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**MEMORANDUM**

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**TO:** SUZY WALSH, NAOMI CAHN  
**FROM:** CHRIS KUNZ  
**SUBJECT:** FADA DRAFT FOR MARCH 21-22, 2014, MEETING  
**DATE:** MARCH 17, 2014

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This draft is a real pleasure to read. It has clarity, common sense, and coherence to other areas of law. It also has an increasing elegance, as we've been able to strip away the unneeded provisions. When Pat Fry (chair) and Ben Beard (reporter) were working on the Uniform Electronic Transactions Act (UETA), they called it the gradually shrinking act, because it went from 64 sections to 21. The final result was simple and elegant.

**Media neutrality**

FADA uses UETA's definitions (record, electronic, information), but it doesn't adhere well to the principles of media neutrality that are at the core of UETA (1999) and Congress's near-copy, E-SIGN, 15 U.S.C. § 7001 et seq. (enacted 2000). Under UETA, if the parties have "agreed" to do business electronically, a record, signature, or contract can't be denied legal effect or enforceability solely because it's in electronic form. UETA §§ 5, 7. The same rule appears in the first section of E-SIGN for transactions in or affecting interstate or foreign commerce. E-SIGN § 7001(a).

Although UETA and E-SIGN expressly don't validate electronic wills, codicils, and testamentary trusts, UETA § 3(b)(1) and E-SIGN § 7003(a)(1), the basic principle of media neutrality remains key to the development of the internet and computer law—the idea that the law should “level the playing field” across various media and refrain from making separate rules that depend on the medium of communication or storage, unless the electronic setting poses a new issue not present in the paper setting or the bricks-and-mortar setting. This approach has allowed electronic commerce law and internet law to evolve without needing a brand new set of legal rules for each step and has prevented legal disputes from having a threshold issue as to which rule of law should apply to that particular dispute.

When I joined this project, I thought that one of FADA's basic tenets was that fiduciaries ought to be able to access the represented person's assets, regardless of whether the assets are on paper, in bricks and mortar, or electronic. However, sections 4-7 jump in and out of media neutrality, depending on the fiduciary involved:

- Section 4's default rule on wills grants access to digital assets, catalogues, and contents to the personal representative.
- Similarly, section 7's default rule on trusts grants access to digital assets, catalogues, and contents to the trustee.
- Section 6's default rule on POAs grants access to digital assets and catalogues but denies access to contents (unless the principal has granted this as a hot power).
- Section 5's default rule on conservatorships goes even further in that direction, by requiring the court's specific authorization for the conservator to access digital assets, catalogues, and contents.

Based on my 23 years of working on laws governing electronic commerce and internet/computer law, I would expect that these differing rules would be accompanied by a coherent set of justifications for these differences, but that's not the case. When members of the FADA drafting committee think about their past and present clients, they may think of a person who lacks technological savvy, but that person won't be the typical person covered by FADA. Digital assets and communications are becoming more common for everyone, as everyone's technology skills continue to improve and expand. Future clients will increasingly assume that their digital assets will be covered by the same rules as their other assets, because their lives will be a seamless mix of technology, paper, and bricks and mortar. For those reasons, I would favor a truly media-neutral approach, with all of the default rules in sections 4, 5, 6, and 7 giving all of the fiduciaries access to digital assets, catalogues, and contents. In addition, I would edit the Prefatory Note:

- Page 1, line 1: ~~vest make sure~~ fiduciaries ~~with have~~ the authority . . .
- Page 1, line 7: Few laws ~~exist on~~ specifically address the rights of fiduciaries over digital assets, even though many laws address fiduciaries' rights over assets generally.
- Page 2, line 1: it is designed solely to ~~provide~~ ensure . . .

### **How many categories? 2? 3? 4?**

The March 2014 draft discusses the fiduciaries' access to three categories:

- (1) digital assets, other than content of electronic communications (ECs);
- (2) catalogues of ECs; and
- (3) content of ECs (if access is permitted by the SCA).

However, those categories omit a fourth category: the content of ECs within the various exceptions to the SCA (ECs made publicly, ECs on employer-run emails, etc., etc.). This fourth category is like the digital assets in the first category and the catalogues in the second category, because they all are exempt from the SCA's restrictive rules.

That means that there really are two categories of assets:

- (1) Jim Lamm's proposed category of "protected content," which is governed by the SCA's rules, and
- (2) everything else (unencumbered by any SCA rules), so all four types of fiduciaries should be able to access
  - a. digital assets, other than "protected content";
  - b. catalogue of ECs; and
  - c. content of ECs other than "protected content."

This problem affects section 2's definitions of these categories, as well as sections 4, 5, 6, and 7.

### **"Signed . . . separately"**

I really really like the new version of section 8(b), which voids a TOS provision limiting a fiduciary's access to the account holder's digital assets. But the "unless" clause has some fresh

problems because it allows the account holder to opt out of this rule by separately signing this TOS provision. If this were an arm's length transaction, we could imagine the account holder initialing the TOS provision in the margin (a "separate signing", to be sure). But many of these TOS's are electronic clickwrap agreements in which the account holder either clicks the "I agree" box or can't set up an account. The click is an "electronic signature" that accepts the TOS:

- Under UCC § 1-201(b)(37), "'Signed' includes using any symbol executed or adopted with present intention to adopt or accept a writing."
- Under UETA § 2(8), "'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

So it would be easy for future custodian to set up the TOS assent process so that the future account holder first needs to click assent to the term limiting the fiduciary's access (thereby complying with the "unless" clause in section 8(b)) and then needs to click assent to the rest of the TOS. That seems too easy.

### Applicability

John Gregory has already forwarded our thoughts on section 14. It's definitely better than it was. I'm still thinking about the Massachusetts alternative.

### Smaller edits and suggestions

#### Sec. 2. Definitions.

- I can't figure out how to fix this, but the definitions of "account holder" and "terms-of-service agreement" are circular because they are each defined by each other. This circularity is broken by the definition of "custodian," which is part of the definition of "terms-of-service agreement." Maybe it's not a problem.
- In (5), page 3, line 18, should "that" be changed to "and"? Does "content of ECS" mean information . . . that is controlled by an ECS or a RCS and is not readily accessible to the public?
- In the comment, page 6, line 16, consider saying "definition of 'agreement' found in UCC § 1-201(3)."

#### Sec. 4. Authority of Personal Representative . . .

- In comment, page 7, line 10, change "subsection" to "section."
- In comment, page 7, line 13, change "(a)(2)" to just "(2)."

#### Sec. 8. Fiduciary Access and Authority.

- This is kind of a big deal. Subsection (a)'s coverage of a "fiduciary . . . that has the right to access a digital asset of an account holder" is circular with the provisions in (a)(2) and (3) providing "lawful consent" and making the fiduciary an "authorized user." In other words, we don't know whether a fiduciary has the right to access "protected content" unless we know that the fiduciary has lawful consent and is an authorized user.
- Page 11, lines 18 & 22: Capitalize the first words of (b) and (c).
- Page 11, line 23: Add a hyphen between "third" and "party."

- Page 13, lines 1 &19: The “unauthorized access” provisions in the CFAA and the SCA differ in the scope of what’s being accessed—the “facility” versus a “computer.” This comment needs greater precision.
- Page 14, line 3: Add a bit: “the account holder’s authority”