

**UNIFORM FIDUCIARY ACCESS TO
DIGITAL ASSETS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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NATIONAL CONFERENCE OF COMMISSIONERS
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DIGITAL ASSETS ACT**

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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1 **UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2
3 **Prefatory Note**

4
5 This act vests fiduciaries with the authority to access, control, or copy digital assets and
6 accounts. The act applies only to fiduciaries, which must always act in compliance with their
7 fiduciary powers and duties. The goal of the Uniform Fiduciary Access to Digital Assets Act
8 (UFADAA) is to remove barriers to a fiduciary’s access to electronic records; other law, such as
9 fiduciary, probate, trust, banking, investment securities, and agency law, remains unaffected by
10 UFADAA. Moreover, UFADAA does not change existing law, which would prohibit any
11 fiduciary from violating fiduciary responsibilities through divulging or publicizing any
12 information the fiduciary obtains while carrying out his or her fiduciary duties.
13

14 UFADAA addresses four different types of fiduciaries: personal representatives of
15 decedents’ estates, conservators for protected persons and individuals, agents acting pursuant to a
16 power of attorney, and trustees. It distinguishes the authority of fiduciaries, which exercise
17 authority subject to this act only on behalf of the account holder, from any other efforts to access
18 the digital assets. Family members or friends may seek such access, but, unless they are
19 fiduciaries, their efforts are subject to other laws and are not covered by this act.
20

21 As the number of digital assets held by the average person increases, questions
22 surrounding the disposition of these assets upon the individual’s death or incapacity are
23 becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few
24 holders of digital assets and accounts consider the fate of their online presences once they are no
25 longer able to manage their assets. And these assets have real value: according to a 2011 survey
26 from McAfee, Intel’s security-technology unit, American consumers valued their digital assets,
27 on average, at almost \$55,000. Kelly Greene, *Passing Down Digital Assets*, WALL STREET
28 JOURNAL (Aug. 31, 2012), <http://goo.gl/7KAaOm>. These assets range from online gaming items
29 to photos, to digital music, to client lists. There are millions of Internet accounts that belong to
30 dead people. Some Internet service providers have explicit policies on what will happen when
31 an individual dies, others do not; even where these policies are included in the terms-of-service
32 agreement, most consumers click through these agreements.
33

34 The situation regarding fiduciaries’ access to digital assets is less than clear, and is
35 subject to federal and state privacy and computer “hacking” laws as well as state probate law. A
36 minority of states has enacted legislation on fiduciary access to digital assets, and numerous
37 other states have considered, or are considering, legislation. Existing legislation differs with
38 respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary
39 included, and whether the principal’s death or incapacity is covered. A uniform approach among
40 states will provide certainty and predictability for courts, account holders, fiduciaries, and
41 Internet service providers. It gives states precise, comprehensive, and easily accessible guidance
42 on questions concerning fiduciaries’ ability to access the electronic records of a decedent,
43 protected person, principal, or a trust. For issues on which states diverge or on which the law is
44 unclear or unknown, the act will for the first time provide uniform rules.

1 The general goal of the act is to facilitate fiduciary access while respecting the privacy
2 and intent of the account holder. It adheres to the traditional approach of trusts and estates law,
3 which respects the intent of the account holder and promotes the fiduciary’s ability to administer
4 the account holder’s property in accord with legally-binding fiduciary duties.
5

6 With regard to the general scope of the act, the act’s coverage is inherently limited by the
7 definition of “digital assets.” The act applies only to electronic records, which do not include the
8 underlying asset or liability unless it is itself an electronic record.
9

10 The act is divided into fifteen sections. Sections 1-2 contain general provisions and
11 definitions, including those relating to the scope of the fiduciary’s authority.
12

13 Sections 3-6 establish the rights of personal representatives, conservators, agents acting
14 pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different opt-in
15 and default rules based on the presumed intent of the account holder and the applicability of
16 other state and federal laws. A personal representative is presumed to have access to all of the
17 decedent’s digital assets unless that is contrary to the decedent’s will or to other applicable law.
18 A conservator may access the assets pursuant to a court order. An agent acting pursuant to a
19 power of attorney is presumed to have access to all of a principal’s digital assets not subject to
20 the protections of other applicable law; if another law protects the asset, then the power of
21 attorney must explicitly grant access. And a trustee may access any digital asset held by the trust
22 unless that is contrary to the terms of the trust or to other applicable law.
23

24 Section 7 contains provisions relating to the rights of the fiduciary to access digital assets.
25 Section 8 addresses compliance, and Section 9 grants immunity to custodians. Sections 10-15
26 address miscellaneous topics, including retroactivity, applicability, the effective date of the act,
27 and similar issues. The act addresses only the rights of the four types of fiduciaries, and it is
28 designed to provide access without changing the ownership of the digital asset.

