

DRAFT
FOR DISCUSSION ONLY

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2013
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

October 22, 2013

DRAFTING COMMITTEE ON 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 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, North Carolina Dept. of Justice, P.O. Box 629, Raleigh, NC 27602-0629

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

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

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

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, *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, William Mitchell College of Law, 875 Summit Ave., St. Paul, MN 55105,
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, Illinois 60602
312/450-6600
www.uniformlaws.org

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

TABLE OF CONTENTS

| | |
|--|----|
| SECTION 1. SHORT TITLE. | 1 |
| SECTION 2. DEFINITIONS. | 1 |
| SECTION 3. SCOPE. | 4 |
| SECTION 4. AUTHORITY OVER DIGITAL ASSETS AND COMMUNICATIONS OF DECEDENT BY PERSONAL REPRESENTATIVE. | 4 |
| SECTION 5. AUTHORITY OVER DIGITAL ASSETS AND ELECTRONIC COMMUNICATIONS OF PROTECTED PERSON BY [CONSERVATOR]. | 5 |
| SECTION 6. CONTROL OF DIGITAL ASSETS AND ELECTRONIC COMMUNICATIONS BY AGENT UNDER POWER OF ATTORNEY. | 7 |
| SECTION 7. CONTROL OF DIGITAL ASSETS AND ELECTRONIC COMMUNICATIONS BY TRUSTEE | 8 |
| SECTION 8. FIDUCIARY AUTHORITY. | 8 |
| SECTION 9. COMPLIANCE. | 11 |
| SECTION 10. CUSTODIAN IMMUNITY. | 13 |
| SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. | 13 |
| SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT | 13 |
| [SECTION 13. SEVERABILITY. | 14 |
| SECTION 14. APPLICABILITY. | 14 |
| SECTION 15. REPEALS; CONFORMING AMENDMENTS. | 14 |
| SECTION 16. EFFECTIVE DATE. | 14 |

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 \$55,000.¹ 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.² The average individual has 25 passwords. Some service providers have explicit policies on what will happen when an individual dies, others do not;³ even where these policies are included in the terms of service, most consumers click-through these agreements.

Only a minority of states have enacted legislation on fiduciary access to digital assets: Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island. In addition, other states, including Massachusetts, Nebraska, New York, and Oregon, have considered, or are considering, legislation.⁴ Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal's death or incapacity is covered.

This draft is for review by the Drafting Committee. While an earlier draft focused on amendments to existing uniform laws in this area, this draft is designed to be a stand-alone act. The draft is divided into eleven sections. Sections 1-3 contain general provisions and definitions, 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 relief from liability for compliance. Sections 10-14 address miscellaneous issues, including the effective date of the act and similar issues.

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

² 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>.

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

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

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 a person, including a decedent, that has entered into a
6 terms-of-service agreement.

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

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

11 (4) “Contents,” when used in connection with an electronic communication, means
12 information concerning the substance, purport, or meaning of the communication.

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

15 (6) “Custodian” means a person that stores, or has control of, digital assets or electronic
16 communications of an account holder.

17 (7) “Digital asset” means: a) information created, generated, sent, communicated,
18 received, or stored by electronic means on a digital device or system that delivers digital
19 information, and includes a contract right; and b) an electronic system for creating, generating,
20 sending, receiving, storing, displaying, or processing information which the account holder is
21 entitled to access.

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

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

3 (10) “Electronic communication” means a transfer of a sign, signal, writing, image,
4 sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,
5 electromagnetic, photoelectronic or photooptical system. The term does not include a wire or
6 oral communication; any communication made through a tone-only paging device; or any
7 communication from a tracking device.

8 (11) “Electronic communication service” means a person that provides electronic
9 communications to the public.

10 (12) “Fiduciary” includes a personal representative, [conservator,] [guardian,] agent, or
11 trustee.

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

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

16 (15) “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 (16) “Personal representative” means an executor, administrator, successor personal
20 representative, special administrator, or a person that performs substantially the same function
21 under law of this state other than this [act].

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

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

3 (19) “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 (20) “Remote computing service” means a person that stores electronic records or
6 provides computer processing services to the public by means of an electronic communication
7 service.

8 (21) “Terms-of-service agreement” means an agreement that controls the relationship
9 between an account holder and a custodian. The term includes a terms-of-use agreement, a
10 license agreement, and a privacy policy.

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

13 (23) “Will” means a testamentary instrument. The term includes a codicil and a
14 testamentary instrument that only appoints an [executor] or revokes or revises another will.

15 **Comments for the Committee**

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

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

1 The definition of “electronic communication” excludes a variety of communications to
2 ensure that they are treated as digital assets rather than electronic communications, a distinction
3 that is significant in later sections of the act.

