

**THE NEW UNIFORM DIGITAL ASSETS LAW:  
ESTATE PLANNING AND ADMINISTRATION  
IN THE INFORMATION AGE**

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*Editor’s Synopsis: The “Information Age” has significantly changed the estate planning process by adding digital assets to decedents’ estates. This Article examines the definition of digital assets, as well as the state and federal laws affecting digital assets. It also provides estate planning attorneys with advice on how to deal with digital assets in estate planning and administration.*

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## I. INTRODUCTION

Not so long ago, in a world not so far way, estate planning and the administration of a decedent's estate was typically a process that focused on the individual's tangible belongings, financial assets, and real estate. Aside from the federal tax laws, state statutes and common law primarily controlled all aspects of the planning and administration of a decedent's estate. However, in the Information Age, where almost every aspect of our lives is in some manner affected or controlled by information that is stored in an electronic form, it is not surprising that the impact of "digital assets" has fundamentally and irrevocably changed the nature of estate planning and administration.

Starting in the 1980s with the passage of the Stored Communications Act (SCA)<sup>1</sup> and the Computer Fraud and Abuse Act (CFAA),<sup>2</sup> Congress has enacted federal statutes that have a profound effect on the legal status of digital assets. However, these statutes generally do not address the impact of the death or incapacity of the owner or creator of the digital assets. In the last several years, the efforts of the Uniform Law Commission (ULC) culminated in the statute known as the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).<sup>3</sup> As of this writing, RUFADAA had been adopted by thirty-four states.<sup>4</sup> In addition, all states have statutes that criminalize unauthorized access, or "hacking," of computer systems and networks.<sup>5</sup>

With such a *mélange* of state and federal laws, preparing effective estate planning documents for individuals, or administering the estates of incapacitated persons and decedents, presents a unique and difficult set of challenges. In approaching these challenges, the practitioner will be benefitted by having a working understanding of not only the elements of state law that impact digital assets, but also of the SCA and the CFAA, particularly as those statutes are interpreted by the Internet and technology industry.

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<sup>1</sup> See Stored Communications Act, 18 U.S.C. §§ 2701-2712. All statutory citations in this Article refer to the current statute unless otherwise indicated.

<sup>2</sup> See Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

<sup>3</sup> See NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS, REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 1-21 (2015), <http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20> [hereinafter UFADAA].

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., OR. REV. STAT. § 164.377; WASH. REV. CODE § 9A.48.100, §§ 9A.52.110-130 (repealed 2016); S.B. 2375, 2016 Leg.; CAL. PENAL CODE § 502.

## II. WHAT ARE DIGITAL ASSETS?

My favorite professor in college frequently admonished his students that the key foundational element to any cogent analysis is to carefully define the relevant terms of that analysis. Hence, as a starting point, the somewhat illusive and amorphous term “digital assets” should be defined.

### A. RUFADAA Definition of Digital Assets

RUFADAA states that a “digital asset” means an “electronic record in which an individual has a right or interest,” but does not include the “underlying asset or liability unless the asset or liability is itself an electronic record.”<sup>6</sup> In turn, a “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”<sup>7</sup> Finally, “electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.”<sup>8</sup>

As an initial observation, the definition of digital assets refers to an electronic record that is owned by an “individual.”<sup>9</sup> Hence, this definition would appear to exclude any digital asset that is owned by an estate or business entity, all of which *are* included within RUFADAA’s separate definition of “person.”<sup>10</sup> The ULC’s comments do not address this nuance, and the consequences of this language are unclear.

The definition of “digital asset” includes any type of electronically-stored information, including electronic information stored on a user’s computer or any other digital device, content uploaded to the Internet, and rights in digital property.<sup>11</sup> It also includes records that are either the catalogue or the content of an electronic communication.<sup>12</sup>

### B. Practical Scope of Digital Assets Definition

Digital assets will include any electronically stored information, regardless of whether the location of that storage is the Internet

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<sup>6</sup> RUFADAA, *supra* note 3, § 2(10). The citations of RUFADAA in the article utilize the section numbers of the ULC version of the act.

<sup>7</sup> *Id.* § 2(22).

<sup>8</sup> *Id.* § 2(11).

<sup>9</sup> *Id.* § 2(10).

<sup>10</sup> *Id.* § 2(17).

<sup>11</sup> *Id.* § 2 cmt.

<sup>12</sup> *See id.*

(including social media applications and email services), a private computer network, personal computer, tablet, memory drive, or mobile phone.<sup>13</sup> The definition's proviso, "*unless the asset or liability is itself an electronic record*,"<sup>14</sup> also has important consequences. For example, digital currency, such as bitcoin, would be an asset that is itself an electronic record. An Internet domain name would also be considered an asset that is also an electronic record.<sup>15</sup> Finally, commercial loyalty points and awards, such as accrued airline miles and hotel points, would be considered digital assets, although many are subject to contractual restrictions and cannot be transferred to the heirs of a deceased customer.<sup>16</sup> However, as discussed below, online digital assets are typically subject to a "term of service agreement" (TOSA), even following the death or incapacity of the owner of the digital asset.<sup>17</sup>

### C. Economic and Non-Economic Value of Digital Assets

In a 2011 McAfee survey, American households valued their digital assets at nearly \$55,000.<sup>18</sup> Certainly, many digital assets, such as bitcoin, commercial domain names, and similar property, have an ascertainable value that must be included as part of the administration of the estate of an incapacitated individual or a decedent. For an estate subject to federal or state estate taxes, the value of such property will need to be determined and included on the pertinent estate tax returns. Likewise, such property may need to be separately listed on any required inventories of a decedent's estate.<sup>19</sup>

Many other forms of digital assets have no extrinsic economic value, but may have tremendous sentimental value. For example, most photographs are now created by digital cameras and stored in some digital form, often within a user's account with an online provider such as Facebook, Instagram, Flickr, and Photobucket. However, once uploaded

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<sup>13</sup> See *id.* § 2(10).

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> See, e.g., Elizabeth Sy, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up with Technology?*, 32 *TOURO L. REV.* 647, 650 n.29 (2016).

<sup>16</sup> See, e.g., Kara Brandeisky, *What Happens to Your Airline Miles When You Die?*, *TIME* (July 31, 2015), <http://time.com/money/3978458/airline-miles-death/>.

<sup>17</sup> *Id.* at 672.

