



Ohio Legislative Service Commission

Bill Analysis

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Reps. Cupp, Rezabek

BILL SUMMARY

- Adopts the Revised Uniform Access to Digital Assets Act, which:
 - Authorizes specified fiduciaries (an agent under a power of attorney, an executor or administrator of an estate, a guardian, or a trustee) of another person to access a digital asset in which the other person has or had a right or interest;
 - Describes the scope of authority of fiduciaries in relation to digital assets;
 - Specifies the manner in which a fiduciary may access digital assets and a custodian may disclose those assets;
 - Authorizes a fiduciary to request a custodian to terminate a user's account and a guardian to request the termination or suspension of a ward's account for good cause;
 - Creates an order of priority if the user has provided contradictory directions with respect to the disclosure of the user's digital assets.
- Permits a user to direct the custodian of the user's digital assets to disclose or not to disclose some or all of those assets to a third party by means of an online tool.

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CONTENT AND OPERATION

Overview

The bill enacts the Revised Uniform Fiduciary Access to Digital Assets Act, which parallels the model act of the same name adopted by the National Conference of Commissioners on Uniform State Laws.¹ It provides for continued access or control over digital assets when the owner of those assets dies or becomes incapacitated. The bill authorizes persons legally acting on behalf of an owner to access and take action in relation to the assets. It also specifies the manner in which the custodian of those assets is to disclose them, with protections given to the contents of electronic communications. Lastly, it creates an order of priority in the event the owner of digital assets has

¹ Uniform Law Commission, Fiduciary Access to Digital Assets Act, Revised (2015), [http://www.uniformlaws.org/Act.aspx?title=Fiduciary Access to Digital Assets Act](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act), Revised (2015), accessed September 29, 2016.

provided conflicting directions with respect to those assets or has provided no directions.

The following are the major terms needed to understand the bill:

Digital asset

A digital asset is an electronic record in which an individual has a right or interest. The term includes an underlying asset or liability only if the asset or liability is itself an electronic record.² Common examples of digital assets that the bill might cover would be email accounts, social media pages, and websites. The bill does not, however, apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.³

Custodian

Under the bill, a custodian is the person or entity that carries, maintains, processes, receives, or stores the digital assets of a user who resides in Ohio or resided in Ohio at the time of the user's death.⁴

User

The user is the person who has an account with a custodian.⁵

Fiduciary and the person on whose behalf the fiduciary acts

Under the bill, a fiduciary is any of the following:

(1) An agent acting under a power of attorney executed before, on, or after the bill's effective date. The person creating the power of attorney is called the principal.⁶

(2) An executor or administrator of an estate (called a "personal representative" in the bill) acting for a decedent who died before, on, or after the bill's effective date.

² R.C. 2137.01(I).

³ R.C. 2137.02(B).

⁴ R.C. 2137.01(G) and 2137.02(A)(5).

⁵ R.C. 2137.01(Y).

⁶ R.C. 2137.01(B), (M), (S), and (T) and 2137.02(A)(1).

These terms include a commissioner in a release of assets from administration and an applicant for summary release from administration (small estates).⁷

(3) A guardian appointed by the probate court in a guardianship proceeding commenced before, on, or after the bill's effective date to have the care and management of the person, the estate, or the person and the estate of an incompetent or minor, who is referred to as a "ward."⁸

(4) A trustee acting under the authority granted by a trust created before, on, or after the bill's effective date. A trustee is a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. The person creating the trust is called the settlor.⁹

Online tool and designated recipient

The bill permits a user to utilize an online tool that enables the user to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications, to a third party called the "designated recipient." The online tool is an electronic service provided pursuant to an agreement between the custodian and the user that must be distinct from the terms-of-service agreement. The online tool may permit the user to modify or delete a direction at all times.¹⁰

Powers and duties of a fiduciary in relation to digital assets

Authority generally

If the digital asset is not held by a custodian or is not subject to a terms-of-service agreement, a fiduciary with authority over the property of another has the right to access any digital asset in which that other person had a right or interest. The fiduciary also is an authorized user of the property of another for the purpose of applicable computer-fraud and unauthorized-computer-access laws, as long as the fiduciary is acting within the scope of the fiduciary's authority.