1 **UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Fiduciary

3 Access to Digital Assets Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Account holder” means:

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

7 and

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

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

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

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

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

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

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

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

23 (9) “Digital asset” means a record that is electronic. The term does not include an

1 underlying asset or liability unless the asset or liability is itself a record that is electronic.

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

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

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

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

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

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

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

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

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

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

1 attorney.

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

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

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

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

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

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

16 **Legislative Note:** *States should insert the appropriate term for a conservatorship or comparable*
17 *state proceeding in subsection (5), the appropriate court in subsection (7), and the appropriate*
18 *term for the individual that would be subject to a conservatorship or comparable state*
19 *proceeding in subsection (20).*

20 *In states in which the constitution, or other law, does not permit the phrase “as amended” when*
21 *federal statutes are incorporated into state law, the phrase should be deleted in subsection (22).*

22 **Comments**

23 Many of the definitions are based on those in the Uniform Probate Code: agent (UPC
24 Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic
25 (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC
26 Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC
27 Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC
28 Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC

1 Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57). The
2 definition of “information” is based on that in the Uniform Electronic Transactions Act,
3 Section 2, subsection (11). Many of the other definitions are either drawn from federal law, as
4 discussed below, or are new for this act.

5
6 An account holder includes any person who entered into a terms-of-service agreement,
7 including a deceased individual who entered into the agreement during the individual’s lifetime.
8 A fiduciary is defined as a person, and a fiduciary can be an account holder when the fiduciary
9 opens the account.

10
11 The definitions of carries is drawn from federal law, 47 U.S.C. Section 1001(8).

12
13 The act includes a definition for “catalogue of electronic communications.” This is
14 designed to cover log-type information about an electronic communication. The term “content
15 of an electronic communication” is adapted from 18 U.S.C. Section 2510(8), but it refers only to
16 information that is not readily accessible to the public because, if the information were readily
17 accessible to the public, it would not be subject to the privacy protections of federal law under
18 the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 *et seq.* See S. Rep.
19 No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the
20 content of an electronic communication, the act’s legislative history notes the requirements for
21 disclosure: “Either the sender or the receiver can directly or through authorized agents authorize
22 further disclosures of the contents of their electronic communication.” S. Rep. No. 99-541, at 37
23 (1986).

24
25 ECPA does not apply to private e-mail service providers, such as employers and
26 educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz,
27 Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and*
28 *State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404
29 (2014) (available at: <http://goo.gl/T9jX1d>).

30
31 A custodian includes any Internet service provider as well as any other entity that
32 provides or stores electronic data of an account holder. A custodian does not include most
33 employers because an employer typically does not have a terms-of-service agreement with an
34 employee. The treatment of digital assets of an employer used by an employee in the ordinary
35 course of the employer’s business is discussed in Section 13.

36
37 The definition of a digital asset specifies that it is “a record that is electronic.” Because
38 records may exist in both electronic and non-electronic formats, this definition clarifies the scope
39 of the act and the limitation on the type of records to which it applies. The term includes
40 products currently in existence and yet to be invented that are available only electronically. It
41 refers to any type of electronically-stored information, such as: 1) any information stored on a
42 computer and other digital devices; 2) content uploaded onto websites, ranging from photos to
43 documents; and 3) rights in digital property, such as domain names or digital entitlements
44 associated with online games. See Lamm, *et al, supra*, at 388. Both the catalogue and content of
45 an electronic communication are covered by the term “digital assets.”

1 The fiduciary’s access to a record defined as a “digital asset” does not mean that the
2 fiduciary is entitled to “own” the asset or otherwise engage in transactions with the
3 asset. Consider, for example, funds in a bank account or securities held with a broker or other
4 custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar
5 presence. This act affects records concerning the bank account or securities, but does not affect
6 the authority to engage in transfers of title or other commercial transactions in the funds or
7 securities, even though such transfers or other transactions might occur electronically.
8 UFADAA simply reinforces the right of the fiduciary to access all relevant electronic
9 communications and the online account that provides evidence of ownership or similar
10 rights. An entity may not refuse to provide access to online records any more than the entity can
11 refuse to provide the fiduciary with access to hard copy records.
12

13 The definition of “electronic communication” is adapted from the language of 18 U.S.C.
14 Sections 2510(12) and 2702(a)(1) and (2), the definition of “electronic-communication service”
15 is drawn from 18 U.S.C. Section 2510(15), and the definition of “remote-computing service” is
16 adapted from 18 U.S.C. Section 2711(2), to help ensure the act’s compliance with federal law.
17 Electronic communication is a subset of digital assets and covers only the category of digital
18 assets subject to the privacy protections of the Electronic Communications Privacy Act. For
19 example, material stored on a computer’s hard drive is a digital asset but not an electronic
20 communication.
21

22 A “fiduciary” under this act occupies a status recognized by state law, and a fiduciary’s
23 powers under this act are subject to the relevant limits established by other state laws. The
24 definition of fiduciary specifically applies to “each person” in order to cover co-fiduciaries.
25

