) is deemed to have the lawful consent of the account holder for the custodian to  
14 divulge the content of an electronic communication to the fiduciary pursuant to state and federal  
15 electronic privacy law; and

16 (3) is an authorized user under the federal Computer Fraud and Abuse Act [18  
17 U.S.C. Section 1030 et seq.] [and state computer fraud and abuse acts].

18 (b) any provision in a terms-of-service agreement that limits a fiduciary’s access to the  
19 digital assets of the account holder under this [act] is void as against the strong public policy of  
20 this state, unless the limitations of that provision are signed by the account holder separately  
21 from the other provisions of the terms-of-service agreement.

22 (c) subject to Section 9(a), a fiduciary’s access to a digital asset is not a violation of a  
23 terms-of-service agreement, notwithstanding a provision that bars third party access.

24 (d) A fiduciary with authority over the equipment of a decedent, protected person,  
25 principal, or settlor that can receive, store, process, or send an electronic record may access that  
26 equipment and any electronic record stored on it.

1 **Comment**

2 This section clarifies that the fiduciary has the same authority as the account holder if the  
3 account holder were the one exercising the authority (note that, where the account holder has  
4 died, this means that the fiduciary has access as of the hour before the account holder’s death).  
5 Of course, in exercising its responsibilities, the fiduciary is subject to the duties and obligations  
6 established pursuant to state fiduciary law and is liable for breach of those duties.  
7

8 This issue concerning the parameters of the fiduciary’s authority potentially arises in two  
9 situations: 1) the fiduciary obtains access to a password directly from the account holder, as  
10 would be true in various circumstances such as for the trustee of an inter vivos trust or someone  
11 who has stored passwords with a digital locker and those passwords are then transmitted to the  
12 fiduciary; and 2) the fiduciary has obtained access pursuant to this act.  
13

14 The fiduciary does not, however, obtain power over any digital assets if that property was  
15 illegally obtained by the account holder. The section also provides that control by a fiduciary  
16 should not be considered a transfer that would violate the anti-transfer terms of a terms-of-  
17 service agreement. Finally, the fiduciary has the same responsibilities as the account holder  
18 more generally. For example, a fiduciary cannot delete an account if this would be fraudulent.  
19 Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then  
20 the fiduciary is similarly able to do so. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass.  
21 2013).  
22

23 Subsection (a) is designed to establish that the fiduciary is authorized to exercise control  
24 over digital assets in accordance with other applicable laws. The language mirrors that used in  
25 Title II of the Electronic Communications Privacy Act of 1986 (ECPA), known as the Stored  
26 Communications Act (SCA), 18 U.S.C. § 2701 *et seq.* The subsection clarifies that the fiduciary  
27 is “authorized” under the two federal statutes that prohibit unauthorized access to computers and  
28 computer data, the SCA and the Computer Fraud and Abuse Act,<sup>5</sup> as well as pursuant to any  
29 comparable state laws criminalizing unauthorized access.<sup>6</sup>  
30

31 The Stored Communications Act contains two potentially relevant prohibitions.

32 1) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for

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

<sup>6</sup> *See Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), <http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx>; Christina Kunz, Peter Rademacher & Lucie O’Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive); James D. Lamm, et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. \_\_ (2013), <http://lawreview.law.miami.edu/wp-content/uploads/2011/12/The-Digital-Death-Conundrum-How-Federal-and-State-Laws-Prevent-Fiduciaries-from-Managing-Digital-Property.pdf>.

1 anyone to “intentionally access [] without authorization a facility through which an electronic  
2 communication service is provided” as well as to “intentionally exceed [] an authorization to  
3 access that facility.” Thus, someone who has authorization to access the facility is not engaging  
4 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user  
5 of that service with respect to a communication of or intended for that user.”<sup>7</sup>

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

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

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

23 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to  
24 access the files under the *first* section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA;  
25 and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can  
26 voluntarily disclose the files pursuant to the *second* relevant provision of the SCA, 18 U.S.C.  
27 § 2702. Moreover, this language should be adequate to avoid liability under the state  
28 unauthorized access laws.

29 Subsection (b) is new and is based on discussions at the last Drafting Committee meeting.  
30 This subsection is discussed in more detail in Commissioner Walsh’s issues memo.

31 Subsection (c) reinforces the concept that the fiduciary “steps into the shoes” of the  
32 account holder, with no more – and no fewer – rights. For example, the terms-of-service  
33 agreement (TOSA) controls the rights of the account holder (settlor, principal, incapacitated  
34 person, decedent). The Act does not permit the account holder’s fiduciary to override the TOSA  
35 in order to make a digital asset or collection of digital assets “descendible,” although it does  
36 preserve the rights of the fiduciary to make the same claims as the account holder. See *Ajemian*  
37 *v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton, *Indescendibility*, 102 Calif. L. Rev.  
38 \_\_ (forthcoming 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311506).