<sup>18</sup> See *McAfee Reveals Average Internet User Has More Than \$37,000 in Underprotected 'Digital Assets'*, *MCAFEE* (Sept. 27, 2011), <http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx>.

<sup>19</sup> See, e.g., *OR. REV. STAT.* § 113.165.

to these sites, these photos are subject to each provider's TOSA, which may limit access to such accounts upon the user's incapacity or death.<sup>20</sup>

### III. FEDERAL LAW AFFECTING DIGITAL ASSETS

#### A. Stored Communications Act

Congress passed the SCA in 1986 as part of the Electronic Communication Privacy Act (ECPA).<sup>21</sup> Drafted early in the era of electronic communications, Congress sought to deal with the impact of Internet communications upon Fourth Amendment privacy protections. The SCA states that a provider of either an "electronic communication service" or "remote computing service" may not "knowingly divulge to any person or entity the contents of a communication which is carried or maintained on that service."<sup>22</sup>

However, the SCA contains several key exceptions. First, the SCA does not prevent providers from providing non-governmental entities with a user's "non-content" information, such as the name of the person connected with the account in question.<sup>23</sup> An appropriate analogy to understand non-content information is to contrast the "envelope" containing a letter as containing non-content information, with the letter inside that envelope containing the "content" of the communication. Second, the statute allows the disclosure of content-based information to an "agent" of the addressee or intended recipient of an electronic communication.<sup>24</sup> Third, and most notably, a provider "may" disclose content information 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."<sup>25</sup>

What is "lawful consent" in the context of digital assets owned by a decedent's estate or incapacitated person? While personal representatives and executors generally have the statutory authority under state law to take all necessary actions to administer the decedent's estate, this state-law authority does not automatically equate to the authority to grant

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<sup>20</sup> See, e.g., *How do I request content from the Facebook account of a deceased person?*, FACEBOOK, <https://www.facebook.com/help/123355624495297> (last visited Feb. 19, 2017).

<sup>21</sup> See Stored Communications Act, 18 U.S.C. §§ 2701-2712.

<sup>22</sup> *Id.* § 2702(a)(1)-(2).

<sup>23</sup> *Id.* § 2702(a)(3).

<sup>24</sup> *Id.* § 2702(b)(1).

<sup>25</sup> *Id.* § 2702(b)(3) (emphasis added).

“lawful consent” to the disclosure of the content of digital assets under the SCA.<sup>26</sup>

The only federal court that had the opportunity to address this question declined to rule on the issue.<sup>27</sup> In 2008, Sahar Daftary (Sahar), an internationally-known model, died following a fall from the twelfth floor of a building in England.<sup>28</sup> In the inquiry that followed, Sahar’s executors sought access to her Facebook account, which they believed contained critical evidence of Sahar’s state of mind at the time of her death.<sup>29</sup> In the *ex parte* proceeding that followed, the executors sought a subpoena in federal court in California.<sup>30</sup> Facebook responded and requested the court quash the subpoena, arguing that the subpoena violated the SCA.<sup>31</sup> The court agreed, and in declining to decide whether Sahar’s executors could provide the sufficient “lawful consent” under the SCA, the court stated that it

lacks jurisdiction to address whether the Applicants may offer consent on Sahar’s behalf so that Facebook may disclose the records voluntarily. Any such ruling would amount to nothing less than an impermissible advisory opinion. Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar’s behalf and providing the requested materials voluntarily.<sup>32</sup>

Even if the court had explicitly found that the executors’ fiduciary authority was sufficient to constitute “lawful consent” under the SCA, the language of the pertinent provisions of the SCA’s exceptions states that the provider “*may* divulge the content of the communication.”<sup>33</sup> Given the discretionary language of the statute, and the absence of clear authority, the reality is that providers are reluctant to risk litigation and liability exposure in making a potentially incorrect decision and,

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<sup>26</sup> RUFADAA, *supra* note 3, § 8 cmt.

<sup>27</sup> *See In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012).

<sup>28</sup> *See id.* at 1205.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 1206.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> 18 U.S.C. § 2702(b) (emphasis added).

therefore are hesitant to disclose a decedent's digital assets to a personal representative based solely upon the authority to do so under the SCA.

#### B. Computer Fraud and Abuse Act (and Similar State Statutes)

Congress passed the CFAA in 1986.<sup>34</sup> In relevant part, the CFAA imposes both criminal and civil liability upon anyone who “intentionally accesses a computer without authorization or exceeds authorized access,” and obtains information from any “protected computer.”<sup>35</sup> In addition, all 50 states have statutes that criminalize “unauthorized access” or “hacking” of computers and computer systems.<sup>36</sup>

In analyzing whether a fiduciary possesses legal authority for purposes of the CFAA and state counterparts, at least two essential issues should be analyzed. First, either under the governing instruments or relevant state law, does the fiduciary have clear legal authority to access the computer or digital assets of the decedent or incapacitated individual? Second, if the computer system or digital asset is subject to the terms and conditions of a TOSA, does the fiduciary's access violate the terms of that TOSA? Hence, a fiduciary with ostensible legal authority may still violate the CFAA if the fiduciary's access violates the terms of the TOSA. For example, the United States Justice Department has used the CFAA to prosecute individuals based *solely* upon the violation of the terms of a TOSA.<sup>37</sup>

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<sup>34</sup> See Computer Fraud and Abuse Act, Pub. L. No. 99-474, 100 Stat. 1213 (codified at 18 U.S.C. § 1030).

<sup>35</sup> 18 U.S.C. § 1030(a)(2)(C). For purposes of the CFAA, a “protected computer” is defined in 18 U.S.C. section 1030(e)(2) as a computer exclusively for the use or affecting the “use of a financial institution or the United States Government,” or “which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.”

<sup>36</sup> *Computer Crime Statutes*, NAT'L CONF. OF STATE LEGIS. (May 12, 2016), <http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx>.

<sup>37</sup> See Sasha A. Klein & Mark R. Parthemer, *Who Will Delete the Digital You? Understanding Fiduciary Access to Digital Assets*, PROB. & PROP. MAG., July-Aug. 2016, at 3, [http://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2016/july\\_august\\_2016/2016\\_aba\\_rpte\\_pp\\_v30\\_4\\_article\\_klein\\_parthemer\\_understanding\\_fiduciary\\_access\\_to\\_digital\\_assets.html](http://www.americanbar.org/publications/probate_property_magazine_2012/2016/july_august_2016/2016_aba_rpte_pp_v30_4_article_klein_parthemer_understanding_fiduciary_access_to_digital_assets.html).