26 The term “record” includes information available in both tangible and electronic media.
27 The act applies only to electronic records.
28

29 The “terms-of-service agreement” definition relies on the definition of “agreement”
30 found in UCC Section 1-201(b)(3) (“the bargain of the parties in fact, as found in their language
31 or inferred from other circumstances, including course of performance, course of dealing, or
32 usage of trade”). It refers to any agreement that controls the relationship between an account
33 holder and a custodian, even though it might be called a terms-of-use agreement, a click-wrap
34 agreement, a click-through license, or a similar term. State and federal law determine capacity to
35 enter into a binding terms-of-service agreement.
36

37 **SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL**

38 **ASSETS OF DECEDENT.** Subject to Section 7(b) and unless otherwise provided by the court
39 or the will of a decedent, a personal representative of the decedent has the right to access:

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

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

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

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

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

8 **Comments**

9 This section is modeled on the formulation of the personal representative’s default power
10 set out in UPC Section 3-715. The phrase, “Unless otherwise provided by the will,” is intended
11 to indicate that a will controls the personal representative’s authority. As is true more generally
12 with respect to interpretation of wills, public policy can override the explicit terms of a will.
13

14 The section clarifies the difference between fiduciary authority over digital assets other
15 than the content of an electronic communication protected by ECPA and authority over
16 ECPA-covered content of an electronic communication. For the content of an electronic
17 communication, subsections (1) and (2) establish procedures that cover: first, the ECPA-covered
18 content of communications and, second, the catalogue (logs and records) that electronic
19 communications service providers may release without consent under the ECPA. Federal law
20 distinguishes between the permissible disclosure of the “content” of an electronic
21 communication, covered in 18 U.S.C. Section 2702(b), and of “a record or other information
22 pertaining to a” subscriber or customer, covered in 18 U.S.C. Section 2702(c); *see* Matthew J.
23 Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105
24 (2009).
25

26 Content-based material can, in turn, be divided into two types of communications: those
27 received by the account holder and those sent. Material when the account holder is the
28 “addressee or intended recipient” can be disclosed either to that individual or to an agent for that
29 person, 18 U.S.C. Section 2702(b)(1), and it can also be disclosed to third parties with the
30 “lawful consent” of the addressee or intended recipient. 18 U.S.C. Section 2702(b)(3). Material
31 for which the account holder is the “originator” can be disclosed to third parties only with the
32 account holder’s “lawful consent.” 18 U.S.C. Section 2702(b)(3). (Note that, when the account
33 holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or
34 (b)(3), but that when the account holder is the originator, lawful consent is required under
35 (b)(3).) See the Comments concerning the definitions of the “content of an electronic
36 communication” after Section 2. By contrast to content-based material, non-content material can
37 be disclosed either with the lawful consent of the account holder or to any person (other than a
38 governmental entity) even without lawful consent. This information includes material about any
39 communication sent, such as the addressee, sender, date/time, and other subscriber data, which

1 this draft defines as the “catalogue of electronic communications.” (Further discussion of this
2 issue and examples are set out in the Comments to Section 7, *infra*.)

3
4 **SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF**

5 **PROTECTED PERSON.** Subject to Section 7(b), the court, after an opportunity for hearing
6 under [state conservatorship law], may grant a [conservator] the right to access:

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

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

12 and

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

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

17 **Comments**

18 Section 4 establishes that the conservator must be specifically authorized by the court to
19 access the protected person’s digital assets. Each of the different levels of access to the content
20 of an electronic communication, to the catalogue of electronic communications, and to any other
21 digital assets must be specifically granted by court order. The requirement in Section 4 for
22 express authority over digital assets does not limit the fiduciary’s authority over the underlying
23 “brick-and-mortar” assets, such as a bank account. The meaning of the term “hearing” will vary
24 from state to state, as it will vary under state law and procedures.

25
26 Section 4 is comparable to Section 3. It responds to the concerns of Internet service
27 providers who believe that the act should be structured to clarify the difference between fiduciary
28 authority over digital assets other than the content of an electronic communication protected by
29 federal law (the Electronic Communications Privacy Act (ECPA)), and fiduciary authority over
30 ECPA-protected content of an electronic communication. Consequently, this draft sets out
31 procedures that cover all digital assets as well as the catalogue of electronic communications
32 (logs and records) that relevant service providers may release without consent under ECPA, and
33 then it addresses ECPA-covered content of an electronic communication separately.

1 The section refers to an individual or a protected person because a conservator may be
2 appointed for a single transaction or without a finding that the person is a protected person.
3

4 State law will establish the criteria for when a court will grant power to the conservator.
5 For example, UPC Section 5-411(c) requires the court to consider the decision the protected
6 person would have made as well as a list of other factors. Existing state law may also set out the
7 requisite standards for a conservator's actions. Under Section 7, the conservator has the same
8 power over digital assets as the account holder. The conservator must exercise authority in the
9 interests of the protected person.
10

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

12 (a) To the extent a power of attorney expressly grants authority to an agent over the
13 content of an electronic communication of the principal and subject to Section 7(b), the agent has
14 the right to access the content of an electronic communication sent or received by the principal if
15 the electronic-communication service or remote-computing service is permitted to disclose the
16 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as
17 amended].