4 **SECTION 3. SCOPE.** This [act] applies only to a grant of authority to a fiduciary.

5 **Comment**

6 This section distinguishes the authority of fiduciaries, who exercise authority subject to
7 this act only on behalf of the account holder from any other efforts to access the digital assets
8 and electronic communications. Family members or friends may seek such access, but, unless
9 they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

10 **SECTION 4. AUTHORITY OVER DIGITAL ASSETS AND**
11 **COMMUNICATIONS OF DECEDENT BY PERSONAL REPRESENTATIVE.**

12 (a) Unless prohibited by the will of the decedent, a court, or law of this state other than
13 this [act], a personal representative of the decedent may obtain:

14 (1) the digital assets of a decedent;

15 (2) records of the electronic communications of the decedent controlled by an
16 electronic communication service or a remote computing service, including a log of the
17 electronic address of each party with whom the decedent communicated; and

18 (3) the contents of each electronic communication controlled by an electronic
19 communication service or a remote computing service sent or received by the decedent, to the
20 extent consistent with 18 U.S.C. Section 2702(b).

21 (b) Once obtained, a personal representative may access, manage, deactivate, and delete
22 the digital assets and the records and contents of the electronic communications of a decedent.

23 **Comments for the Committee**

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

28 The subsection clarifies the difference between fiduciary authority over digital assets

1 other than electronic communications protected by ECPA, and authority over ECPA-covered
2 electronic communications. For electronic communications, subsections (a)(2) and (3) establish
3 procedures that cover: first, logs and records that providers may release without consent under
4 ECPA; and second, ECPA-covered communications. Federal law distinguishes between the
5 permissible disclosure of the “contents” of a communication, covered in 18 U.S.C. § 2702(b),
6 and of “a record or other information pertaining to a” subscriber or customer, covered in
7 18 U.S.C. § 2702(c). The first, content-based material, can be divided into two types of
8 communications: those received by the account holder and those sent. Material when the
9 account holder is the “addressee or intended recipient” can be disclosed either to that individual
10 or to an agent for that person. 18 U.S.C. § 2702(b)(1). Material for which the account holder is
11 the “originator” (as well as an addressee or intended recipient) can be disclosed with the account
12 holder’s “lawful consent.” 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the
13 addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that
14 when the account holder is the originator, lawful consent is required. By contrast to content-
15 based material, non-content material can be disclosed not only with the lawful consent of the
16 account holder but also to any person other than a governmental entity (which would presumably
17 include fiduciaries). (Further discussion of this issue is set out in the Comments to Section 8,
18 *infra.*)

19 Several people have raised the issue of whether this authority must be specifically
20 granted in a court order or whether it should be a default power. That’s an issue for Committee
21 discussion. The Committee might want to revisit issues involving dead hand control in the face
22 of language in a will that prohibits access to any digital assets.

23 **Comment**

24 The term, “otherwise provided by will,” is intended to indicate that a will controls the
25 personal representative’s authority. As is true more generally with respect to interpretation of
26 wills, public policy can override the explicit terms of a will.

27 **SECTION 5. AUTHORITY OVER DIGITAL ASSETS AND ELECTRONIC** 28 **COMMUNICATIONS OF PROTECTED PERSON BY [CONSERVATOR].**

29 (a) “Protected person” means an individual for whom a protective order has been entered.

30 (b) “Protective order” means an order appointing a [conservator] or related to
31 management of a protected person’s digital assets.

32 (c) At a hearing concerning the appointment or authority of a [conservator] for an
33 individual or a protected person, a court may authorize a [conservator] to obtain:

34 (1) the digital assets of an individual or a protected person;

1 (2) records of the electronic communications of an individual or a protected
2 person controlled by an electronic communication service or a remote computing service,
3 including a log of the electronic address of each person with whom the individual or protected
4 person communicated; and

5 (3) the contents of each electronic communication controlled by an electronic
6 communication service or a remote computing service sent or received by the individual or
7 protected person to the extent consistent with 18 U.S.C. Section 2702(b).

8 (4) Once obtained, the [conservator] may access, manage, deactivate, and delete
9 the digital assets and the records and contents of electronic communications of the individual or
10 protected person.

11 (d) In granting authority to a [conservator] under subsection (a), the court shall consider
12 the intent of the individual or protected person with respect to the authority granted to the extent
13 that intent can be ascertained.

14 **Comments for the Committee**

15 Section 5 establishes that the conservator must be specifically authorized by the court to
16 access the protected person’s digital assets. Each of the different levels of access must be
17 specifically granted by court order. The Committee may need to clarify that the requirement in
18 Section 5 for express authority over digital assets does not limit the fiduciary’s authority over
19 the underlying “bricks and mortar” assets, such as a bank account.