#### IV. THE REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT: THE DIGITAL ASSETS “MULLIGAN”

##### A. Original UFADAA

The ULC approved the “original” Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014.<sup>38</sup> Thereafter, UFADAA was introduced in approximately 27 states.<sup>39</sup> A key component of the original UFADAA was that—subject to the SCA as well as any applicable TOSA—fiduciaries were legally imputed with lawful authority to administer the digital assets of a decedent or protected person in the same manner as provided under state law with respect to other non-digital assets.<sup>40</sup> UFADAA went as far as stating that a fiduciary had “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.”<sup>41</sup>

However, the proposed legislation was met with strenuous opposition from lobbyists for the online providers. The providers raised a number of arguments. First, contrary to UFADAA’s presumptive access stance, the providers argued that the default position of a decedent or incapacitated person was that their digital assets should *not* be disclosed to anyone, even to their fiduciary.<sup>42</sup> Second, the providers took the position that UFADAA could not create a legal presumption of “lawful consent” for purposes of the SCA, and that UFADAA was preempted by federal law.<sup>43</sup> Third, the providers argued that UFADAA should not override or supersede their TOSAs in any way.<sup>44</sup> Lastly, there were indications that the providers were concerned about civil litigation liability exposure and the cost of complying with UFADAA.<sup>45</sup> As a result of these lobbying efforts, UFADAA was not passed in any state except

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<sup>38</sup> See FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, (UNIF. LAW COMM’N, 2015), <http://www.uniformlawcommission.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>, [hereinafter Original UFADAA].

<sup>39</sup> See Robert K. Kirkland, *Pixar for Estate Planners: Who Gets Your Digital Stuff When You’ve Logged Off for the Final Time*, AM. LAW INST. 27 (Sept. 13, 2016).

<sup>40</sup> See, e.g., Original UFADAA, *supra* note 38, §§ 3, 7.

<sup>41</sup> *Id.* § 8(a)(2) (emphasis added).

<sup>42</sup> See Klein & Parthemmer, *supra* note 37, at 4.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*



Delaware, which passed a version of UFADAA from a draft 2014 version.<sup>46</sup>

#### B. RUFADAA Compromise

Following the near-complete failure of UFADAA, representatives from the ULC and the digital provider industry entered into negotiations to discuss a compromise, the result of which was RUFADAA. The ULC formally approved the final draft of RUFADAA in July 2015.<sup>47</sup> Unlike the Original UFADAA, which granted fiduciaries *presumptive* authority to access digital assets, RUFADAA places great emphasis upon whether the deceased or incapacitated user *expressly* consented to the disclosure of the content of the digital assets, either through what RUFADAA refers to as an “online tool” or an express grant of authority in the user’s estate planning documents or power of attorney.<sup>48</sup> Hence, RUFADAA respects the concept of “lawful consent” under the SCA, and, unlike UFADAA, does not attempt to impute such lawful consent to the fiduciary.

#### C. Explanation of RUFADAA Provisions

The following is a section-by-section summary of RUFADAA’s provisions, using the section numbers from the uniform act.

**Section 2** of RUFADAA sets forth a list of definitions used in the act.<sup>49</sup> While a comprehensive discussion of each definition is beyond the scope of this Article, several of the key definitions are discussed below. Many of RUFADAA’s definitions are based on those in the Uniform Probate Code.<sup>50</sup>

A “*custodian*” is defined as “a person that carries, maintains, processes, receives, or stores a digital asset of a user.”<sup>51</sup> Hence, a custodian will include most providers of online email and social media services.

The phrase “*content of an electronic communication*” is adapted from the SCA, which provides that content, “when used with respect to any wire, oral, or electronic communication, includes any information

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<sup>46</sup> See *id.*

<sup>47</sup> See NAT’L CONFERENCE OF COMM’R ON UNIF. STATE LAWS, REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT title page (2015), <http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20>

<sup>48</sup> See *id.* § 9.

<sup>49</sup> See *id.* § 2.

<sup>50</sup> *Id.* § 2(10); *id.* § 2 cmt. (discussing the definition of “digital asset”).

<sup>51</sup> *Id.* § 2(8).

concerning the substance, purport, or meaning of that communication.”<sup>52</sup> The definition is designed to cover only content subject to the coverage of the ECPA (including the SCA).<sup>53</sup> Consequently, the “content of an electronic communication,” used throughout the Revised UFADAA, refers only to information in the body of an electronic message that is not readily accessible to the public.<sup>54</sup> If the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under ECPA.<sup>55</sup> For example, a “tweet” by a Twitter user that is accessible to the public at large would *not* fall under this definition.<sup>56</sup>

In contrast, the definition of “*catalogue of electronic communications*” means information that identifies each person with which a user has had an electronic communication, the time and date of that communication, and the electronic address of the person.<sup>57</sup> For example, a catalogue relating to an email would be email addresses of the sender and the recipient, and the date and time the email was sent. Generally, a fiduciary will have access to a catalogue of the user’s communications, but not the content, unless (as discussed below) the user consented to the disclosure of the content.<sup>58</sup>

RUFADAA defines an “*online tool*” as “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.”<sup>59</sup> An online tool can provide for a “designated recipient” to administer the digital assets of the user.<sup>60</sup> As discussed below, an online tool supersedes directions in the user’s estate planning documents, even

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<sup>52</sup> *Id.* § 2 cmt.; *see also* 18 U.S.C. § 2510(8).

<sup>53</sup> *See* RUFADAA, *supra* note 3, § 2 cmt.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* § 2(4).

<sup>58</sup> *See id.* at prefatory cmt.

<sup>59</sup> *See id.* § 2(16). Google’s “Inactive Account Manager” is an example of an online tool, accessible at, [https://support.google.com/accounts/answer/3036546?hl=en&ref\\_topic=2382809](https://support.google.com/accounts/answer/3036546?hl=en&ref_topic=2382809). Facebook also provides for “Memorialized Accounts” for deceased users, which allows the account to continue to be viewed, but content cannot be added to the account once it is placed into the “memorialized” status. Additionally, Facebook allows the user to appoint a “Legacy Contact.” Information on Facebook’s tools is available at <https://www.facebook.com/help/1506822589577997/>.

