

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

PREFATORY NOTE

The purpose of this act is to vest fiduciaries with the authority to access, control, or copy digital assets and accounts. The act applies only to fiduciaries, who must always act in compliance with their fiduciary powers and duties. The goal of the Uniform Fiduciary Access to Digital Assets Act (UFADAA) is to remove barriers to a fiduciary's access to electronic records and to leave unaffected other law, such as fiduciary, probate, trust, banking, investment securities, and agency law. Existing law prohibits any fiduciary from violating fiduciary responsibilities by divulging or publicizing any information the fiduciary obtains while carrying out his or her fiduciary duties.

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

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

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

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

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

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

Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who have access to digital assets under UFADAA. Section 3 states that the act does not apply to the digital assets of an employer used by an employee during the ordinary course of business.

Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different opt-in and default rules based on the presumed intent of the account holder and the applicability of other state and federal laws. A personal representative is presumed to have access to all of the decedent's digital assets unless that is contrary to the decedent's expressed intent or to other applicable law. A conservator may access digital assets pursuant to a court order. An agent acting pursuant to a power of attorney is presumed to have access to all of a principal's digital assets not subject to the protections of other applicable law; if another law protects the asset, then the power of attorney must explicitly grant access. And a trustee may access any digital asset held by the trust unless that is contrary to the terms of the trust or to other applicable law.

Section 8 contains general provisions relating to the rights of the fiduciary to access digital assets. Section 9 addresses compliance, and Section 10 grants immunity to custodians. Sections 11-15 address miscellaneous topics, including retroactivity, the effective date of the act, and similar issues. The act addresses only the rights of the four types of fiduciaries, and it is designed to provide access without changing the ownership of the digital asset.

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) “Account holder” means a person that has entered into a terms-of-service agreement with a custodian or a fiduciary for the person.

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

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

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

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

(6) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

(A) has been sent or received by an account holder;

(B) 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

(C) is not readily accessible to the public.

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

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

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

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

(11) “Electronic communication” has the same meaning as the definition in 18 U.S.C. Section 2510(12) [as amended].

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

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

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

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

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

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

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

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

(20) “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.

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

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

(23) “Trustee” means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

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

Legislative Note: States should insert the appropriate term for a person named in a conservatorship or comparable state proceeding to manage another’s estate in paragraph (5), the appropriate court in paragraph (7), and the appropriate term for the individual that would be subject to a conservatorship or comparable state proceeding in paragraph (20).

In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (11) and (22).

Comment

Many of the definitions are based on those in the Uniform Probate Code: agent (UPC Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57)). The

definition of “information” is based on that in the Uniform Electronic Transactions Act, Section 2, subsection (11). Many of the other definitions are either drawn from federal law, as discussed below, or are new for this act.

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

The definition of “carries” is drawn from federal law, 47 U.S.C. Section 1001(8).

The term “catalogue of electronic communications” in Section 2(4) is designed to cover log-type information about an electronic communication such as the email addresses of the sender and the recipient, and the date and time the communication was sent.

The term “content of an electronic communication” in Section 2(6) is adapted from 18 U.S.C. Section 2510(8), which provides that content: “when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.” The 2(6) definition is designed to cover only content subject to the coverage of Section 2702 of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 et seq.; it does not include content not subject to ECPA. Consequently, the “content of an electronic communication”, as used later throughout UFADAA, refers *only* to information in the body of an electronic message that is not readily accessible to the public; if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under ECPA. See S. Rep. No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the content of an electronic communication, the act’s legislative history notes the requirements for disclosure: “Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication.” S. Rep. No. 99-541, at 37 (1986).

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

Example: X uses a Twitter account to send a message. If the tweet is sent only to other people who have been granted access to X’s tweets, then it meets the Act’s definition of “content of an electronic communication.” But, if the tweet is completely public with no access restrictions, then it does not meet the Act’s definition of “content of an electronic communication.”

A custodian includes any Internet service provider as well as any other entity that provides or stores electronic data of an account holder. A custodian does not include most employers because an employer typically does not have a terms-of-service agreement with an employee. The treatment of digital assets of an employer used by an employee in the ordinary

course of the employer's business is discussed in Section 3.