20 Section 5 is comparable to Section 4. It responds to the concerns of internet service
21 providers who believe that the act should be structured to clarify the difference between fiduciary
22 authority over digital assets other than electronic communications protected by federal law, the
23 Electronic Communications Privacy Act (ECPA), and authority over ECPA-protected electronic
24 communications. Consequently, this draft sets out procedures that cover: first, logs and records
25 that providers may release without consent under ECPA; and second, ECPA-covered
26 communications.

27 Subsection (c) is comparable to Section 4(a) with respect to the separation of authority
28 over digital assets and electronic communication subject to ECPA.

29 Subsection (d) repeats the introductory language in UPC Section 5-411(c), and is
30 designed to clarify that a decision by the court to grant powers to the conservator under this

1 section must be based primarily on the decision that the protected person would have made, if of
2 full capacity. The protected person’s personal values and expressed desires, past and present, are
3 to be considered when making decisions about the conservator’s authority. Existing state law
4 may also set out the requisite standards for a conservator’s actions, and the bracketed language
5 allows for reference to those laws. Under Section 8, the conservator has the same power over
6 digital assets as the account holder. The conservator must exercise authority in the interests of
7 the protected person.

8 **SECTION 6. CONTROL OF DIGITAL ASSETS AND ELECTRONIC**

9 **COMMUNICATIONS BY AGENT UNDER POWER OF ATTORNEY.** If a power of

10 attorney grants authority to an agent over digital assets and electronic communications of a
11 principal, and exercise of the authority is not otherwise prohibited by a governing instrument, the
12 agent may[:

13 (1)] access, manage, deactivate, and delete the digital assets and electronic
14 communications[; and

15 (2) change a governing instrument, other than the power of attorney, affecting the digital
16 assets and electronic communications].

17 **Comments for the Committee**

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

29 The American College of Trusts and Estates Counsel’s State Laws Committee recently
30 asked the Committee to consider whether the authority over digital assets and electronic
31 communications, instead. The Committee has decided this power must be expressly granted,
32 because when expressed and not default, it satisfies the lawful consent requirement of ECPA.

33 An issue for the Committee is how the agent accesses the digital assets. Is access in the
34 name of the agent or the principal? Outside of the digital world, it is clear that the agent is not the

1 principal. But is this an issue we even need to address?

2 Each of the different levels of access must be specifically granted by the power. An
3 affirmative grant of authority to an agent is required because of the risk those acts pose to the
4 principal's property and estate plan, and it is consistent with the agent's lack of supervision by a
5 court.

6 Subsection 2 is bracketed to indicate each state will need to decide whether an agent can
7 change a governing instrument. Because of the danger of fraud and influence inherent in the use
8 of powers of attorney, we may want to discuss further whether or not an agent's control should
9 differ from that granted to other fiduciaries.

10 **SECTION 7. CONTROL OF DIGITAL ASSETS AND ELECTRONIC**
11 **COMMUNICATIONS BY TRUSTEE.** A trustee may access, manage, deactivate, and delete
12 the digital assets and electronic communications held in the trust in accordance with the terms of
13 the trust expressly authorizing the trustee to exercise these powers.

14 **Comments for the Committee**

15 A trustee may have title to digital assets and electronic communications both through an
16 account created by and used by the principal and an account created by the fiduciary for
17 fiduciary business. There should be no question that holding property in trust form constitutes
18 authorization from the account holder to access digital assets, and that it provides "lawful
19 consent" to allow disclosure of electronic communications from an electronic communication
20 service or a remote computing service pursuant to applicable law. Both authorization and lawful
21 consent are important because 18 U.S.C. § 2701 deals with intentional access without
22 authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

23 **SECTION 8. FIDUCIARY AUTHORITY.**

24 (a) A fiduciary with authority over digital assets or electronic communications of an
25 account holder under this act:

26 (i) has the same authority as the account holder;

27 (ii) has the lawful consent of the account holder; and

28 (iii) is an authorized user of the account.

29 (b) The rights of the fiduciary exercising the account holder's authority are subject to
30 copyright and other law as well as any applicable and enforceable terms of service agreement.

1 (c) The exercise of authority over digital assets or electronic communications by a
2 fiduciary is not a transfer of property, notwithstanding a contrary provision in a terms of service
3 agreement.

4 (d) A fiduciary with authority over a digital device of a decedent, protected person,
5 principal, or settlor may access any record stored on the digital device.