<sup>60</sup> *See* RUFADAA, *supra* note 3, § 2(9).

if those directions are *contrary* to the user's preferences as expressed in an online tool.

**Section 3** of RUFADAA provides that the act applies to (1) a fiduciary acting under a will or power of attorney signed before or after the effective date of the act; (2) a personal representative of a decedent who died before or after the effective date of the act (including a decedent who died intestate); (3) a conservatorship commenced before or after the effective date of the act; and (4) a trustee of a trust created before or after the effective date of the act.<sup>61</sup>

**Section 4** of RUFADAA establishes a "three-tier priority system"<sup>62</sup> for determining a user's intent with respect to any digital asset. First, through an online tool, the user may direct the custodian whether to disclose the content of the digital asset.<sup>63</sup> If the online tool allows the user to modify or delete the direction at any time, then any such direction "overrides a contrary direction by the user in a will, trust, power of attorney, or other record."<sup>64</sup> Second, if an online tool is not utilized, then the user's directions in a will, trust, power of attorney, or "other record" will control whether the content of a digital asset may be disclosed to a fiduciary.<sup>65</sup> Finally, if the user provides no direction in either an online tool or applicable documents, then the TOSA controlling the digital asset will govern the rights of the fiduciary.<sup>66</sup> If, as in most instances, the TOSA is silent as to the rights of a user's fiduciary, then RUFADAA's default rules (discussed below) will be the fiduciary's sole remaining option.<sup>67</sup>

**Section 5** of RUFADAA states that if a fiduciary obtains access to a digital asset, then the TOSA continues to apply to the fiduciary in the same manner as the original user.<sup>68</sup> A custodian is not required to permit a fiduciary to assume the rights under the TOSA if the custodian can comply with section 6.<sup>69</sup>

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<sup>61</sup> See *id.* § 3; see also *id.* § 3 cmt.

<sup>62</sup> *Id.* § 4 cmt. Arguably, the act's judicial procedure (discussed below) could be viewed as a fourth tier, albeit not a preferable choice in most instances.

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* § 4(a).

<sup>65</sup> See *id.* § 4(b). At this tier, it is important to note that RUFADAA refers to "disclosure" and not "access." Those concepts are distinct under the statute.

<sup>66</sup> See *id.* § 4(c).

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* § 5.

<sup>69</sup> See *id.* § 5 cmt.

**Section 6** establishes the procedure by which a custodian may comply with RUFADAA's disclosure procedures.<sup>70</sup> In particular, when disclosing a digital asset, the custodian, at its "*sole discretion*," may grant the fiduciary or designated recipient (1) "full access to the user's account"; (2) "partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged"; or (3) an electronic or paper copy of the digital asset.<sup>71</sup> This section allows the custodian to seek guidance from the court if the custodian feels a request from a fiduciary would impose an "undue burden" upon the custodian.<sup>72</sup>

**Section 7** is the first of RUFADAA's provisions that delineate the procedures by which fiduciaries may seek access to information from online providers regarding the digital assets of a deceased or incapacitated user.<sup>73</sup> This section allows the personal representative of a decedent's estate to obtain such access if a court directs or the personal representative gives the custodian (1) a written request for disclosure in written or electronic form; (2) a certified copy of the user's death certificate; (3) a certified document evidencing the authority of the personal representative (such as court-issued letter of appointment or letters testamentary); and (4) unless the user utilized an online tool, a written document showing the "user's consent to disclosure of the content of electronic communications."<sup>74</sup>

In addition, section 7 further provides that if the custodian requests, the personal representative can be required to provide the custodian with additional information, including evidence to show the user had an account with the custodian, which could include the account number, username, address, or other unique identifying information.<sup>75</sup> In addition, the custodian can also request that the fiduciary obtain a court order finding that (1) the user had an account with the custodian; (2) disclosure of the content of the electronic communications does not violate the SCA; (3) unless the user utilized an online tool, that the user consented to

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<sup>70</sup> *See id.* § 6.

<sup>71</sup> *Id.* § 6(a).

<sup>72</sup> *See id.* § 6(d). This guidance may include an order from the court to disclose a subset limited by the date of the user's digital assets, all or none of user's digital assets, or all of the user's digital assets to the court for review in camera. *See id.*

<sup>73</sup> *See id.* § 7.

<sup>74</sup> *Id.* §§ 7(1)-(4).

<sup>75</sup> *See id.* §§ 7(5)(A)-(B).

the disclosure; *or* (4) disclosure of the information is “reasonably necessary for administration of the estate.”<sup>76</sup>

The judicial procedures contemplated by section 7 present serious challenges to the personal representative. The introductory phrase of section 7 allows disclosure of the content of a digital asset if a “court directs.”<sup>77</sup> However, prior to such disclosure, the custodian may request a finding from the court that the disclosure would not violate the SCA and federal privacy statutes (that is 47 U.S.C. section 222); or that the “user consented to the disclosure.”<sup>78</sup> This provision directly implicates the issue of whether, under federal law, a fiduciary appointed pursuant to state law has the user’s “lawful consent” under the SCA to receive the content of an electronic communication. As seen in the *In re Facebook, Inc.* case discussed above,<sup>79</sup> courts appear to be reluctant to imply consent solely by the fact that the personal representative is serving in a fiduciary capacity. This places great importance upon a user granting express consent for disclosure of digital assets under the user’s will, trust, or power of attorney.

Absent express consent in the decedent’s will, **section 8** of RUFADAA permits the personal representative to request that the custodian disclose a “catalogue of electronic communications sent or received by the user, *other than the content* of electronic communications of the user.”<sup>80</sup> The procedure under section 8 is similar to that described in section 7, except that no copy of the decedent’s will is required, and a finding by the court need not include references to compliance with the SCA because such non-content disclosures are not prohibited by the SCA.<sup>81</sup> Hence, the fiduciary may still be able to receive non-content information from the custodian even if no basis for “lawful consent” under the SCA is present.

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<sup>76</sup> *Id.* § 7(5)(C).

<sup>77</sup> *Id.* § 7.

<sup>78</sup> *Id.* § 7(5)(C).

<sup>79</sup> See 923 F. Supp. 2d 1204 (N.D. Cal. 2012); *see also* *Negro v. The Superior Court of Santa Clara County*, 179 Cal. Rptr. 3d 215 (Cal. Ct. App. 2014) (holding that state law can mandate disclosure of electronic communications, even if the SCA makes such disclosure discretionary when, in the facts of *Negro*, the user was found to have consented to such disclosure).