⁷ R.C. 2137.01(M) and (R) and 2137.02(A)(2).

⁸ R.C. 2137.01(M), (N), and (Z) and 2137.02(A)(3). For a more complete description of "guardian," see "**Definitions**," below.

⁹ R.C. 2137.01(M) and (X) and 2137.02(A)(4).

¹⁰ R.C. 2137.01(H), (P), and (W) and 2137.03(A).



If a fiduciary has authority over the tangible, personal property of the other person, the fiduciary has the right to access that property and any digital asset stored in it.¹¹

Authority to terminate an account

A user's fiduciary may request a custodian to terminate the user's account. The request must be in writing, in either physical or electronic form, and accompanied by all of the following:

- (1) If the user is deceased, a copy of the user's death certificate;
- (2) A copy of the instrument giving the fiduciary authority over the account, as follows:
 - For an executor or administrator, a copy of the letter or entry of appointment;
 - For an agent, a copy of the power of attorney;
 - For a trustee, either:
 - A copy of the trust instrument and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust;
 - A certification of the trust under the Ohio Trust Law.
 - For a guardian, a copy of the court order giving the guardian authority over the ward (see **COMMENT**).
- (3) If requested by the custodian, any of the following:
 - The unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - Evidence linking the account to the user;
 - A finding by the court that the user had a specific account with the custodian, identifiable by the unique identifier.

¹¹ R.C. 2137.14(C), (D), and (E).

The custodian may disclose to the fiduciary information in an account that is needed to terminate the account.¹²

Authority to terminate or suspend an account

The bill permits a guardian to request the custodian to terminate or suspend the ward's account for good cause (see **COMMENT**). Either request must be accompanied by a copy of the court order giving the guardian authority over the ward.¹³

Limits of powers

The bill also establishes limits regarding a fiduciary's authority with respect to a user's digital assets. The authority is subject to other applicable laws, including Copyright Law, and may not be used to impersonate the user. Also, except as otherwise provided below under "**Order of priority if instructions conflict**," the authority is subject to the applicable terms-of-service agreement.

The bill does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or represents. The fiduciary's authority also is limited by the scope of the fiduciary's duties; for example, an agent under a power of attorney has authority over digital assets only if the power of attorney grants that authority.

In addition, a fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under the provisions described below under "**Order of priority if instructions conflict**."¹⁴

Duties

The bill makes explicit that the legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the duties of care, loyalty, and confidentiality.¹⁵

¹² R.C. 2137.14(F) and (G).

¹³ R.C. 2137.13(C).

¹⁴ R.C. 2137.04(A) and (B) and 2137.14(B).

¹⁵ R.C. 2137.14(A).

Order of priority if instructions conflict

The terms-of-service agreement, online direction tool, power of attorney, trust, and will may contain conflicting instructions from the user regarding the disclosure of digital assets to a fiduciary. The bill creates an order of priority to resolve some of these potentially contradictory directions.

(1) If a user uses an online tool *through which the user can modify or delete a direction at all times*, a direction regarding disclosure that is made with that online tool overrides a contrary direction in the user's will, trust, power of attorney, or other record. (Though not expressly stated in the bill, it appears that if a direction is made by an online tool that *cannot* be changed, a contradictory direction in the user's will, trust, power of attorney, or other record takes priority.)

(2) If a user does not utilize an online tool, or if an online tool is not provided by the custodian, the user may allow or prohibit disclosure of digital assets to a fiduciary via a will, trust, power of attorney, or other record.