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

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

The definition of "electronic communication" in Section 2(11) is that set out in 18 U.S.C. Section 2510(12):

"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—

- (A) any wire or oral communication;
- (B) any communication made through a tone-only paging device;
- (C) any communication from a tracking device (as defined in section 3117 of this title); or
- (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

The definition of "electronic-communication service" in Section 2(12) is drawn from 18 U.S.C. Section 2510(15): "any service which provides to users thereof the ability to send or receive wire or electronic communications." The definition of "remote-computing service" in Section 2(22) is adapted from 18 U.S.C. Section 2711(2): "the provision to the public of computer storage or processing services by means of an electronic communications system." The definition refers to 18 U.S.C. Section 2510(14), which defines an electronic communications system as: "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related

electronic equipment for the electronic storage of such communications.”

Electronic communication is a particular type of digital asset and covers only the category of digital assets subject to the privacy protections of the Electronic Communications Privacy Act. For example, material stored on a computer’s hard drive is a digital asset but not an electronic communication.

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

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

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

SECTION 3. APPLICABILITY.

(a) This [act] applies to:

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

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

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

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

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

Comment

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

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

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

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

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

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

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

SECTION 4. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL

ASSET OF DECEDENT. Subject to Section 8(b) and unless otherwise ordered by the court or provided in the will of a decedent, the personal representative of the decedent has the right to access:

- (1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];
- (2) any catalogue of electronic communications sent or received by the decedent; and
- (3) any other digital asset in which at death the decedent had a right or interest.

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

Comment

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

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

Content-based material can, in turn, be divided into two types of communications: those received by the account holder and those sent. Federal law, 18 U.S.C. Section 2702(b) permits a custodian to “divulge the contents of a communication “(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient” or “(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”

Consequently, when the account holder is the “addressee or intended recipient,” material can be disclosed either to that individual or to an agent for that person, 18 U.S.C. Section 2702(b)(1), and it can also be disclosed to third parties with the “lawful consent” of the addressee or intended recipient. 18 U.S.C. Section 2702(b)(3). Material for which the account holder is the “originator” can be disclosed to third parties only with the account holder’s “lawful consent.” 18 U.S.C. Section 2702(b)(3). (Note that, when the account holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is required under (b)(3).) See the Comments concerning the definition of “content” after Section 2. By contrast to content-based material, non-content material can be disclosed either with the lawful consent of the account holder or to any person (other than a governmental entity) even without lawful consent. This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, which this act defines as the “catalogue of electronic communications.” (Further discussion of this issue and examples are set out in the Comments to Section 8, *infra*.)

SECTION 5. ACCESS BY [CONSERVATOR] TO DIGITAL ASSET OF

[PROTECTED PERSON]. Subject to Section 8(b), the court, after an opportunity for hearing under [state conservatorship law], may grant a [conservator] the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

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

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

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

States should insert the appropriate term for a conservator or comparable fiduciary throughout this Section.

Comment

Section 5 establishes that the conservator must be specifically authorized by the court to access the protected person’s digital assets. Each of the different levels of access to the content of an electronic communication, to the catalogue of electronic communications, and to any other digital assets must be specifically granted by court order. The requirement in Section 5 for express authority over digital assets does not limit the fiduciary’s authority over the underlying assets, such as funds held in a bank account. The meaning of the term “hearing” will vary from

state to state according to state law and procedures.

Section 5 is comparable to Section 4. It responds to the concerns of Internet service providers who believe that the act should be structured to clarify the difference between fiduciary authority over digital assets other than the content of an electronic communication protected by federal law (the Electronic Communications Privacy Act (ECPA)), and fiduciary authority over ECPA-protected content of an electronic communication. Consequently, Section 5 sets out separate procedures for digital assets as well as the catalogue of electronic communications (logs and records) that relevant service providers may release without consent under ECPA, and the ECPA-covered content of an electronic communication.

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

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

SECTION 6. ACCESS BY AGENT TO DIGITAL ASSET OF PRINCIPAL.

(a) To the extent a power of attorney expressly grants an agent authority over the content of an electronic communication of the principal and subject to Section 8(b), the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended].