<sup>80</sup> NAT’L CONFERENCE OF COMM’R ON UNIF. STATE LAWS, REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8 (2015), <http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20> (emphasis added).

<sup>81</sup> See RUFADAA, *supra* note 3, § 8(4)(D).

Under **section 9** of RUFADAA, an agent under a power of attorney may request disclosure of content of a digital asset if the power of attorney “expressly grants” authority to the agent of such digital assets.<sup>82</sup> The request of the agent to the custodian must include: (1) a written request for disclosure in paper or electronic form; (2) an “original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal”; and (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect.<sup>83</sup> As in section 7, the custodian may request that the agent provide identifier information or other evidence to confirm that the user has an account with the custodian.<sup>84</sup>

**Section 10** allows the agent under a power of attorney to seek a catalogue of electronic communications.<sup>85</sup> The agent must submit the request to the custodian along with a copy of the power of attorney and certification under penalty of perjury that the power of attorney remains in effect.<sup>86</sup> As with section 9, the custodian may request identifier information or other evidence to confirm an existing account.<sup>87</sup>

**Section 11** of RUFADAA states that if a trustee is an “original user” of an account, then the trustee can access all digital assets of the account held in trust in addition to a catalogue of all electronic communications.<sup>88</sup>

If the trustee of a trust is *not* the original user of an account and the account is transferred into a trust by the settlor or in another manner, then **section 12** of RUFADAA sets forth a process by which the trustee can request disclosure of digital assets from the custodian.<sup>89</sup> Unless ordered by the court, directed by the original user, or provided in the trust, a custodian shall disclose the digital asset information to the trustee if the trustee gives the custodian (1) a written request for disclosure in paper or electronic form; (2) a certified copy of the trust instrument or

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<sup>82</sup> *See id.* § 9. The language “expressly grants” that a simple power of attorney, without explicit consent by the principal to permit disclosure of electronic communications to the agent, will likely not satisfy section 9’s requirement.

<sup>83</sup> *Id.* § 9(1)-(3).

<sup>84</sup> *See id.* § 9(4).

<sup>85</sup> *See id.* § 10.

<sup>86</sup> *See id.* § 10(1)-(3).

<sup>87</sup> *See id.* § 10(4).

<sup>88</sup> *See id.* § 11.

<sup>89</sup> *See id.* § 12.

certification of trust<sup>90</sup> that includes consent to the disclosure of content of the digital asset to the trustee; and (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust.<sup>91</sup> The custodian may also request that the trustee provide identifier information or “evidence linking the account to the trust.”<sup>92</sup>

RUFADAA’s **section 13** addresses the disclosure of non-content information (that is the catalogue of electronic communications).<sup>93</sup> Under this section, the trustee is entitled to submit a request to the custodian by submitting a request similar to that described in section 12 above, except that the copy of the trust instrument or certification of trust need not include a reference to consent to disclosure of the content of the digital asset.<sup>94</sup>

**Section 14** of RUFADAA sets forth the process by which a conservator may receive limited information relating to the protected person’s digital assets.<sup>95</sup> This section is premised upon the notion that the protected person retains privacy rights in his or her personal communications.<sup>96</sup> Hence, digital assets may only be accessed by an express order of the court, and not solely based on the conservator’s general authority to manage the protected person’s assets.<sup>97</sup> Except as otherwise directed by the court, the conservator may receive only the catalogue of the user’s digital assets, and not the content-based information.<sup>98</sup> Procedurally, the conservator is entitled to obtain this information by giving the custodian a request for such information in either paper or electronic format with a certified copy of the court’s order.<sup>99</sup> In addition, a conservator with general authority over the protected person’s digital assets may request

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<sup>90</sup> See, e.g., UNIF. TRUST CODE § 1013 (UNIF. LAW COMM’N 2000); see also OR. REV. STAT. § 130.860 (setting forth the requirements of a certification of trust).

<sup>91</sup> See RUFADAA, *supra* note 3, § 12.

<sup>92</sup> *Id.* § 12(4).

<sup>93</sup> See *id.* § 13.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* § 14.

<sup>96</sup> See *id.* § 14 cmt.

<sup>97</sup> See *id.* § 14(a).

<sup>98</sup> See *id.* § 14(b).

<sup>99</sup> See *id.*

that the custodian terminate or suspend the protected person's account for good cause.<sup>100</sup>

**Section 15** of RUFADAA is an important section that specifies the nature and extent of a fiduciary's duties as they specifically relate to digital assets.<sup>101</sup> This section begins by confirming that the legal duties of a fiduciary that is "charged with managing tangible property" also apply to the management of digital assets.<sup>102</sup> These duties include (and are presumably not limited to) the duties of care, loyalty, and confidentiality.<sup>103</sup> In addition, section 15 states that the fiduciary's authority over a digital asset (1) is subject to any applicable TOSA, except as supplanted by the user's direction in an online tool or applicable documents expressing lawful consent (that is section 4 of RUFADAA); (2) is subject to applicable law, including copyright law; (3) is limited by the scope of the fiduciary's duties; and (4) is not to be used to "impersonate the user."<sup>104</sup>

If a digital asset is not held by a custodian or subject to a TOSA (for example, digital files stored on a decedent's personal computer), then section 15 confirms that the fiduciary has an unrestricted right to access such digital assets.<sup>105</sup> For purposes of state laws relating to computer fraud or unauthorized computer access,<sup>106</sup> a fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of a decedent, protected person, principal, or settlor.<sup>107</sup> Similarly, a fiduciary with authority over tangible personal property of a decedent, protected person, principal, or settlor, has the right to access such property and any digital asset stored thereon.<sup>108</sup> With respect to termination of a digital asset account, section 15 states that (1) a custodian may disclose to a fiduciary information in an account that is required in order to close such an account; and (2) a fiduciary may terminate the user's account by submitting a written request to the custodian, along with enumerated

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<sup>100</sup> See *id.* § 14(c).

<sup>101</sup> See *id.* § 15.

<sup>102</sup> *Id.* § 15(a).

