To: Drafting Committee on Fiduciary Access to Digital Assets (FADA)

From: Suzanne Brown Walsh

cc: Professor Naomi Cahn, Reporter

Re: **Fiduciary Access to Digital Assets Drafting Committee March 2014 Meeting; Summary of Changes and Issues**

Date: February 28, 2014

A. Changes to the Fall 2013 Meeting Draft

In addition to the substantive changes we discussed making at our fall meeting, the draft has been "styled" and corresponding changes made as a result of that process. Hitting the high points, in the order of their appearance and not importance, the changes are:

1. **Definitions**. We added a new definition of what we have called a "catalogue", which is the record that an electronic communication took place (the log). There is no magic to our use of that word, over any other. Previously, we called this a "record" but through simplification, revision and the Style process, that became unworkable. We also slightly revised the definition of "content". We think these changes simplify the Act, along the lines we discussed at the end of the fall meeting. Please see if you agree.

We should also discuss whether we should define the term "access". When reviewing Sections 8 and 9 of the draft, you will see (and remember we discussed this at our fall meeting) that our descriptions of what it means to give a fiduciary access are inconsistent. Naomi and I have danced around this in Section 8, by replacing the phrase "manage and administer" (we discussed that wording at the last meeting) with "take actions concerning the asset". **Another solution might be to use "access" everywhere and define it here, in Section 2**.

Finally, we redefined "electronic communication" in Section 2 to track 18 U.S.C. Sections 2702(a)(1) and (2). Jim Lamm suggested this change, because the earlier version of this definition used the phrase "transfer through" which would not pick up either unopened electronic mail, or drafts that had not been sent (i.e., the *Petraeus* unsent e-mail situation we discussed at an earlier meeting.)

2. **Section 3, Scope**: Style wants us to delete this but we left it in, because we think it is critically important to identify explicitly just what--and whom--the Act covers.

3. **Personal Representatives, Section 4:** We reworked and reworded this Section but did not substantively change it.

4. **Conservators, Section 5**. We reworked and reworded this Section but did not substantively change it

5. **Agents, Section 6.** We changed this so that the agent has default authority over all digital assets, *except* the contents of electronic communications that are protected by the SCA. Where a power of attorney explicitly covers electronic communications, Section 6 allows the agent to access the contents if the service is permitted to disclose.

6. **Trustees, Section 7.** We changed this section along the lines we discussed at our fall meeting, to differentiate between digital assets initially held by the trustee, and digital assets that are collected by or subsequently transferred into the trust, such as pursuant to a pour over will. We accomplished that by referring to the trustee as the initial account holder of the former and the successor account holder of the latter.

7. **Fiduciary Access and Authority, Section 8**. Here we continue to try and describe in greater detail the nature and extent of the fiduciary's authority under the Act. Subsection 8(b) is the one we discussed at the end of our last meeting, and is designed to

prohibit a virtually undisclosed, blanket prohibition on fiduciary access that would be part of a standard TOSA. I believe what the committee intends is for this to be an affirmative "opt in" regime, so that to prohibit fiduciary access, the account holder would have to click and affirm. I know the providers are concerned with this and have suggested an alternative approach, which is more like the following:

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

Please note that any provision that requires a change to a TOSA imposes an affirmative obligation on the custodian or account provider, so we ought to think about that in connection with Section 14 (Applicability) as well.

We reworded Subsection 8(c) to clarify that it is simply supposed to prevent a TOSA provision that precludes all third party access to the account or deems it to be a transfer from preventing access under the Act. Depending on the final wording, we may be able to combine this with Subsection (d).

Chris Kunz raises the following issue, which we must discuss: "[T]he use of "signed" is fraught with peril, because the standard ULC definition for signed includes a means of assent like a mere click or checkmark—it doesn't have to be someone's name in script or even print. So it would be really easy for a TOS to be set up so that the account holder just clicked next to the term when asked to, and then clicked assent to the whole agreement. That seems like less than intended by this Act."

8. **Compliance, Section 9**. Some of the content providers are concerned that our Act would permit a "bad" fiduciary and a "bad" provider to launder illegally obtained, pirated content. This would occur when a bad fiduciary requests a copy, and the bad custodian complies and is granted immunity for doing so under Section 10. To prevent that, they asked that we add the limitation that all copies are subject to the copyright of a third party. Naomi has also flagged this with some alternative language the providers suggested in the Commentary to Section 9. We might also rely solely on a good faith or other standard in Section 10.

Note that we have retained the Act's "shall" comply mandate. Some observers wanted it to be "may" because the SCA is permissive, but that would render our Act ineffective.

10. **Custodian Immunity, Section 10**. This grants immunity to custodians who act in good faith in complying with the Act.

11. **Applicability, Section 14.** We changed this section in response to the comments raised in Chris Kunz and John Gregory's summary of comments on our draft made at the ABA Winter Working Meeting of the Cyberspace Law Committee. <u>It is crucial that the committee review this section carefully during our last meeting</u>. As currently drafted, it applies retroactively to all fiduciary relationships and conservatorship proceedings. Carl Szabo noted that some companies will find it more difficult to allow for existing account holders customers to opt out of our act, than to change the TOSA's that govern new accounts. If the committee wishes to consider limiting the application of the Act along those lines, we could consider reversing the approach used in the recent Massachusetts bill:

SECTION 3. Paragraph (28) of subsection (a) and subsection (b) of section 3-715 of chapter 190B of the General Laws shall apply to: (i) all electronic mail accounts existing on or after the effective date of this act; and (ii) all instances in which the electronic mail account contents have been preserved by the electronic mail service provider as of the effective date of this act.

Whatever we do, let's pay close attention to this section during our meeting, please.

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