

MEMO TO: Suzanne Walsh and Naomi Cahn  
CC: Christina Kunz and Jim Lamm  
FROM: John Gregory  
DATE: Sunday March 16 2014  
RE: March draft of the Fiduciary Access to Digital Asset Act (FADA)

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I think the March draft is very much improved over the November draft. Congratulations to Naomi and Suzy.

This memo has a few drafting points and a few points of (I hope) substance. I don't know if there is any point in circulating them to the Drafting Committee before the meeting. If you think that's appropriate, then go ahead, or let me know and I will send it around. I have put the points I think are purely about drafting at the end of the memo.

#### SUBSTANCE

- Definitions
  - Catalogue of electronic communications
    - Is it clear that the electronic relationship between an account holder and the service provider is always a 'communication', so that the service provider is a 'person with whom the account holder communicated'? I guess it is, but it's different from someone to whom one sends a message. It may be just automated account management, like changing one's signature line.
  - Content of e-communication
    - Is it clear that the accessibility test for the communication is properly 'accessible to the public'? If it were accessible to a narrower group, would the federal law apply? (I suppose the phrase echoes the federal law.)
- Scope
  - I suggest 'a fiduciary who is purporting to exercise (his, her, its) fiduciary obligations and duties' (if there is a difference between obligations and duties). The provision aims to ensure that the Act applies only to fiduciaries recognized by law (and only the laws mentioned). It is not aimed to control whether the fiduciaries are acting in accordance with all applicable laws (including criminal laws), so that any infringement of any law by the fiduciary would deprive the fiduciary of access to digital assets under the Act. Saying that the Act applies only to fiduciaries who are acting lawfully risks the latter result.

- If it were necessary to say ‘a grant of authority recognized by law to a fiduciary who...’, that would be OK.
  - The term ‘grant’ suggests that a fiduciary status (duties etc) cannot arise by operation of law, in the absence of a document or order. Is that right?
  - It is a separate point that the fiduciaries may exercise only the authority that the relevant law about their fiduciary capacity gives them. That point is in article 8.
- Authority of PR
    - This may be a drafting point, but it’s pretty ‘substantial’. It also applies to all four operative provisions, all four types of fiduciaries. All the articles say ‘unless prohibited by...’ the relevant document. I suggest the Act should say ‘unless otherwise provided by ...’. The provision in question may not be a prohibition. A will giving control over digital assets, or some digital assets, to someone other than the main personal representative does not prohibit the main PR from getting access to the digital assets, but it should have that effect anyway.
    - We should note clearly – maybe it’s a case for the eventual commentary on the Uniform Act – that ‘may access’ is not an option, and is not in contrast to ‘shall access’. It is a grant of authority or legal permission. The duties of the PR to access, i.e. whether it’s a choice or an obligation, are found in the general law about PRs. We had a lot of futile misdirected debate about that point in November.
  - Authority of conservator
    - I think it is unfortunate that this provision is not media-neutral, and that a court must mention digital assets expressly in order to have them covered by the order. The comments to the committee do not explain why conservatorship orders are different from all the other classes.
    - I don’t know what the commentary means (line 18-19, page 8) in referring to ‘each of the different levels of access’.
    - Re (b) – are these considerations any different from what a court must think about in making a conservation order about any non-digital asset? I suppose the Act is directing the court to ask itself ‘did the interested person have any views about his/her digital assets in particular?’ I would have thought that in a statute devoted (as it should be) to media neutrality, that is a legitimate question to ask, but not different from the question that might be asked about any kind of asset, e.g. ‘did the interested person have any special ideas about the family cottage, or his stamp collection?’ (not his/her – women don’t collect stamps [my wife assures me they have better things to do. Philately will get you nowhere...]).
    - In short, do we need (b), especially if we treat conservators as we do the other kinds of fiduciary?
  - Control by agent