(3) If a custodian's terms-of-service agreement does not require the user to "act affirmatively and distinctly" and if the user wants to allow fiduciary access to digital assets (and, apparently, the terms-of-service agreement prohibits that access), a user's contradictory direction under (1) or (2) above overrides that prohibition.¹⁶

Custodian discretion when granting access or disclosing

The bill specifies that it does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use the user's digital assets.¹⁷

When disclosing a user's digital assets under the bill, the custodian may, at its sole discretion, do any of the following:

(1) Grant a fiduciary or designated recipient full access to the user's account;

(2) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged;

(3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

¹⁶ R.C. 2137.03.

¹⁷ R.C. 2137.04(A).



A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under the bill. In addition, the custodian is not required to disclose a digital asset that the user deleted.

If a user directs or a fiduciary or designated recipient requests a custodian to disclose some, but not all, of the user's digital assets, the custodian is not required to disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian, fiduciary, or designated recipient may seek an order from the court to disclose (1) a subset limited by date of the user's digital assets, (2) all of the user's digital assets to the fiduciary or designated recipient, (3) none of the user's digital assets, or (4) all of the user's digital assets to the court for review in private.¹⁸

Mandatory custodian disclosure and granting of access – overview

The bill contains largely parallel requirements, based on the type of fiduciary involved, for custodian disclosure of the contents of electronic communications, other digital assets, and a "catalogue of electronic communications," which consists of information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the person's electronic address.¹⁹

Under the bill, a higher standard sometimes must be met regarding disclosure of electronic communications. The "content of an electronic communication" is the information concerning the substance or meaning of the communication that (1) has been sent or received by a user, (2) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public, and (3) is not readily accessible to the public.²⁰

To obtain disclosure, the fiduciary generally must provide the custodian with the following:

- (1) A written request for disclosure;
- (2) A copy of the document or documents providing authority to the fiduciary;

¹⁸ R.C. 2137.05.

¹⁹ R.C. 2137.01(D).

²⁰ R.C. 2137.01(E).

(3) If requested by the custodian, identifying information, such as the account name, and evidence linking the account to the user.

Different types of fiduciaries have different types of authority. Trustees, agents, and guardians might have full access to the digital assets, depending on the scope of their authority, as their role may involve ongoing duties. The authority of executors and administrators is more limited, as their role is to wrap up the affairs of the deceased person.²¹ The specific prerequisites for disclosure vary according to the fiduciary. The specific authorities and requirements are described in greater detail below under "**Mandatory custodian disclosure and granting of access – by fiduciary type.**"

Procedure

Not later than 60 days after receipt of the information required above under "**Mandatory custodian disclosure and granting of access – overview,**" a custodian generally must comply with a request from a fiduciary or designated recipient to disclose digital assets or a request from a fiduciary to terminate an account. But, the custodian may notify the user that a request for disclosure or to terminate an account was made. And, the custodian may deny the request if the custodian is aware of any lawful access to the account following the receipt of the request.

If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance. If the court issues an order, the order must contain a finding that compliance is not in violation of the federal Stored Communications Law.²²

The bill specifies that it does not limit a custodian's ability to obtain, or to require a fiduciary or designated recipient requesting disclosure or termination to obtain, a court order that does all of the following:

- (1) Specifies that an account belongs to the ward or principal;
- (2) Specifies that there is sufficient consent from the ward or principal to support the requested disclosure;
- (3) Contains a finding required by law other than the bill.²³

²¹ R.C. 2137.06 to 2137.13.

²² R.C. 2137.15(A) to (D).

²³ R.C. 2137.15(E). It appears that the only fiduciary this provision would apply to is a guardian or agent.

Immunity

A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with the bill.²⁴

Mandatory custodian disclosure and granting of access – by fiduciary type

Estate executor or administrator

Content of electronic communication

If a deceased user consented to, or a court directs, disclosure of the contents of the user's electronic communications, the custodian must disclose to the estate executor or administrator the content of an electronic communication sent or received by the user if the executor or administrator gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) A copy of the user's death certificate;
- (3) A copy of the letter or entry of appointment as executor or administrator;
- (4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to the disclosure;
- (5) If requested by the custodian, any of the following:
 - The unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - Evidence linking the account to the user;
 - A finding by the court that one of the following applies:
 - The user had a specific account with the custodian, identifiable by the unique identifier.
 - Disclosure of the content of the user's electronic communications would not violate federal stored communications laws, common carrier customer privacy laws, or other applicable laws.