18 (b) Except as provided in subsection (a) and unless otherwise provided by a power of
19 attorney or the court, an agent has the right, subject to Section 7(b), to access:

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

21 and

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

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

26 Comments

27 This section establishes that the agent has default authority over all of the principal's
28 digital assets, other than the content of the principal's electronic communications. When the
29 principal does not want the agent to exercise this authority, then the power of attorney must
30 explicitly prevent an agent from doing so.

1 The situation is different with respect to the content of an electronic communication. In
2 that case, the principal must specifically authorize the agent to access the content of the
3 principal’s electronic communications. This provision is modeled on UPC Section 5B-201(a).
4 Because a power of attorney contains the consent of the account holder, ECPA should not
5 prevent the agent from exercising authority over the content of an electronic communication.
6 See the Comments concerning the definitions of the “content of an electronic communication”
7 after Section 2. There should be no question that an explicit delegation of authority in a power
8 of attorney constitutes authorization from the account holder to access digital assets and provides
9 “lawful consent” to allow disclosure of the content of an electronic communication from an
10 electronic-communication service or a remote-computing service pursuant to applicable law.
11 Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with
12 intentional access without authorization and 18 U.S.C. Section 2702 allows a service provider to
13 disclose with lawful consent. Federal courts have not yet interpreted how ECPA affects a
14 fiduciary’s efforts to access the content of an electronic communication. E.g., *In re*
15 *Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

16
17 States may need to amend their power of attorney statutes and forms to include this
18 power.

19
20 **SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS.** Subject to

21 Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a
22 trustee or a successor of the trustee:

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

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

27 (A) the content of an electronic communication sent or received by the original or
28 any successor account holder if the electronic-communication service or remote-computing
29 service is permitted to disclose the content under the Electronic Communications Privacy Act,
30 18 U.S.C. Section 2702(b) [as amended];

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

1 (C) any other digital asset in which the original or any successor account holder
2 has a right or interest.

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

6 Comments: Subsection (1) clarifies that access to digital assets, including the content of
7 electronic communications, is presumed with respect to assets for which the trustee is the initial
8 account holder. A trustee may have title to digital assets when the trustee opens an account as
9 trustee; under those circumstances, the trustee can access the content of each digital asset that is
10 in an account for which the trustee is the original account holder, although not necessarily each
11 digital asset held in the trust.

12
13 Subsection (2) addresses situations involving an inter vivos transfer of a digital asset into
14 a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other governing
15 instrument of a digital asset into a trust. In those situations, a trustee becomes a successor
16 account holder when the settlor transfers a digital asset into the trust. There should be no
17 question that the trustee with legal title to the digital asset was authorized by the settlor to access
18 the digital assets so transferred, including both the catalogue and content of an electronic
19 communication, and this provides “lawful consent” to allow disclosure of the content of an
20 electronic communication from an electronic-communication service or a remote-computing
21 service pursuant to applicable law. See the Comments concerning the definitions of the “content
22 of an electronic communication” after Section 2. Nonetheless, subsection (2) distinguishes
23 between the catalogue and content of an electronic communication in case there are any
24 questions about whether the form in which property transferred into a trust is held constitutes
25 lawful consent. Both authorization and lawful consent are important because 18 U.S.C.
26 Section 2701 deals with intentional access without authorization and because 18 U.S.C.
27 Section 2702 allows a service provider to disclose with lawful consent.

28
29 The underlying trust documents and default trust law will supply the allocation of
30 responsibilities between and among trustees.

31
32 **SECTION 7. FIDUCIARY AUTHORITY.**

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

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

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

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

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

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

14 (d) Except as provided in subsection (b), a fiduciary’s access under this [act] to a digital
15 asset does not violate a terms-of-service agreement, notwithstanding a provision of the
16 agreement which limits third-party access or requires notice of change in the account holder’s
17 status.

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

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

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

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

3 **Comment**

4 This issue concerning the parameters of the fiduciary’s authority potentially arises in two
5 situations: 1) the fiduciary obtains access to a password or the like directly from the account
6 holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or
7 someone who has stored passwords in a written or electronic list and those passwords are then
8 transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.
9

10 This section clarifies that the fiduciary has the same authority as the account holder if the
11 account holder were the one exercising the authority (note that, where the account holder has
12 died, this means that the fiduciary has access as of the hour before the account holder’s death).
13 This means that the fiduciary’s authority to access the digital asset is the same as the account
14 holder except where, pursuant to subsection (b), the account holder has explicitly opted out of
15 fiduciary access. In exercising its responsibilities, the fiduciary is subject to the duties and
16 obligations established pursuant to state fiduciary law and is liable for breach of those duties.
17 Note that even if the digital asset were illegally obtained by the account holder, the fiduciary
18 would still need access in order to handle that asset appropriately. There may, for example, be
19 tax consequences that the fiduciary would be obligated to report.
20

