

MEMORANDUM

TO: Susie Walsh
Naomi Cahn

FROM: Stan Kent

DATE: March 10, 2014

RE: Fiduciary Access to Digital Assets Act
March 21-22, 2014 Meeting Draft

I wonder if there is a problem with our current definition of “account holder” (section 2 (1)) as that term is used elsewhere in the draft.

Here is what I mean.

The current definition of “account holder” reads:

(1) “Account holder” means an individual who has entered into a terms-of-service agreement. The term includes a deceased individual who entered into the agreement during the individual’s lifetime.

Under this definition, a fiduciary, including a trustee (section 7(a)) can never be an account holder because the fiduciary will never have entered into a terms-of-service (TOS) agreement.

Furthermore, when a fiduciary is an account holder because the fiduciary has signed a TOS our Act will not, and should not, apply.

Said another way, our Act is a “stepping-into-the-shoes-of” Act. The fiduciary will be acting for the “account holder” who has died, become incapacitated, or transferred assets to a trustee. Again, in either case, the fiduciary will not be the “account holder” as that term is defined in our Act.

If this is true, then we don’t need section 7(a). Moreover, we will not need to deal with definitions for “initial account holder” and “successor account holder.”

Again, if the above is true, then section 7 could be amended as follows:

SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS

(a) ~~Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial account holder may access each digital~~

~~asset, including the catalogue of electronic communications sent or received by the account holder and the content of those electronic communications, held in trust.~~

(b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor account holder, the trustee may access:

(1) the digital assets, THAT ARE PROPERTY OF THE TRUST including the catalogue of electronic communications sent....

A trustee will have legal title to the digital assets of an account holder (just as a p.r. will have legal title to assets of a decedent) but the trustee will not have entered into the TOS and will not be an “account holder” under the current draft of our Act.

If a trustee (or any fiduciary for that matter) does enter into a TOS for purposes of administration of the fiduciary estate, then that fiduciary will be THE account holder and will not need our Act to gain access. Indeed, it may be useful to add a section that makes it clear that the Act does not apply to a fiduciary who has entered into a TOS.

By the same token, section 8 could be amended to read as follows:

SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary ~~that is an account holder or that has the right to access a digital asset of an account holder:....~~

ALTERNATIVE

The alternative, I suppose, would be to simply change the definition of “account holder” something like this:

(1) “Account holder” means: (i) an individual who has entered into a terms-of-service agreement; and (ii) a fiduciary to whom an individual’s digital assets have been assigned/transferred. The term includes a deceased individual who entered into a terms-of-service-agreement during the individual’s lifetime.

If we do this, then I believe that sections 7 and 8 as written will work but we may have to define the terms “initial account holder” and “successor account holder.”

Additionally, I would recommend changing sections 4, 5(a)(1), 6(a) and 7(b)(1) to use the term “account holder.” For example, section 4 would read:

Unless prohibited by the will of a decedent, DECEASED ACCOUNT HOLDER a court, law of this state other than this [act], or federal law, a personal representative of the decedent may access:....

Similar changes would be made in the other sections for the purpose of importing the term “account holder” into the black letter for these sections.