



Proposed Changes to the Uniform Fiduciary Access to Digital Assets Act

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) was approved last year by the Uniform Law Commission following a normal two year drafting process. In the first legislative session following its approval, twenty-seven states introduced a UFADAA bill, showing a strong demand by state legislatures to address the question of access to digital assets.

Despite the high number of bill introductions, UFADAA has not been enacted into law anywhere except Delaware, where a substantially similar law based on a final draft of UFADAA was enacted in 2014. The 2015 bills were blocked by a coalition of internet-based businesses and privacy advocates that opposed certain provisions of UFADAA and offered their own limited model legislation (a version of which was enacted in Virginia).

Although many of the opposing parties participated in the drafting process, they did not articulate or engage in serious discussions about their concerns until recently. Based on a better understanding of their concerns and on lessons learned from the 2015 enactment effort, the Executive Committee is recommending a waiver of the two-year reading rule to permit the conference to consider a set of amendments to UFADAA, drafted by representatives of the UFADAA enactment committee and ULC legislative staff who worked extensively on the legislative effort this last year. Because these proposed amendments address the primary concerns that arose in the legislative effort, the enactment committee believes that approval of the amendments will serve the essential purposes of the original act and substantially decrease opposition to its enactment.

The proposed amendments, although extensive in form, will not substantially change the purpose or effect of the act. UFADAA will still permit four common types of fiduciaries (executors of a decedent’s estate, agents under a power of attorney, trustees, and conservators) to gain access to online information as necessary for them to carry out their duties. Custodians of digital assets will still be required to disclose digital assets to legally appointed fiduciaries. Fiduciaries who manage digital assets will still be bound by all of the usual fiduciary duties.

The proposed amendments are necessary to clarify the application of federal privacy laws, to better define the rights and duties of all parties, and to give legal effect to an account holder’s instructions for the disposition of digital assets.

The changes in language are extensive because much of the language used originally had other implications for various constituencies. For example, the term “access” was understood universally within the technology industry to mean “allowing a user to log on directly to an account” which was never the intent.

The following chart summarizes the proposed changes.

Provisions Changed	Rationale
Section 4 – Individual consent versus terms of service.	The original UFADAA provided fiduciaries with default access to information protected under federal privacy law. The federal Electronic Communications Privacy Act (ECPA) regulates disclosure of a subset of digital assets – private communications (such as email and voice mail). ECPA prohibits disclosure of the <i>content</i> of electronic communications without the consent of either the sender or the intended recipient (with certain exceptions). Custodians of digital property feared disclosure as

	required by UFADAA would force them into litigation. New Section 4 clarifies that account holders may consent to disclosure of their content either online or in a record, and that such consent will override any prohibition on disclosure contained in a boilerplate terms-of-service agreement. Without consent, custodians are not required to disclose user content.
Section 5 – Terms-of-Service Agreement preserved.	This new section clarifies that the law does not override a custodian’s terms-of-service agreement (except to give effect to an account holder’s express consent as provided in Section 4).
Terminology in various sections – “access” vs. “disclosure”. New Section 6 – Procedure for Disclosing Digital Assets.	Fiduciaries need access to information contained in online accounts, but not necessarily to the account itself. Internet firms expressed concern that the language of UFADAA required them to allow a fiduciary full online access to an account, with the attendant risk that full access was neither intended, nor necessary. The proposed amendments clarify that disclosure of <i>information</i> is what the act requires, and new Section 6(a) provides the custodians of digital assets with a choice of how to disclose the requested information.
Sections 7 through 13 – Consent required for access to content.	The proposed amendments clarify that a fiduciary must demonstrate that the account holder consented to disclosure of the content of communications before a custodian is required to release that information. In the case of a decedent, the custodian may require court verification of consent. However, consent is not necessary for custodians to disclose a catalogue of electronic communications, or non-communications such as digital photos or files.
Sections 7 through 14 – Identification of assets and accounts	Many online accounts are anonymous. When a custodian receives a request from a fiduciary for access to an account, the custodian may not have enough information to link a particular account with the particular person represented by the fiduciary. Therefore, the proposed amendments require a fiduciary to identify the proper account by specific reference to a username, email address, or account number, and to provide evidence linking the account to a particular account holder when asked.
Section 14 – No access to the contents of a protected person’s communications.	When a conservator is appointed to represent a protected person’s interests, the protected person may still retain some right to privacy in their personal communications. Recent court decisions held that an account holder must give actual consent before a custodian is permitted to release the contents of electronic communications. Therefore, Section 10 no longer permits conservators to request disclosure of a protected person’s electronic communications on the basis of the conservatorship order alone. The conservator may request suspension or termination of the protected person’s account.
Section 15(a) – Fiduciary duties expressly imposed.	The original UFADAA incorporated fiduciary duties by reference to “other law.” This proved to be confusing and led to enactment difficulty. Section 11(a) now expressly imposes fiduciary duties.
Section 15(f) – Account termination	A fiduciary may want to terminate an online account rather than access its contents. New Section 11(f) clarifies that the fiduciary has that option.
Section 16 – Custodian compliance and immunity	Section 12(a) sets out the rule for custodian compliance, and Sections 12 (b) and (c) allow the custodian to verify that the account belongs to the person represented by the fiduciary.
Various Sections	Style changes suggested by Style Committee Liaison David Biklen.