21 In exercising its responsibilities, the fiduciary is subject to the same limitations as the
22 account holder more generally. For example, a fiduciary cannot delete an account if this would
23 be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service
24 agreement, then the fiduciary is also able to do so. *See Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604
25 (Mass. 2013).
26

27 Subsection (a) is designed to establish that the fiduciary is authorized to exercise control
28 over digital assets in accordance with other applicable laws. The language mirrors that used in
29 Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the
30 Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr,
31 *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*,
32 72 GEO. WASH. L. REV. 1208 (2004). The subsection clarifies that state law treats the fiduciary
33 as “authorized” under the two federal statutes that prohibit unauthorized access to computers and
34 computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any
35 comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act,
36 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra*. (State law may be useful to federal courts
37 interpreting these statutes.)
38

39 ECPA contains two potentially relevant prohibitions. The first, 18 U.S.C.
40 Section 2701(a), defines the crime of unlawful access to stored communications, which applies
41 to a person who “(1) intentionally accesses without authorization a facility through which an
42 electronic communication service is provided; or (2) intentionally exceeds an authorization to
43 access that facility....” Thus, someone who has authorization to access the facility is not
44 engaging in criminal behavior. Moreover, this section does not apply to “conduct authorized . . .

1 by a user of that service with respect to a communication of or intended for that user.” 18 U.S.C.
2 Section 2701(a), (c)(2).

3
4 The second, 18 U.S.C. Section 2702, entitled “Voluntary disclosure of customer
5 communications or records,” concerns actions by the service provider. It prohibits an
6 electronic-communication service or a remote-computing service from knowingly divulging the
7 content of an electronic communication that is stored by or carried or maintained on that service
8 unless disclosure is made (among other exceptions) “to an addressee or intended recipient of
9 such communication or an agent of such addressee or intended recipient” or “with the *lawful*
10 *consent* of the originator or an addressee or intended recipient of such communication, or the
11 subscriber in the case of remote-computing service.” 18 U.S.C. Section 2702(b)(1), (3)
12 (emphasis added). See the Comments concerning the definitions of the “content of an electronic
13 communication” after Section 2. The statute permits disclosure of “customer records” that do
14 not include content, either with lawful consent from the customer or “to any person other than a
15 governmental entity.” 18 U.S.C. Section 2702(c)(2) and (6). Thus, in contrast to its restrictions
16 on the release of content, the electronic-communication or remote-computing service provider is
17 permitted to disclose the catalogue of electronic communications to anyone except the
18 government.

19
20 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.
21 18 U.S.C. Section 1030. Like ECPA, the CFAA similarly protects against anyone who
22 “intentionally accesses a computer without authorization or exceeds authorized access.”
23 18 U.S.C. Section 1030(a).

24
25 State laws vary in their coverage, but typically prohibit unauthorized computer access.

26
27 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization under
28 applicable law to access the digital assets under the *first* relevant provision of ECPA, 18 U.S.C.
29 Section 2701, as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the
30 originator/subscriber under applicable law so that the service provider can voluntarily disclose
31 the digital assets pursuant to the *second* relevant provision of ECPA, 18 U.S.C. Section 2702,
32 including the content of an electronic communication. Moreover, this language should be
33 adequate to avoid liability under the state unauthorized computer access laws.

34
35 Subsection (b) addresses whether account holders can opt out of the rules in this act and
36 whether Internet service providers can prevent fiduciary access. First, a terms-of-service
37 agreement in which an account holder has made an affirmative choice to limit a fiduciary’s right
38 to access will supersede any contrary provision in a will, trust, protective order, or power of
39 attorney. The affirmative act must clearly demonstrate the account holder’s deliberate intent to
40 prevent fiduciary access. Second, the subsection provides that any other term in a
41 terms-of-service agreement that bars fiduciary access is void as against the state’s strong public
42 policy. While all of a state’s laws could be considered that state’s public policy, the phrase
43 “strong public policy” is to be construed under conflict of laws principles to protect fiduciary
44 access to digital assets under this act, notwithstanding a contrary terms-of-service agreement
45 provision and even if the terms-of-service agreement chooses the law of another state or country

1 to govern its contractual rights and duties. See Restatement (Second) Conflict of Laws § 90 and
2 § 187 cmt. G; see also Uniform Trust Code § 107(1). However, a terms-of-service agreement
3 provision for which an account holder has made an affirmative choice, separate from the account
4 holder’s assent to other provisions of the terms-of-service agreement, to limit a fiduciary’s access
5 to the account holder’s digital assets is not voided by this act and will supersede any contrary
6 provision in a will, or trust. (See Example 5).