<sup>103</sup> See *id.*

<sup>104</sup> *Id.* § 15(b). "Impersonate" in this context is likely limited to actions by which the fiduciary "pretends" to be the user (for example, in a social media or email account). It is unlikely that a fiduciary that lawfully obtains access to a digital asset is "impersonating" the user for purposes of this section.

<sup>105</sup> See *id.* § 15(c).

<sup>106</sup> See, e.g., OR. REV. STAT. § 164.377 (2015).

<sup>107</sup> See RUFADAA, *supra* note 3, § 15(d).

<sup>108</sup> See *id.* § 15(e).



documentation to verify the fiduciary's authority and a death certificate, if the user in question is deceased.<sup>109</sup>

**Section 16** of RUFADAA provides that, within 60 days after a custodian receives a request for disclosure from a fiduciary together with all information required by RUFADAA, the custodian shall comply with the request.<sup>110</sup> If the custodian fails to comply with the request, the fiduciary may seek a court order compelling compliance, but any such order must also contain a finding that "compliance is not in violation of 18 U.S.C. section 2702."<sup>111</sup> Section 16 gives the custodian the authority to notify the original user of a disclosure request by a fiduciary.<sup>112</sup> Section 16 further provides that "if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request" under RUFADAA, then the custodian may deny that fiduciary's disclosure request.<sup>113</sup>

In addition, section 16 does not limit a fiduciary's ability to obtain, *or* require a fiduciary to obtain, a court order which specifies that (1) the account belongs to a protected person or principal under a power of attorney; (2) "specifies that there is sufficient consent from the [protected person] or [principal] to support the requested disclosure"; and (3) "contains a finding required by law other than [RUFADAA]."<sup>114</sup>

Finally, section 16 states that a custodian (together with its officers, employees, and agents) "are immune from liability for an act or omission done in good faith in compliance" with RUFADAA.<sup>115</sup> The comments to RUFADAA further explain this section's grant of "immunity" in indicating that the section shields custodians from "indirect" liability (for example, if a custodian grants access under the act).<sup>116</sup> However, this immunity would not apply to instances of "direct" liability, such as a custodian's noncompliance with a court order under RUFADAA.<sup>117</sup>

**Section 17 through section 21** of RUFADAA contain several administrative provisions, including a uniformity provision.

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<sup>109</sup> *See id.* §§ 15(f)-(g).

<sup>110</sup> *See id.* § 16(a).

<sup>111</sup> *Id.* §§ 16(a)-(b).

<sup>112</sup> *See id.* § 16(c).

<sup>113</sup> *Id.* § 16(d).

<sup>114</sup> *Id.* §§ 16(e)(1)-(3).

<sup>115</sup> *Id.* § 16(f).

<sup>116</sup> *See id.* § 16 cmt.

<sup>117</sup> *See id.*

## V. ESTATE PLANNING IN CONJUNCTION WITH RUFADAA

### A. Provide for “Lawful Consent” Under the SCA

Under the current rubric of federal and state laws, including RUFADAA and its inherent deference to the “lawful consent” requirements of the SCA, the most important step in the process of planning is to include a clear expression of such “lawful consent” in the individual’s applicable estate planning documents. These documents include the individual’s will, general power of attorney, and any trust (including a revocable living trust) that may at any point interact with a digital asset. As seen above in the discussion of RUFADAA’s disclosure procedures, absent a clear expression of a user’s consent, the fiduciary will not be able to access the content within the digital asset and may be limited to a “catalogue” of electronic communications.

While such catalogue information may be helpful to the work of the personal representative in administering the estate, without corresponding content, such a catalogue could potentially raise more questions than it answers. For the personal representative, this is the equivalent of reviewing the outside of an envelope without any ability to access the contents of that envelope.

Appendix A to this Article sets forth a sample provision to be adapted to an individual’s will. With appropriate adjustments, the provision could be adapted to grant digital assets authority to a trustee of a trust or an agent under a power of attorney. While there is no “magic language” to be used in such a provision, there are several important elements to consider.

First, the individual should clearly express that the individual consents to disclosure to the fiduciary of the *content* of any digital asset. This provision invokes the “lawful consent” provision of the SCA.<sup>118</sup> To provide a custodian with a high degree of “comfort” that the user intended the provision to be an “SCA consent,” it is best to cite the SCA and the CFAA in the provision. Second, the provision should give the fiduciary the authority to access a digital asset in any location, whether it is stored on a tangible digital device (such as a personal computer or memory drive) or at an Internet location. Third, the provision should give the fiduciary the authority to hire a “technical” expert or consultant to help the fiduciary access the content of a digital asset or possibly secure the integrity and security of an electronic device or online account.

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<sup>118</sup> 18 U.S.C. § 2702(b)(3).

Lastly, the provision should clearly state that the fiduciary is an “authorized user” for purposes of applicable computer-fraud and unauthorized-computer-access laws, such as the CFAA.

#### B. Create a Virtual Assets Instruction Letter

In 2011, the author and his law partner, Victoria Blachly, created the concept of a Virtual Asset Instruction Letter (VAIL). The VAIL is not a form, but an attempt to delineate an intentional process for dealing with a client’s digital assets. Here are the steps of the VAIL process:

1. Identify each digital asset and determine how the custodian of that asset treats the account of the user upon death or incapacity.
2. Determine the digital assets that the fiduciary should maintain or have access to, and prepare a written or electronic list of those assets, together with their passwords.
3. Determine the digital assets that the fiduciary should terminate and provide the necessary instructions to do so.
4. Consider saving the list of digital assets or instructions to a memory drive, then store that drive in a *very* secure location, such as safe deposit box. Give your fiduciary instructions on how to access this list. Remember to update the list frequently to reflect new and updated passwords.
5. Make sure that all relevant documents, including the will, trusts, powers of attorney, or other estate planning documents, are updated to provide “lawful consent” under the SCA and RUFADAA.
6. If persons other than your personal representative are designated to handle your digital assets, make sure that such persons are granted adequate authority and consent to access the digital assets under state law, the SCA, and RUFADAA.

### VI. FIDUCIARY ADMINISTRATION OF DIGITAL ASSETS

In an estate or trust administration, the fiduciary<sup>119</sup> should adhere to the common practices required by law in dealing with digital assets.

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<sup>119</sup> In this section, the use of the term “fiduciary” generally refers to any person charged with administering a decedent’s estate or trust (for example, an executor or personal representative of an estate, and a trustee of a trust). Most of the principles discussed in this section apply in the same manner to each type of fiduciary.