(b) Subject to Section 8(b) and unless otherwise ordered by the court or provided by a power of attorney, an agent has the right to access:

- (1) any catalogue of electronic communications sent or received by the principal;
- and
- (2) any other digital asset in which the principal has a right or interest.

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

States may also need to amend their power of attorney statutes and forms to include this power.

Comment

This section establishes that the agent has default authority over all of the principal’s digital assets, other than the content of the principal’s electronic communications. When the principal does not want the agent to exercise such broad authority, then the power of attorney must explicitly prevent an agent from doing so. An agent has access to the content of electronic communications only when the power of attorney explicitly grants access.

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

SECTION 7. ACCESS BY TRUSTEE TO DIGITAL ASSET.

(a) Subject to Section 8(b) and unless otherwise ordered by the court or provided in a trust, a trustee that is an original account holder has the right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee and the content of an electronic communication.

(b) Subject to Section 8(b) and unless otherwise ordered by the court or provided in a trust, a trustee that is not an original account holder has the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

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

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

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

Comment

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

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

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

SECTION 8. FIDUCIARY AUTHORITY.

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

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

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

(3) is, for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including [this state's law on unauthorized computer access], an authorized user.

(b) Unless an account holder, after [the effective date of this [act]], agrees to a provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's assent to other provisions of the agreement:

(1) the provision is void as against the strong public policy of this state; and

(2) the fiduciary's access under this [act] to a digital asset does not violate the terms-of-service agreement even if the agreement requires notice of a change in the account holder's status.

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

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

principal, or settlor:

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

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

Legislative Note: *A state with a computer trespass statute should add the appropriate reference in paragraphs (a)(3) and (d)(2) and may want to amend the statute to be in accord with this act.*

Comment

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

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

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

Subsection (a) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004). The subsection clarifies that state law treats the fiduciary as “authorized” under the two federal statutes that prohibit unauthorized access to computers and computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any

comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra* (state law may be useful to federal courts interpreting these statutes.)

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

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

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

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

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

Subsection (a)(1) states that the fiduciary can take actions to the extent of the fiduciary’s

power under the law of this state. Note that the fiduciary's powers under state law are defined by statute, common law, and the terms of the governing instrument.

Subsection (b) addresses whether account holders can opt out of the rules in this act and whether Internet service providers can prevent fiduciary access. First, a terms-of-service agreement in which an account holder has made an affirmative choice to limit a fiduciary's right to access will supersede any contrary provision in a will, trust, protective order, or power of attorney. The affirmative act must clearly demonstrate the account holder's deliberate intent to prevent fiduciary access. Second, the subsection provides that any other term in a terms-of-service agreement that bars fiduciary access is void as against the state's strong public policy. While all of a state's laws could be considered that state's public policy, the phrase "strong public policy" is to be construed under conflict of laws principles to protect fiduciary access to digital assets under this act, notwithstanding a contrary terms-of-service agreement provision and even if the terms-of-service agreement chooses the law of another state or country to govern its contractual rights and duties. *See* Restatement (Second) Conflict of Laws § 90 and § 187 cmt. G; *see also* Uniform Trust Code § 107(1). However, a terms-of-service agreement provision for which an account holder has made an affirmative choice, separate from the account holder's assent to other provisions of the terms-of-service agreement, to limit a fiduciary's access to the account holder's digital assets is not voided by this act and will supersede any contrary provision in a will, or trust. (*See* Example 5).

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

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

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

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

Example 1—Access to digital assets by personal representative. D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account

with a company that provides electronic-communication services to the public. The personal representative of D's estate needs access to the electronic bank account statements, the photo account, and e-mails.

The personal representative of D's estate has the authority to access D's electronic banking statements and D's photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to the personal representative, then the bank and the photo account service must give access to the personal representative when the request is made in accordance with Section 9. If the terms-of-service agreement permits D to transfer the accounts electronically, then the personal representative of D's estate can use that procedure for transfer as well.

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

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

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

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

A has the authority to access X's electronic bank statements, the photo account, the game character and in-game property associated with the online game, all of which fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to A as X's agent, then the bank, the photo account service provider, and

the online game service provider must give access to A when the request is made in accordance with Section 9. If the terms-of-service agreement permits X to transfer the accounts electronically, then A as X's agent can use that procedure for transfer as well.