7
8 Subsection (c) supports the importance of fiduciary access by providing that any choice
9 of law governing the effect of a terms-of-service agreement that prevents fiduciary access is
10 unenforceable.

11
12 Subsection (d) reinforces the concept that the fiduciary “steps into the shoes” of the
13 account holder, with no more – and no fewer – rights. For example, the terms-of-service
14 agreement controls the rights of the account holder (settlor, principal, incapacitated person,
15 decedent). The act does not permit the account holder’s fiduciary to override the
16 terms-of-service agreement in order to make a digital asset or collection of digital assets
17 “descendible,” although it does preserve the rights of the fiduciary to make the same claims as
18 the account holder. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton,
19 *Indescendibility*, 102 Calif. L. Rev. 543 (2014).

20
21 Under subsection (d), access by a fiduciary should not be considered a transfer or other
22 use that would violate the anti-transfer terms or other terms of a terms-of-service agreement.

23
24 Subsection (e) clarifies that the fiduciary is authorized to access digital assets stored on
25 tangible personal property, such as laptops, computers, smartphones or storage media of the
26 decedent, protected person, principal, or settlor, exempting fiduciaries from application for
27 purposes of state or federal laws on unauthorized computer access. For criminal law purposes,
28 this clarifies that the fiduciary is authorized to access all of the account holder’s digital assets,
29 whether held locally or remotely.

30
31 *Example 1 – Access to digital assets by personal representative.* D dies with a will that is
32 silent with respect to digital assets. D has a bank account for which D received only electronic
33 statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account
34 with a company that provides electronic-communication services to the public. The personal
35 representative of D’s estate needs access to the electronic bank account statements, the photo
36 account, and e-mails.

37
38 The personal representative of D’s estate has the authority to access D’s electronic
39 banking statements and D’s photo account, which both fall under the act’s definition of a “digital
40 asset.” This means that, if these accounts are password-protected or otherwise unavailable to the
41 personal representative, then the bank and the photo account service must give access to the
42 personal representative when the request is made in accordance with Section 8. If the
43 terms-of-service agreement permits D to transfer the accounts electronically, then the personal
44 representative of D’s estate can use that procedure for transfer as well.

1 The personal representative of D’s estate is also able to request that the e-mail account
2 service provider grant access to e-mails sent or received by D; ECPA permits the service
3 provider to release the catalogue to the personal representative. The service provider also must
4 provide the personal representative access to the content of an electronic communication sent or
5 received by D if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose
6 the content. The bank may release the catalogue of electronic communications or content of an
7 electronic communication for which it is the originator or the addressee because the bank is not
8 subject to the ECPA.

9
10 *Example 2 – Access to digital assets by conservator.* C is seeking appointment as the
11 conservator for P. P has a bank account for which P received only electronic statements, P has
12 stored photos in a cloud-based Internet account, and P has an e-mail account with a company that
13 provides electronic communication services to the public. C needs access to the electronic bank
14 account statements, the photo account, and e-mails.

15
16 Without a court order that explicitly grants access to P’s digital assets, including
17 electronic communications, C has no authority pursuant to this act to access the electronic bank
18 account statements, the photo account, or the e-mails. Based on law outside of this act, the bank
19 may release the catalogue of electronic communications or content of an electronic
20 communication for which it is the originator or the addressee because the bank is not subject to
21 the ECPA.

22
23 *Example 3 – Access to digital assets by agent.* X creates a power of attorney designating
24 A as X’s agent. The power of attorney expressly grants A authority over X’s digital assets,
25 including the content of an electronic communication. X has a bank account for which
26 X receives only electronic statements, X has stored photos in a cloud-based Internet account, and
27 X has a game character and in-game property associated with an online game. X also has an
28 e-mail account with a company that provides electronic-communication services to the public.

29
30 A has the authority to access X’s electronic bank statements, the photo account, the game
31 character and in-game property associated with the online game, all of which fall under the act’s
32 definition of a “digital asset.” This means that, if these accounts are password-protected or
33 otherwise unavailable to A as X’s agent, then the bank, the photo account service provider, and
34 the online game service provider must give access to A when the request is made in accordance
35 with Section 8. If the terms-of-service agreement permits X to transfer the accounts
36 electronically, then A as X’s agent can use that procedure for transfer as well.

37
38 As X’s agent, A is also able to request that the e-mail account service provider grant
39 access to e-mails sent or received by X; ECPA permits the service provider to release the
40 catalogue. The service provider also must provide A access to the content of an electronic
41 communication sent or received by X if the service provider is permitted under 18 U.S.C.
42 Section 2702(b) to disclose the content. The bank may release the catalogue of electronic
43 communications or content of an electronic communication for which it is the originator or the
44 addressee because the bank is not subject to the ECPA.