These practices are now supplemented by the provisions of RUFADAA. However, while this area of the law is still developing, careful application of existing fiduciary standards will likely be helpful. This discussion would also be relevant in a similar context if a person loses mental capacity and a conservator or successor trustee is faced with similar dilemmas with respect to the incompetent person's assets.

#### A. Digital Assets and a Fiduciary's "Prudent Person" Standard

In a general sense, a fiduciary's duty is often expressed as a "prudent person" standard. For example, section 804 of the Uniform Trust Code states that "[a] trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust."<sup>120</sup> But, how does this standard apply to a fiduciary's duties in dealing with digital assets held by an estate or a trust? Comment "a" to section 174 of Restatement (Second) of Trusts states that the standard of care and skill required of a trustee is an "external standard."<sup>121</sup> Hence, the proliferation of digital assets in the modern world necessarily leads to the conclusion that a trustee's duties must evolve to meet the changing manner in which individuals own and manage their assets. In 1960, it would have been unlikely for a court to conclude that the "ordinary prudence" of a trustee would include a working knowledge of computer technologies. However, a court in the "information age" would likely reach a much different conclusion. The following discussion provides the fiduciary with a starting point in evaluating the steps required to meet the "prudent" standard in the context of an estate or trust which owns substantial digital assets.

#### B. Locating a Decedent's Digital Assets

Consider the possibility of a decedent with substantial assets and a strong tendency to manage those assets electronically so as to leave only

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<sup>120</sup> UNIF. TRUST CODE § 804 (amended 2010), 7C U.L.A. 495 (2006); *see also* DEL. CODE ANN. tit. 12, § 3302(a) ("a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account"); OR. REV. STAT. § 130.665 (statute is identical to section 804 of the Uniform Trust Code); UNIF. PROBATE CODE § 7-302 ("[t]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another"); RESTATEMENT (SECOND) OF TRUSTS, § 174 ("the trustee is under duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property").

<sup>121</sup> RESTATEMENT (SECOND) OF TRUSTS § 147 cmt. (AM. LAW INST. 1959).

a limited “paper trail” in the traditional sense. If the decedent managed his or her assets online, received “paperless” account statements via email, maintained information about those assets on a “cloud” server, and generally communicated about those assets by email, unless the decedent undertook careful planning during his or her lifetime to grant proper “lawful consent” to his or her fiduciary, simply finding the decedent’s digital assets may present a serious challenge.

If such a decedent did not plan adequately, what constitutes “prudent” action by the fiduciary may be difficult to ascertain. First, the fiduciary should consider whether it may be necessary to hire a forensic expert in information technologies to advise the fiduciary on a prudent process for locating a decedent’s digital assets. After analyzing the applicable TOSAs, the fiduciary should attempt to determine whether it is possible to gain working access to important “portals” into the decedent’s digital existence. This may include the decedent’s personal computer(s), smartphone, or other digital storage devices. If the decedent utilized financial software (for example, Quicken or Microsoft Money), entries found in such programs might lead to digital assets. Finally, sources such as tax returns and Forms 1099 could reflect assets that might not otherwise be found in traditional “paper records” such as account statements.

### C. Administering an Estate with Digital Assets

Presuming the decedent’s digital assets can be located, there are a number of steps that the fiduciary should consider.<sup>122</sup>

1. The fiduciary should use the procedures under RUFADAA to obtain disclosure of the digital assets from the relevant custodians.<sup>123</sup> A sample RUFADAA disclosure request letter is set forth in Appendix B. If the relevant documents (that is a decedent’s will or the principal’s power of attorney) contain sufficient consent under the SCA, the fiduciary should attempt to obtain the full access to the content of the relevant digital assets.<sup>124</sup> If such documents are silent as to the user’s consent, the fiduciary should carefully review the relevant TOSAs in question and possibly request a “catalogue” of the digital assets under RUFADAA, as

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<sup>122</sup> See Dennis Kennedy, *Estate Planning for Your Digital Assets*, LAW PRACTICE TODAY (Mar. 15, 2010), <http://apps.americanbar.org/lpm/lpt/articles/pdf/ft03103.pdf>.

<sup>123</sup> See *infra* Part VI.C.

<sup>124</sup> However, note that section 6 of RUFADAA allows the custodian to utilize options that are short of full access to the digital assets in question.

the catalogue could potentially lead the fiduciary to the existence of unknown assets.

2. If the fiduciary obtains lawful access to digital assets,<sup>125</sup> the fiduciary should attempt to “marshal” such assets by making certain that the fiduciary is the only party that has access to the assets. For example, the fiduciary should consider changing the password that is used to access the asset. If the decedent had shared such a password with a family member or other individual who is not the fiduciary, then such a “digital interloper” could interfere with the fiduciary’s ability to accomplish the proper administration of the estate or trust. The fiduciary should remove all private and/or personal data from online shopping accounts (or close them as soon as reasonably possible).

3. If the decedent had established any form of “automatic” means to pay bills, make loan payments, or other debts, the fiduciary should determine the exact nature of these arrangements, then evaluate whether they should be continued, or (more likely) converted to a payment method that is consistent with the fiduciary’s administrative and accounting procedures.

4. If possible, the fiduciary should endeavor to remove personal or sensitive data (such as credit card information) from online sites. This is yet another means to try to prevent identity theft or other unforeseen consequences.

5. While undertaking such control, the fiduciary should also take steps to archive important electronic data for the full duration of the relevant statutes of limitation. In this way, if data is updated during the course of administration, the fiduciary will have a “baseline” of data if beneficiaries or other parties raise questions or complaints in the future.

6. Along with all other assets under the fiduciary’s control, the fiduciary should prepare a written inventory of the decedent’s digital assets. If a digital asset has its own extrinsic value (such as a commercial

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<sup>125</sup> As part of RUFADAA’s disclosure procedures, if a fiduciary lawfully obtains the means to access digital assets, and such assets are subject to the fiduciary’s control, section 15(d) of RUFADAA likely shields the fiduciary from liability under state computer-fraud and unauthorized-computer-access laws. While RUFADAA is subject to federal preemption, the fiduciary’s inherent authority under state law combined with RUFADAA Section 15(d) likely gives the fiduciary a good argument that such access is not “without authorization” or exceeds authorization under the CFAA, 18 U.S.C. § 1030(a).

website or online publication), then the value of such asset should be separately listed on the estate or trust's asset inventory. While placing a value on such assets may be difficult, it is certainly not beyond the professional expertise of a qualified valuation professional. This step may also be relevant to the extent that the estate may be subject to federal estate tax or state-level transfer taxes.