6 **Comment**

7 This section clarifies that the fiduciary has the same authority as the account holder. This
8 issue potentially arises in two situations: 1) the fiduciary obtains access to a password directly
9 from the account holder, as would be true in various circumstances such as for the trustee of a
10 trust or someone who has stored passwords with a digital locker; and 2) the fiduciary has
11 obtained access pursuant to this act. The fiduciary does not, however, obtain power over any
12 digital assets if that property was illegally obtained by the account holder. The section also
13 provides that control by a fiduciary should not be considered a transfer that would violate the
14 anti-transfer terms of a terms-of-service agreement. Finally, the fiduciary has the same
15 responsibilities as the account holder more generally. For example, a fiduciary cannot delete an
16 account if this would be fraudulent.

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

24 The Stored Communications Act contains two potentially relevant prohibitions.

25 1) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for
26 anyone to “intentionally access [] without authorization a facility through which an electronic
27 communication service is provided” as well as to “intentionally exceed [] an authorization to

⁵ 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).

⁶ *See Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), <http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx>; Christina Kunz, Peter Rademacher & Lucie O’Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive).

1 access that facility.” Thus, someone who has authorization to access the facility is not engaging
2 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user
3 of that service with respect to a communication of or intended for that user.”⁷

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

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

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

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

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

35
36 Subsection (d) is designed to clarify that the fiduciary is authorized to access material
37 stored on the digital device of the decedent, protected person, principal, or settlor, thereby
38 superseding state laws on unauthorized access to the device.

⁷ 18 U.S.C. §§ 2701(a), (c)(2).

1 **SECTION 9. COMPLIANCE.**

2 (a) If the fiduciary of an account holder complies with subsection (b) and makes a request
3 in a record to a custodian of digital assets or electronic communications of the account holder for
4 access to the assets and communications or ownership or a copy of the assets or communications,
5 the custodian must comply with the request.

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

7 (1) a personal representative with authority under Section 4 the request must be
8 accompanied by a certified copy of the letter of appointment of the representative;

9 (2) a [conservator][with authority under Section 5], the request must be
10 accompanied by a certified copy of the court order that gives the [conservator] authority over the
11 digital assets or electronic communications;

12 (3) an agent [with authority under Section 6], the request must be accompanied by
13 a certified copy of the power of attorney that authorizes the agent to exercise authority over the
14 digital assets or electronic communications; and must be accompanied by an affidavit in which
15 the affiant attests that the record is an accurate record of the original of the power and that, to the
16 best of the affiant’s knowledge, the power remains in effect; or

17 (4) a trustee [with authority under Section 7], the request must be accompanied by
18 a certified copy of the trust instrument or a certification of the trust under [cite trust certification
19 statute, such as Uniform Trust Code Section 1013] that authorizes the trustee to exercise
20 authority over the digital assets or electronic communications. .

21 (c) A custodian shall comply with a request made under subsection (a) not later than
22 [60] days after receipt of the request. If the custodian fails to comply, the fiduciary may apply to
23 the court for an order directing compliance.

1 [(d) Instead of furnishing a copy of a trust instrument under subsection (c)(4), the trustee
2 may furnish a certification of trust. A certification of trust:

3 (1) must contain the following information:

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

5 (B) the identity of the settlor;

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

7 (D) the powers of the trustee;

8 (E) the revocability or irrevocability of the trust and the identity of any
9 person holding a power to revoke the trust;

10 (F) the authority of a co-trustee to sign or otherwise authenticate, and
11 whether all or less than all co-trustees are required to exercise powers of the trustee;

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

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

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

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

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

19 (f) A recipient of a certification of trust under subsection (e) may require the trustee to
20 furnish copies of excerpts from the original trust instrument and later amendments which
21 designate the trustee and confer on the trustee the power to act in the pending transaction.

22 (g) A custodian that acts in reliance on a certification under subsection (e) without
23 knowledge that the representations contained in it are incorrect is not liable to any person for so

1 acting and may assume without inquiry the existence of the facts contained in the certification.

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

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

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

10 **Comment**

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

14 Under subsection (d), the custodian must comply within a certain period of time. The
15 Committee may want to discuss, at Style's suggestion, whether to include an expedited time
16 period.

17 **SECTION 10. CUSTODIAN IMMUNITY.** A custodian and its officers, employees,
18 and agents are immune from liability for any action done in compliance with this [act].

19 **Comment**

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

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

26 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
27 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic

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

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

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

11
12 **SECTION 14. APPLICABILITY.** This [act] applies to:

13 (1) each will executed on or after the effective date of this [act]; and

14 (2) each proceeding pending in court or commenced after the effective date of this [act],
15 unless the court determines that it is not feasible to apply the [act] or, in the interests of justice,
16 the [act] should not apply.

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

18 (a) ...

19 (b) ...

20 (c) ...

21 **SECTION 16. EFFECTIVE DATE.** This [act] takes effect....