1 *Example 4 – Access to digital assets by trustee.* T is the trustee of a trust established
2 by S. As trustee of the trust, T opens a bank account for which T receives only electronic
3 statements. S transfers into the trust to T as trustee (in compliance with a terms-of-service
4 agreement) a game character and in-game property associated with an online game and a
5 cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in
6 compliance with the terms-of-service agreement) an e-mail account with a company that
7 provides electronic-communication services to the public.
8

9 T is an original account holder with respect to the bank account that T opened, and T has
10 the ability to access the electronic banking statements. T, as successor account holder to S, may
11 access the game character and in-game property associated with the online game and the photo
12 account, which both fall under the act’s definition of a “digital asset.” This means that, if these
13 accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the
14 photo account service provider, and the online game service provider must give access to T when
15 the request is made in accordance with Section 8. If the terms-of-service agreement permits the
16 account holder to transfer the accounts electronically, then T as trustee can use that procedure for
17 transfer as well.
18

19 T as successor account holder of the e-mail account for which S was previously the
20 account holder is also able to request that the e-mail account service provider grant access to
21 e-mails sent or received by S; the ECPA permits the service provider to release the catalogue.
22 The service provider also must provide T access to the content of an electronic communication
23 sent or received by S if the service provider is permitted under 18 U.S.C. Section 2702(b) to
24 disclose the content. The bank may release the catalogue of electronic communications or
25 content of an electronic communication for which it is the originator or the addressee because the
26 bank is not subject to the ECPA.
27

28 *Example 5 – Access notwithstanding terms in a terms-of-service agreement.* D, who is
29 domiciled in state X, dies. D was a professional photographer who stored valuable digital photos
30 in an online storage account provided by C. P is appointed by a court in state X to
31 administer D’s estate. P needs access to D’s online storage account to inventory and
32 appraise D’s estate assets and to file D’s estate tax return. During D’s lifetime, D entered into a
33 terms-of-service agreement with C for the online storage account. The choice-of-law provision
34 selects the law of state Y to govern the contractual rights and duties under the terms-of-service
35 agreement. A provision of the terms-of-service agreement prohibits fiduciary access to the
36 digital assets of an account holder, but D did not agree to that provision by an affirmative act
37 separate from D’s assent to other provisions of the terms-of-service agreement. UFADAA has
38 been enacted by state X but not by state Y. Because P’s access to D’s assets is fundamental to
39 carrying out P’s fiduciary duties, a court should apply subsections (b) and (c) of this act under
40 the law of state X to void the terms-of-service agreement provision prohibiting P’s access to D’s
41 online account, even though the terms-of-service agreement selected the law of state Y to govern
42 the contractual rights and duties under the terms-of-service agreement.

1 **SECTION 8. COMPLIANCE.**

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

5 (1) access to the asset;

6 (2) control of the asset; and

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

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

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

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

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

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

23 (c) A custodian shall comply with a request made under subsection (a) not later than

1 [60] days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for
2 an order directing compliance.

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

5 (1) must contain the following information:

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

7 (B) the identity of the settlor;

8 (C) the identity and address of the trustee;

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

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

13 (F) whether a cotrustee has authority to sign or otherwise authenticate, and
14 whether all or fewer than all cotrustees are required to exercise powers of the trustee;

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

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

18 and

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

20 (e) A custodian that receives a certification of trust under subsection (d) may require the
21 trustee to provide copies of excerpts from the original trust instrument and later amendments

22 which designate the trustee and confer on the trustee the power to act in the pending transaction.

23 (f) A custodian that acts in reliance on a certification under subsection (d) without

1 knowledge that the representations contained in it are incorrect is not liable to any person for so
2 acting and may assume without inquiry the existence of facts stated in the certification.

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

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

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

11 **Legislative Note:** *The bracketed material in subsections (d)-(i) allows states that have already*
12 *enacted the Uniform Trust Code or a similar law permitting a certification of trust in lieu of*
13 *furnishing a complete copy of the trust instrument to use the shorter version when setting out*
14 *procedures concerning a trustee's request. Those states that have not adopted the Uniform Trust*
15 *Code or a certification of trust procedure may choose to include the bracketed material, which is*
16 *a slight modification of the language in Uniform Trust Code Section 1013.*

17 **Comment**

18 Subsection (a) allows a fiduciary to request access, control, or a copy of the digital asset.
19 The term “control” means only the ability to move (unless prohibited by copyright law) or delete
20 that particular asset. A fiduciary’s control over a digital asset is not equivalent to a transfer of
21 ownership or a laundering of illegally obtained material. Thus, this subsection grants the
22 fiduciary the ability to access electronic records, and the disposition of those records is subject to
23 other laws. For example, where the account holder has an online securities account or has a
24 game character and in-game property associated with an online game, then the fiduciary’s ability
25 to sell the securities, the game character, or the in-game property is controlled by traditional
26 probate law. The act is only granting access and “control” in the sense of enabling the fiduciary
27 to do electronically what the account holder could have done electronically. Thus, if a
28 terms-of-service agreement precludes online transfers, then the fiduciary is unable to make those
29 transfers electronically as well.