- Again, both in the opening words and in the comments, I would incline to ‘otherwise provided’ not ‘prohibited’ (in the Act) or ‘prevent’ in the comment (line 22).
  - For the comment, I might just say ‘must explicitly or impliedly prevent...’
  - I take the point made on p 10 line 1-3 that ECPA requires a special rule about the communications covered by that federal statute. I suppose that need will cease when a test case holds that state law generally applies to deciding what constitutes a consent for federal purposes, and the power to access includes the power to take whatever steps are needed to make that access effective, i.e. by consenting if a consent is needed (just as it would for any other kind of asset.)
- Control by trustee
    - Again, in (a) and (b), I would say ‘unless otherwise provided...’
    - If I understand the concept of ‘initial account holder’ to mean that the trustee would have opened the account as a trustee, to be operated in trust for the beneficiary, then I do not understand how the terms of the trust could prohibit this or provide otherwise about it. Presumably if there is such a contrary provision, then the trustee is acting in breach of trust in establishing the initial account, but his/her/its ability to operate it should not fail on account of this Act but on account of the general law of trusts.
    - I still have a hard time with both the concepts and the explanation for (b). Maybe I don’t understand the difference between authorization and consent. The trustee is the owner of the assets in question. Consider the transfer of a digital asset (one of the accounts governed by ECPA/SCA) inter vivos, not in trust. Is there any doubt that the transferee would have the ability to give whatever direction to the custodian that the transferee wanted, including whatever manifestation of consent the custodian thought it needed? The transferee would not have to keep going back to the transferor for consent every time he/she/it wanted to access the contents of the account. Why would a trustee not be in the same position as a non-trust transferee?
    - I suppose the response to this hypothetical is that the custodian under federal law would not approve or carry out the transfer without proof of the consent of the original account holder – but that ‘consent’ would be in a transfer agreement, not some special ‘consent’ document. The transfer agreement would be the equivalent of the document creating the trust, which transfers the legal title of the assets to the trustee. Can the custodian block the transfer of digital assets to the trustee because the settlor/account holder has not consented appropriately or given evidence of the consent to the custodian?
  - Fiduciary access and authority
    - In (a)(1), I am not sure I understand why the ‘subject to...’ clause is required. Surely the account holder’s authority under the laws of this state are limited by federal law such as copyright, not to mention ‘other laws’, whatever they are, and the TOSA. The fiduciary gets what the account holder has, subject to state laws that require administration in

the interests of the beneficiary account holder. The first part of this provision already says that.

- In (a)(2), rather than say that the fiduciary is deemed 'to have the lawful consent', why not say 'to exercise the lawful consent'? The law puts the fiduciary into the shoes of the account holder, able to do what the account holder can do. The account holder can consent, so the fiduciary can consent – not just operate under a deeming that the account holder has somehow consented.
  - In this regard, see the opening paragraph of the comments (page 12 lines 1-6), which uses the word 'exercising' twice in the one paragraph.
  - In short, the fiduciary does not have to look outside his/her/its authority to find the consent; it can consent directly.
- Compliance
    - I see that (a)(1) gives a right of access. We need to be clear that getting access, even if it involves downloading for storage and administration, is not copying and not barred by the exclusion of providing a copy of copyrighted works, as set out in (a)(3). The fiduciary is, however, bound by the same copyright obligations as the account holder (as article 8 makes clear, even without the express reference to copyright), so there is no risk to the copyright holder in making the copy accessible or downloadable.
    - I don't see the point of detailing what kinds of works might be subject of copyright, as suggested by Commissioner Robbins and described in the comments (page 16 line 23 – 25). There is a risk of limiting the scope of copyright inappropriately. Commentary to the Uniform Act can educate fiduciaries about the kinds of work in which copyright may subsist, if education is the purpose.
    - In 4(h), we might add after 'did not act in good faith in demanding the trust instrument' something like 'or in using it after it was acquired'.
  - Compliance
    - Does the reference in (2) to a conservatorship proceeding intend to exclude from the Act the conduct of a conservatorship where the order is made before the Act comes into force? I guess we probably have to live with that. So the reference to a proceeding commenced before the in-force date (which is proper, in my view) still needs the proceeding to be pending at that date.