²⁴ R.C. 2137.15(F).

- Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications.
- Disclosure of the content of the user's electronic communications is reasonably necessary for administration of the estate.²⁵

Digital assets and catalogue of electronic communications

Unless the user prohibited disclosure of digital assets, or the court directs otherwise, the custodian must disclose to the estate executor or administrator the user's digital assets, other than the contents of electronic communications, and a catalogue of electronic communications sent or received by the deceased user, if the executor or administrator gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) A copy of the user's death certificate;
- (3) A copy of the letter or entry of appointment as executor or administrator;
- (4) If requested by the custodian, any of the following:
 - The unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - Evidence linking the account to the user;
 - An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate;
 - A finding by the court that either of the following applies:
 - The user had a specific account with the custodian, identifiable by the unique identifier.
 - Disclosure of the user's digital assets is reasonably necessary for administration of the estate.²⁶

²⁵ R.C. 2137.06.

²⁶ R.C. 2137.07.

Agent under a power of attorney

Power of attorney law

The bill revises the statutorily specified forms relating to powers of attorney to include reference to the digital assets and the contents of electronic communications.²⁷

The bill also adds conforming provisions to the power of attorney law. Under the bill, unless the power of attorney provides otherwise, language in a power of attorney granting general authority with respect to digital assets makes the agent an authorized user for the purpose of applicable computer fraud and unauthorized computer access laws. It also authorizes the agent to access all of the following:

- Any catalogue of electronic communications sent or received by the principal;
- Any other digital asset in which the principal has a right or interest;
- Any of the principal's tangible personal property capable of receiving, storing, processing, or sending a digital asset;
- The content of electronic communications sent or received by the principal.

The power of attorney also authorizes the agent to take any action concerning the asset to the extent of the account holder's authority.²⁸

Content of electronic information

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian must disclose to the agent the content if the agent gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) A copy of the power of attorney expressly granting the agent authority over the content of the principal's electronic communications;
- (3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect;

²⁷ R.C. 1337.60.

²⁸ R.C. 1337.571.

(4) If requested by the custodian, either of the following:

- The unique subscriber or account identifier assigned by the custodian to identify the principal's account;
- Evidence linking the account to the principal.²⁹

Digital assets and catalogue of electronic communications

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, the custodian must disclose to an agent the principal's digital assets other than the contents of electronic communications and a catalogue of electronic communications sent or received by the principal, if the agent gives the custodian all of the following:

(1) A written request for disclosure in physical or electronic form;

(2) A copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect;

(4) If requested by the custodian, either of the following:

- The unique subscriber or account identifier assigned by the custodian to identify the principal's account;
- Evidence linking the account to the principal.³⁰

Trustee

If trustee is an original user

If a trustee is an original user of an account, the custodian must disclose to the trustee any digital asset of the account held in trust, including a catalogue of the trustee's electronic communications and the content of electronic communications. This requirement does not apply if otherwise ordered by a court or provided in the trust.³¹

²⁹ R.C. 2137.08.

³⁰ R.C. 2137.09.

³¹ R.C. 2137.10.

If trustee is not an original user

Content of electronic communication

Unless otherwise ordered by the court, directed by the user, or provided in the trust, the custodian must disclose to a trustee that is not an original user of the account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the trust account, if the trustee gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) Either of the following:
 - A copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust;
 - A certification of the trust under Ohio Trust Law that includes a statement that the trust authorizes disclosure of the content of electronic communications to the trustee;
- (3) If requested by the custodian, either of the following:
 - The unique subscriber or account identifier assigned by the custodian to identify the trust's account;
 - Evidence linking the account to the trust.³²

Digital assets and catalogue of electronic communications

Unless otherwise ordered by the court, directed by the user, or provided in a trust, the custodian must disclose to a trustee that is not an original user of an account the digital assets in which the trust has a right or interest, other than the contents of electronic communications, and a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in the trust account, if the trustee gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) Either of the following:

³² R.C. 2137.11.