30
31 *Example – Fiduciary control over a digital asset.* D dies with a will disposing of all D’s
32 assets to D’s spouse, S. E is the personal representative for D’s estate. D left a bank account, for
33 which D only received online statements, and a blog.

1 E as personal representative of D's estate has access to both of D's accounts and can
2 request the passwords from the custodians of both accounts. If D's agreement with the bank
3 requires that transferring the underlying title to the account be done in person, through a hard
4 copy signed by the account holder and the bank manager, then E must comply with those
5 procedures (signing as the account holder) and cannot transfer the funds in the account
6 electronically. If the terms-of-service agreement for the blog permitted D to transfer the blog
7 electronically, then E can make the transfer electronically as well.
8

9 Subsection (c) establishes 60 days as the appropriate time for compliance. This is true
10 regardless of the procedure for supplying the requisite trust instrument. If applicable law other
11 than this act does not prohibit the custodian from complying, then the custodian must grant
12 access to comply. This provision should be read in conjunction with the state's power of
13 attorney act.
14

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

17 **Comment**

18

19 This section establishes that custodians are protected from liability when they act in
20 accordance with the procedures of this act and in good faith. The types of actions covered
21 include disclosure as well as transfer of copies. The critical issue in conferring immunity is the
22 source of the liability. Direct liability is not subject to immunity; indirect liability is subject to
23 immunity.
24

25 Direct liability could only arise from noncompliance with a judicial order issued under
26 section 8. Upon determination of a right of access under sections 4, 5, 6, or 7, a court may issue
27 an order to grant access under section 8. Noncompliance with that order would give rise to
28 liability for contempt. There is no immunity from this liability.
29

30 Indirect liability could arise from granting a right of access under this act. Access to a
31 digital asset might invade the privacy or the harm the reputation of the protected person, might
32 harm the family or business of the protected person, and might harm other persons. The grantor
33 of access to the digital asset is immune from liability arising out of any of these circumstances if
34 the grantor acted in good faith to comply with this act. If there is a judicial order under section 8,
35 compliance with the order establishes good faith. Absent a judicial order under section 8, good
36 faith must be established by the grantor's assessment of the requirements of this act.
37

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

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

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

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

13
14 **SECTION 13. APPLICABILITY.**

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

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

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

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

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

24 (b) This [act] does not apply to a digital asset of an employer used by an employee in the

1 ordinary course of the employer’s business.

2 **Comment**

3 This act does not change the substantive rules of other law, such as agency, banking,
4 conservatorship, contract, copyright, criminal, fiduciary, privacy, probate, property, security,
5 trust, or other applicable law except to vest fiduciaries with authority, according to the provisions
6 of this act, to access, control, or copy digital assets of a decedent, protected person (or other
7 individual under Section 4), principal, settlor, or trustee.

8
9 Subsection (a)(2) covers the situations in which a decedent dies intestate, so it falls
10 outside of subsection (a)(1), as well as the situations in which a state’s procedures for small
11 estates are used.

12
13 Subsection (b) clarifies that the act does not apply to a fiduciary’s access to an
14 employer’s internal email system.

15
16 *Example 1 – Fiduciary access to an employee e-mail account.* D dies, employed by
17 Company Y. Company Y has an internal e-mail communication system, available only to Y’s
18 employees, and used by them in the ordinary course of Y’s business. D’s personal
19 representative, R, believes that D used Company Y’s e-mail system to effectuate some financial
20 transactions that R cannot find through other means. R requests access from Company Y to the
21 e-mails.

22
23 Company Y is not a custodian subject to the act. Under Section 2(7), a custodian must
24 carry, maintain or store an account holder’s digital assets. An account holder, in turn, is defined
25 under Section 2(1) as someone who has entered into a terms-of-service agreement. Company Y,
26 like most employers, did not enter into a terms-of-service agreement with D, so D was not an
27 account holder.

28
29 *Example 2 – Employee of electronic-communication service provider.* D dies, employed
30 by Company Y. Company Y is an electronic-communication service provider. Company Y has
31 an internal e-mail communication system, available only to Y’s employees and used by them in
32 the ordinary course of Y’s business. D used the internal Company Y system. When not at work,
33 D also used an electronic-communication service system that Y provides to the public. D’s
34 personal representative, R, believes that D used Company Y’s internal e-mail system as well as
35 Company Y’s electronic-communication system available to the public to effectuate some
36 financial transactions. R seeks access to both communication systems.

37
38 As is true in Example 1, Company Y is not a custodian subject to the act for purposes of
39 the internal email system. The situation is different with respect to R’s access to Y’s system that
40 is available to the public. Assuming that Y can disclose the communications under federal law,
41 then Y must disclose them to R.

1 **SECTION 14. REPEALS; CONFORMING AMENDMENTS.**

2 (a)

3 (b)

4 (c)

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