

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS

ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Account holder” means:

(A) a person that has entered into a terms-of-service agreement with a custodian;

and

(B) a fiduciary for a person described in subparagraph (A).

(2) “Agent” means an attorney in fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engaging in the transmission of electronic communications.

(4) “Catalogue of electronic communications” means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “[Conservator]” means a person appointed by a court to manage the estate of a living individual. The term includes a limited [conservator].

(6) “Content of an electronic communication” means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(7) “Court” means the [insert name of court in this state having jurisdiction in matters relating to the content of this act].

(8) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(9) “Digital asset” means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(10) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) “Electronic communication” means a digital asset stored by an electronic-communication service or carried or maintained by a remote-computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) “Electronic-communication service” means a custodian that provides to the public the ability to send or receive an electronic communication.

(13) “Fiduciary” means a person that is an original, additional, or successor personal representative, [conservator], agent, or trustee.

(14) “Governing instrument” means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this [act].

(18) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

(19) “Principal” means an individual who grants authority to an agent in a power of attorney.

(20) “[Protected person]” means an individual for whom a [conservator] has been appointed. The term includes an individual for whom an application for the appointment of a [conservator] is pending.

(21) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(22) “Remote-computing service” means a custodian that provides to the public computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14);

(23) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a custodian.

(24) “Trustee” means a fiduciary with legal title to an asset pursuant to an agreement or declaration that creates a beneficial interest in others.

(25) “Will” includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

Legislative Note: States should insert the appropriate court in subsection (6) that would have jurisdiction over matters relating to this act.

SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF DECEDENT. Subject to Section 7(b) and unless otherwise provided by the court or the will of a decedent, a personal representative of the decedent has the right to access:

(1) the content of an electronic communication sent or received by the decedent if the electronic-communication service or remote-computing service is permitted to disclose the

content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(2) the catalogue of electronic communications sent or received by the decedent; and

(3) any other digital asset in which the decedent at death had a right or interest.

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (1).*

SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF PROTECTED PERSON. The court, after an opportunity for hearing under [state conservatorship law], may grant a [conservator] the right to access:

(1) the content of an electronic communication sent or received by the [protected person] if the electronic-communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(2) the catalogue of electronic communications sent or received by the [protected person];

and

(3) any other digital asset in which the [protected person] has a right or interest.

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (1).*

SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS OF PRINCIPAL.

(a) To the extent a power of attorney expressly grants authority to an agent over the content of an electronic communication of the principal, the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic-communication service or remote-computing service is permitted to disclose the

content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended].

(b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right to access:

(1) the catalogue of electronic communications sent or received by the principal;

and

(2) any digital asset in which the principal has a right or interest.

Legislative Note: In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a).

SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS. Subject to Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

(1) that is an original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received by the trustee and the content of an electronic communication; and

(2) that is not an original account holder has the right to access:

(A) the content of an electronic communication sent or received by the original or any successor account holder if the electronic-communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(B) the catalogue of electronic communications sent or received by the original or any successor account holder; and

(C) any other digital asset in which the original or any successor account holder

has a right or interest.

Legislative Note: In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (2)(A).

SECTION 7. FIDUCIARY AUTHORITY.

(a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of this [act] to access a digital asset of an account holder:

(1) subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the asset to the extent of the account holder’s authority and the fiduciary’s powers under [the law of this state];

(2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, under applicable computer fraud and unauthorized access laws, including [this state’s law on unauthorized computer access], an authorized user.

(b) If a provision in a terms-of-service agreement limits a fiduciary’s access to the digital assets of the account holder, the provision is void as against the strong public policy of this state, unless the account holder, after [the effective date of this [act]], agreed to the provision by an affirmative act separate from the account holder’s assent to other provisions of the terms-of-service agreement.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this [act] to the extent the provision designates law that enforces a limitation on a fiduciary’s access to digital assets which limitation is void under subsection (b).

(d) Except as provided in subsection (b), a fiduciary’s access under this [act] to a digital

asset does not violate a terms-of-service agreement, notwithstanding a provision of the agreement which limits third-party access or requires notice of change in the account holder's status.

(e) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, [protected person,] principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including [this state's law on unauthorized computer access].

Legislative Note: States with a computer trespass statutes should add the appropriate reference in Section 7(a)(3), and may want to amend those statutes to be in accord with this act.

SECTION 8. COMPLIANCE.

(a) If a fiduciary with a right under this [act] to access a digital asset of an account holder complies with subsection (b), the custodian shall comply with the fiduciary's request in a record for:

(1) access to the asset;

(2) control of the asset; and

(3) a copy of the asset to the extent permitted by copyright law.

(b) If a request under subsection (a) is made by:

(1) a personal representative with a right of access under Section 3, the request must be accompanied by a certified copy of [the letter of appointment of the representative or a small-estate affidavit or court order];

(2) a [conservator] with the right of access under Section 4, the request must be accompanied by a certified copy of the court order that gives the [conservator] authority over the

digital asset;

(3) an agent with the right of access under Section 5, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) a trustee with the right of access under Section 6, the request must be accompanied by a certified copy of the trust instrument[, or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013],] that authorizes the trustee to exercise authority over the digital asset.

(c) A custodian shall comply with a request made under subsection (a) not later than [60] days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(d) [Instead of furnishing a copy of the trust instrument under subsection (b)(4), the trustee may provide the certification of trust. The certification:

(1) must contain the following information:

(A) that the trust exists and the date the trust instrument was executed;

(B) the identity of the settlor;

(C) the identity and address of the trustee;

(D) that there is nothing inconsistent in the trust with respect to the trustee's powers over digital assets;

(E) whether the trust is revocable and the identity of any person holding a power to revoke the trust; and

(F) whether a cotrustee has authority to sign or otherwise authenticate, and

whether all or fewer than all cotrustees are required to exercise powers of the trustee;

(2) must be signed or otherwise authenticated by a trustee;

(3) must state that the trust has not been revoked, modified, or amended in a manner that would cause the representations contained in the certification of trust to be incorrect; and

(4) need not contain the dispositive terms of the trust.

(e) A custodian that receives a certification of trust under subsection (d) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A custodian that acts in reliance on a certification under subsection (d) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of facts stated in the certification.

(g) A person that in good faith enters into a transaction in reliance on a certification of trust under subsection (d) may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person that demands the trust instrument in addition to a certification of trust under subsection (d) or excerpts under subsection (e) is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

Legislative Note: *The bracketed material in subsections (d)-(i) allows states that have already enacted the Uniform Trust Code or a similar law permitting a certification of trust in lieu of furnishing a complete copy of the trust instrument to use the shorter version when setting out procedures concerning a trustee's request. Those states that have not adopted the Uniform Trust Code or a certification of trust procedure may choose to include the bracketed material, which is*

a slight modification of the language in Uniform Trust Code Section 1013.

SECTION 9. CUSTODIAN IMMUNITY. A custodian and its officers, employees, and agents are immune from liability for any act done in good faith in compliance with this [act].

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 12. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.

SECTION 13. APPLICABILITY.

(a) Subject to subsection (b), this [act] applies to:

(1) a fiduciary or agent acting under a will or power of attorney executed before, on, or after [the effective date of this [act]];

(2) a personal representative acting for a decedent who died before, on, or after [the effective date of this [act]];

(3) a [conservatorship] proceeding, whether pending in a court or commenced before, on, or after [the effective date of this [act]]; and

(4) a trustee acting under a trust created before, on, or after [the effective date of this [act]].

(b) This [act] does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

SECTION 14. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

SECTION 15. EFFECTIVE DATE. This [act] takes effect