- A copy of the trust instrument and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust;
 - A certification of the trust under Ohio Trust Law;
- (3) If requested by the custodian, either of the following:
- The unique subscriber or account identifier assigned by the custodian to identify the trust's account;
 - Evidence linking the account to the trust.³³

Guardian

Access to account

After an opportunity for a hearing, the court with jurisdiction over the guardianship may grant a guardian access to the ward's digital assets.³⁴

Disclosure of digital assets and catalogue of electronic communication

Unless otherwise ordered by the court or directed by the user, a custodian must disclose to a guardian the catalogue of electronic communications sent or received by a ward and any digital assets, other than the content of electronic communications, in which the ward has a right or interest, if the guardian gives the custodian all of the following:

- (1) A written request for disclosure in physical or electronic form;
- (2) A copy of the court order that gives the guardian authority over the ward's digital assets;
- (3) If requested by the custodian, either of the following:
 - The unique subscriber or account identifier assigned by the custodian to identify the ward's account;
 - Evidence linking the account to the ward.³⁵

³³ R.C. 2137.12.

³⁴ R.C. 2137.13(A).

³⁵ R.C. 2137.13(B).

Consideration when applying the bill

In applying and construing the bill, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact versions of the Revised Uniform Fiduciary Access to Digital Assets Act.³⁶

Interaction with federal law

The bill states that it modifies, limits, or supersedes the federal "Electronic Signatures in Global and National Commerce Act," but does not modify, limit, or supersede the federal Act's consumer disclosure provisions or authorize electronic delivery of any of the following:

(1) Court orders or notices, or official court documents required to be executed in connection with court proceedings;

(2) Notice of any of the following:

- The cancellation or termination of utility services;
- Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, an individual's primary residence;
- The cancellation or termination of health insurance or life insurance benefits;
- Recall of a product, or material failure of a product, that risks endangering health or safety.

(3) A document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

Definitions

As used in the bill:

Account means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores the user's digital assets or provides goods or services to the user.

Carries means engages in the transmission of an electronic communication.

³⁶ R.C. 2137.16.

Court means the probate court for all matters in which the court has exclusive jurisdiction. The term also includes the probate court or the general division of the court of common pleas for matters in which such courts have concurrent jurisdiction.

Electronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce, but does not include:

- Any wire or oral communication;
- Any communication made through a tone-only paging device;
- Any communication from a tracking device;
- Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.³⁷

Electronic-communication service means a custodian that provides to a user the ability to send or receive an electronic communication.

Guardian means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or the person and the estate of an incompetent or minor. When applicable, "guardian" includes a limited guardian, an interim guardian, a standby guardian, and an emergency guardian. "Guardian" also includes both of the following:

- An agency under contract with the Department of Developmental Disabilities for the provision of protective services, when appointed by the probate court to have the care and management of the person (as opposed to the estate) of an incompetent;
- A conservator appointed by the probate court upon petition by a competent but physically infirm adult.

³⁷ 18 U.S.C. 2510(12), by reference.

"Guardian" does not include a guardian under the Veterans' Guardianship Law.

Information means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

Person means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

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.

Remote-computing service means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system.

Will includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments admitted to probate. The term does not include inter vivos trusts (living trusts, as opposed to testamentary trusts) or other instruments that have not been admitted to probate.³⁸

COMMENT

A guardian's authority to request the custodian to terminate the account of a ward appears to be ambiguous. Both R.C. 2137.13(C) and 2137.14(G)(2)(d) require the guardian to provide the custodian with a copy of the court order giving the guardian authority over the ward. But, R.C. 2137.13(C) contains the additional requirement of showing "good cause."

HISTORY

ACTION	DATE
Introduced	10-05-16

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³⁸ R.C. 2137.01.