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

1           The providers have indicated that they would feel more comfortable with language like  
2 the following, suggested by Commissioner Dan Robbins:

3           The fiduciary’s authority to access the digital asset is the same as the account holder  
4 except where (i) the TOS permits an account holder to pre-designate another individual to  
5 have exclusive access to the account upon the incapacitation or death of the account  
6 holder, in which case the fiduciary would have no access; or (ii) the custodian has  
7 conspicuously disclosed within the TOS a default rule for deleting the contents of the  
8 account upon death of the account holder.  
9

10           Subsection (d) is designed to clarify that the fiduciary is authorized to access digital  
11 assets stored on equipment of the decedent, protected person, principal, or settlor, thereby  
12 superseding state laws on unauthorized access to the equipment.  
13

14           **SECTION 9. COMPLIANCE.**

15           (a) If a fiduciary that has a right to access a digital asset of an account holder under this  
16 [act] has complied with subsection (b), the custodian shall comply with the fiduciary's request in  
17 a record for:

- 18                   (1) access to the asset;
- 19                   (2) control of the asset; or
- 20                   (3) a copy of the asset unless the asset is subject to the copyright of a third party.

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

22                   (1) a personal representative with the right of access under Section 4, the request  
23 must be accompanied by a certified copy of [the letter of appointment of the representative or a  
24 small estate affidavit];

25                   (2) a [conservator] with the right of access under Section 5, the request must be  
26 accompanied by a certified copy of the court order that gives the [conservator] authority over the  
27 digital asset;

28                   (3) an agent with the right of access under Section 6, the request must be  
29 accompanied by a certified copy of a currently-effective power of attorney that authorizes the

1 agent to exercise authority over the digital asset; and

2 (4) a trustee with the right of access under Section 7, the request must be  
3 accompanied by a certified copy of the trust instrument [,or a certification of the trust under [cite  
4 trust-certification statute, such as Uniform Trust Code Section 1013,] that authorizes the trustee  
5 to exercise authority over the digital asset.

6 (c) A custodian shall comply with a request not later than [60] days after receipt of the  
7 request. If the custodian fails to comply, the fiduciary may apply to the court for an order  
8 directing compliance.

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

11 (1) must contain the following information:

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

13 (B) the identity of the settlor;

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

15 (D) the powers of the trustee;

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

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

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

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

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

23 (3) must state that the trust has not been revoked, modified, or amended in a

1 manner that would cause the representations contained in the certification of trust to be incorrect;  
2 and

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

4 (e) A recipient of a certification of trust under subsection (d) may require the trustee to  
5 provide copies of excerpts from the original trust instrument and later amendments which  
6 designate the trustee and confer on the trustee the power to act in the pending transaction.

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

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

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

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

#### 18 **Comment**

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

22 The Committee may want to consider the “copyright” language in subsection (a), which  
23 has been modified at the suggestion of Commissioner Robbins. He has also suggested, as an  
24 alternative, the following language: “(3) a copy of the asset unless the asset is a copyrighted  
25 motion picture, sound recording, software or electronic book where the copyright is held by a  
26 third party.”

27  
28 Subsection (c) establishes 60 days as the appropriate time for compliance. The

1 Committee may want to discuss, at Style’s suggestion, whether to include an expedited time  
2 period.

3  
4 **SECTION 10. CUSTODIAN IMMUNITY.** A custodian and its officers, employees,  
5 and agents are immune from liability for any action done in good faith in compliance with this  
6 [act].

7 **Comment**

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

11 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
12 applying and construing this uniform act, consideration must be given to the need to promote  
13 uniformity of the law with respect to its subject matter among states that enact it.

14 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND  
15 NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic  
16 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not  
17 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
18 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
19 Section 7003(b).

20 **[SECTION 13. SEVERABILITY.** If any provision of this [act] or its application to  
21 any person or circumstance is held invalid, the invalidity does not affect other provisions or  
22 applications of this [act] which can be given effect without the invalid provision or application,  
23 and to this end the provisions of this [act] are severable.]

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

26  
27 **SECTION 14. APPLICABILITY.** This [act] applies to:

28 (1) a fiduciary or agent acting under a will, trust or power of attorney executed before, on

1 or after [the effective date of this [act]], except as otherwise provided in this [Act]; and

2 (2) a conservatorship proceeding, whether pending in a court or commenced before, on or

3 after [the effective date of this [act]], except as otherwise provided in this [Act].

4 **Comment**

5 As the issues memo and the memo from Chris Kunz and John Gregory note, the  
6 Committee may want to discuss this provision in more detail.

7

8 **SECTION 15. REPEALS; CONFORMING AMENDMENTS.**

9 (a) ...

10 (b) ...

11 (c) ...

12 **SECTION 16.** If the custodian has obligations under other state or federal laws to  
13 preserve records, this act does not override those other obligations.

14 **SECTION 17. EFFECTIVE DATE.** This [act] takes effect....