

**From:** Evan Carroll  
**Sent:** Tuesday, March 18, 2014 11:33 PM  
**To:** Walsh, Suzanne; Naomi Cahn  
**Subject:** Comments on the March 2014 draft

Dear Suzy and Naomi,

First allow me to thank you for all of your efforts leading the FADA committee. While I haven't been able to participate in person, I've made sure to follow along with the drafts and comments.

Reading the issues memo and the comments from Chris Kunz, I want to echo her sentiments on Section 8b, that under the current wording it's simply too easy for an account holder to limit the fiduciary's access by checking another box as a requirement to access the custodian's service. While the purpose of this act is to not determine whether a web-based checkbox is a sufficient signature, I do believe the act would be rendered ineffective if this wording persists.

For this issue, I would like to preserve the notion that an account holder can effectively opt out of fiduciary access through a deliberate process, but only if that opt out is optional and is not a requirement to access and use the service. I realize this may cause some discomfort from service providers, but I believe this is essential to maintain the effectiveness of the act.

On a similar note, I want to express my disapproval of the following language suggested by the service providers:

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.

While I appreciate the concern of the providers, and the efforts some have made to include notions of fiduciary access in their software, I believe this language makes it too easy for providers to block fiduciary access by simply adding a permission (i) or disclosure (ii) in the terms of service, without making any good faith efforts to inform users or provide an easy-to-use means of pre-designating access.

I would be comfortable with language that permits a TOS to allow pre-designation, but that only blocks fiduciary access if the account holder has actually pre-designated access. I also believe that a specific opt out, as noted above, should be the means of deleting content, not a default rule that's disclosed in the TOS.

Finally, allow me to express my gratitude to the committee for tackling this issue and for all of the efforts to create this act. I believe we're very close to an effective, user-centric act that allows for providers to honor the wishes of account holders, while maintaining the appropriate safeguards for all parties.

Again, thank you for your efforts as a part of the committee and your leadership on this issue.

All the best,  
Evan

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