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## DRAFTING

- Prefatory note: last line of second para – I think 'click through' as a verb would not have a hyphen. As an adjective phrase, it would have one: a click-through agreement.
- Definitions:
  - Account holder:

- Should we say with whom the TOSA is entered, i.e. ‘with a custodian’? Is it possible that the relationship might be controlled by a TOSA with someone other than the account holder?
    - Do we really need ‘during the individual’s lifetime’? When else could an individual enter into an agreement? Or are we just trying to avoid someone saying, if we leave the reference to ‘includes a deceased...’, ‘how can a deceased person enter into a TOSA?’ We look a little ridiculous either way, perhaps.
  - Content of e-communications
    - Should there be an ‘and’ before ‘that is not readily accessible to the public’? The antecedent of ‘that’ in the final phrase is presumably ‘communication’ and not ‘computing service’.
  - Custodian
    - ‘person that’ sounds odder than ‘person who’, though the custodian will usually not be an individual, I suppose. This may be from the UPC or other such statute.
  - Digital asset
    - All digital assets are electronic records, but not all electronic records are digital assets. So should this definition read something like “ ‘digital asset’ means an asset in the form of an electronic record” or ... an asset that is an electronic record? After all, we are not changing the law on what an asset is as a matter of law, we are just making the term media-neutral.
  - Information
    - I am a bit concerned with the word ‘similar’ – is it intended to be a limit of some kind? If not, why say it? If so, why continue with ‘of any kind’?
  - Trustee
    - I wonder if the definition should conclude ‘that creates a beneficial interest in the asset in others.’ (I don’t much like two ‘in...’ phrases back to back, but that’s a style question.)
- Authority of personal representative
  - In the third para of the Comments, line 30, I would suggest putting ‘(which would presumably include fiduciaries)’ right after ‘any person’ and before ‘other than a governmental entity’, since it is the term ‘person’ and not the governmental entity which would presumably include fiduciaries.
- Fiduciary access and authority
  - In (c), the term ‘strong public policy’ is odd to me. It’s not used in Canada. I presume there are reasons to use ‘strong’ here.
  - In (d), did we decide that ‘equipment’ was better than ‘devices’? Or is it just a convenient collective to avoid drafting the proper singulars and plurals?
  - Comment page 12 line 11 – I suppose someone may have stored passwords on a piece of paper, too, not just in a digital locker. Could say ‘on paper or in a digital locker’...

- Line 15 – I would not say ‘illegally’. A literal and ‘strong’ meaning of ‘illegally’ could just restate the ‘nemo dat’ rule. I suspect what it’s doing here is to say that the rights are subject to other law, notably copyright. I think a general statement of the principle reflected in the ‘subject to ... other law’ in (a)(1) – which as noted above, I don’t think is needed in the text of the statute itself – could be suitable for commentary.
  - Again, the point could be restated as saying that the fiduciary obtains the power over the digital assets that the account holder had, and subject to the same limits (except as provided here, e.g. right of access to assets even if the assets are non-transferable, for purposes of administration of the fiduciary powers.)
  - Comment page 14 line 3: one does not need the first exception – and probably not the second – because it is clear that the fiduciary’s powers are subject to what the account holder has when the fiduciary assumes office. So if an account holder has made other arrangements about digital assets, the fiduciary is bound by them.
  - This idea is strengthened if the exclusion clauses throughout the Act were changed from ‘prohibited’ to ‘otherwise provided’, as I have suggested.
- Compliance
    - The reference in several parts of this article to a ‘certified copy’ is presumably not going to prevent fiduciaries from communicating electronically with custodians. Is it generally known how to do an electronic certificate for these purposes, or would a PDF or other electronic version of an original be acceptable?