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

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

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

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

Example 5—Access notwithstanding terms in a terms-of-service agreement. D, who is domiciled in state X, dies. D was a professional photographer who stored valuable digital photos in an online storage account provided by C. P is appointed by a court in state X to administer D's estate. P needs access to D's online storage account to inventory and appraise D's estate assets and to file D's estate tax return. During D's lifetime, D entered into a terms-of-service agreement with C for the online storage account. The choice-of-law provision selects the law of

state Y to govern the contractual rights and duties under the terms-of-service agreement. A provision of the terms-of-service agreement prohibits fiduciary access to the digital assets of an account holder, but D did not agree to that provision by an affirmative act separate from D's assent to other provisions of the terms-of-service agreement. UFADAA has been enacted by state X but not by state Y. Because P's access to D's assets is fundamental to carrying out P's fiduciary duties, a court should apply subsections (b) and (c) of this act under the law of state X to void the terms-of-service agreement provision prohibiting P's access to D's online account, even though the terms-of-service agreement selected the law of state Y to govern the contractual rights and duties under the terms-of-service agreement.

SECTION 9. COMPLIANCE.

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

- (1) access to the asset;
- (2) control of the asset; and
- (3) a copy of the asset to the extent permitted by copyright law.

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

(1) a personal representative with the right of access under Section 4, the request must be accompanied by a certified copy of [the letter of appointment of the representative or a small-estate affidavit or court order];

(2) a [conservator] with the right of access under Section 5, the request must be accompanied by a certified copy of the court order that gives the [conservator] authority over the digital asset;

(3) an agent with the right of access under Section 6, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) a trustee with the right of access under Section 7, the request must be accompanied by a certified copy of the trust instrument[, or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013],] that authorizes the trustee to exercise authority over the digital asset.

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

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

(1) must contain the following information:

- (A) that the trust exists and the date the trust instrument was executed;
- (B) the identity of the settlor;
- (C) the identity and address of the trustee;
- (D) that there is nothing inconsistent in the trust with respect to the trustee's powers over digital assets;
- (E) whether the trust is revocable and the identity of any person holding a power to revoke the trust;
- (F) whether a cotrustee has authority to sign or otherwise authenticate; and
- (G) whether all or fewer than all cotrustees are required to exercise powers of the trustee;

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

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

and

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

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

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

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

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

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

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

Comment

Subsection (a) allows a fiduciary to request access, control, or a copy of the digital asset. The term "control" means only the ability to move (unless prohibited by copyright law) or delete that particular asset. A fiduciary's control over a digital asset is not equivalent to a transfer of ownership or a laundering of illegally obtained material. Thus, this subsection grants the fiduciary the ability to access electronic records, and the disposition of those records is subject to

other laws. For example, where the account holder has an online securities account or has a game character and in-game property associated with an online game, then the fiduciary's ability to sell the securities, the game character, or the in-game property is controlled by traditional probate law. The act is only granting access and "control" in the sense of enabling the fiduciary to do electronically what the account holder could have done electronically. Thus, if a terms-of-service agreement precludes online transfers, then the fiduciary is unable to make those transfers electronically as well.

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

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

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

Subsection (h) allows for attorneys' fees. As the comment to Section 709 of the Uniform Trust Code explains, reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

SECTION 10. CUSTODIAN 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 this [act].

Comment

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

Direct liability could only arise from noncompliance with a judicial order issued under section 9. Upon determination of a right of access under sections 4, 5, 6, or 7, a court may issue an order to grant access under section 9. Noncompliance with that order would give rise to liability for contempt. There is no immunity from this liability.

Indirect liability could arise from granting a right of access under this act. Access to a digital asset might invade the privacy or the harm the reputation of the decedent, protected person, principal, or settlor, it might harm the family or business of the decedent, protected person, principal, or settlor, and it might harm other persons. The grantor of access to the digital asset is immune from liability arising out of any of these circumstances if the grantor acted in good faith to comply with this act. If there is a judicial order under section 9, compliance with the order establishes good faith. Absent a judicial order under section 9, good faith must be established by the grantor's assessment of the requirements of this act.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 13. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

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

SECTION 14. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

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