7. The fiduciary should consider consolidating digital assets to as few "platforms" as possible (for example, have multiple email accounts set to forward to a single email account). This may ease the fiduciary's administrative burden.

8. If appropriate, the fiduciary should consider notifying the individuals in the decedent's email contact list and other social media contacts. As these contacts may be very sensitive and personal in nature, the fiduciary may wish to consult with any appropriate family members before undertaking such communications.

9. The fiduciary should keep all accounts open for at least a period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified, and so that all payables can be paid and accounts receivable have been collected.

10. When the fiduciary's administration reaches its conclusion, the fiduciary should determine (i) if the digital accounts should be terminated and take the necessary steps to terminate them, and (ii) if any relevant content (or copies thereof) the fiduciary obtained should be deleted or distributed to the appropriate beneficiaries. The fiduciary should use care at this juncture to minimize the potential exposure of theft of the user's identity.

## **VII. CONCLUSION**

In the last several decades, the Information Age has dramatically changed all aspects of our lives. With these changes, we have witnessed serious debates relating to individual privacy and issues relating to the manner in which both civil and criminal laws should be administered. In a world in which information vital to modern society is created, communicated, and stored on the Internet, it is inevitable that the traditional manner in which individuals undertake their estate planning must change and adapt.

RUFADAA is an example of this societal evolution. However, the act is an imperfect solution to many challenges that estate planners face. In the coming years, attorneys and other professional advisors will need to grapple with the manner in which federal statutes, such as the SCA, significantly impact both the interpretation of state statutes, such as RUFADAA, as well as a fiduciary's administration of digital assets. The courts, future state legislatures, and ultimately Congress, will all play roles in the evolution of the law relating to digital assets.



**APPENDIX A****Sample Will Language**

(a) My Personal Representative may take any action (including, without limitation, assuming or amending a terms-of-service agreement or other governing instrument) with respect to my Digital Assets, Digital Devices, or Digital Accounts as my Personal Representative shall deem appropriate, and as shall be permitted under applicable state and Federal law. My Personal Representative may engage experts or consultants or any other third party, and may delegate authority to such experts, consultants or third party, as necessary or appropriate to effectuate such actions with respect to my Digital Assets, Digital Devices, or Digital Accounts, including, but not limited to, such authority as may be necessary or appropriate to decrypt electronically stored information, or to bypass, reset or recover any password or other kind of authentication or authorization. This authority is intended to constitute “lawful consent” to any service provider to divulge the contents of any communication or record under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), the Computer Fraud and Abuse Act (currently codified as 18 U.S.C. § 1030), and any other state or federal law relating to Digital Assets, data privacy, or computer fraud, to the extent such lawful consent may be required. My Personal Representative shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws. The authority granted under this paragraph is intended to provide my Personal Representative with full authority to access and manage my Digital Assets, Digital Devices, or Digital Accounts, to the maximum extent permitted under applicable state and Federal law and shall not limit any authority granted to my Personal Representative under such laws.

(b) The following definitions and descriptions shall apply under this will to the authority of the Personal Representative with respect to my Digital Assets and Accounts:

(1) “Digital Assets” shall be any electronic record that is defined as a “Digital Asset” under the Oregon Revised Uniform Fiduciary Access to Digital Assets Act, together with any and all files created, generated, sent, communicated, shared, received, or stored on the Internet or on a Digital Device, regardless of the ownership of the

physical device upon which the digital item was created, generated, sent, communicated, shared, received or stored (which underlying physical device shall not be a “Digital Asset” for purposes of this will).

(2) A “Digital Device” is an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information, including, without limitation, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, cameras, electronic reading devices, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops.

(3) “Digital Account” means an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a Digital Asset stored on a Digital Device, regardless of the ownership of such Digital Device.

(4) For the purpose of illustration, and without limitation, Digital Assets and Digital Accounts shall include email and email accounts, social network content and accounts, social media content and accounts, text, documents, digital photographs, digital videos, software, software licenses, computer programs, computer source codes, databases, file sharing accounts, financial accounts, health insurance records and accounts, health care records and accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs and other online accounts which currently exist or may exist as technology develops, or such comparable items and accounts as technology develops, including any words, characters, codes, or contractual rights necessary to access such items and accounts.

**APPENDIX B**

Jane Cordelia, Personal Representative  
Estate of Joseph Cordelia, Deceased  
565 N. Edgar Drive  
Portland, OR 97203  
(503) 555-0122

November 18, 2017

**Via Certified Mail 3419 9866 0430 0011 4755 38**

**Return Receipt Requested**

Ingens Electronics  
5656 Silicone Drive  
Mionloch Acres, CA 94010

Re: Email Account of Joseph Cordelia, Deceased  
(jcordelia@ingens.com)

Dear Sirs:

I am the duly appointed personal representative of Joseph Cordelia (the “Decedent”). The Decedent died on September 14, 2017.

Pursuant to the Oregon Revised Uniform Fiduciary Access to Digital Assets Act, Section 7, Chapter 19, Oregon Laws 2016 (hereafter, “RUFADAA”), I hereby request full access to the Decedent’s email account maintained by Ingens Electronics. In connection with this request, I am enclosing the following:

1. A certified copy of the death certificate of the Decedent.
2. A certified copy of the Letters Testamentary issued by the Multnomah County, Oregon, Circuit Court on October 25, 2017, which appoints me as the Personal Representative of the Decedent’s estate.
3. A copy of the Will of Decedent dated July 27, 2014. Please note that pursuant to Section G. of Article 7 of the Decedent’s Will, the Decedent expressly provided his full consent to the disclosure of all his

digital assets to his personal representative, and further authorized his personal representative to take any and all actions relating to his digital assets as his personal representative shall deem appropriate.

4. A copy of an email dated March 3, 2017, which was sent to me by the Decedent. This email contains the Decedent's ingens.com email address referenced above, together with other information identifying the Decedent's account with Ingens Electronics.

I look forward to your prompt response in accordance with RUFADAA. Please contact me if you have any questions.

Very truly yours,

Jane Cordelia, Personal Representative  
Estate of Joseph Cordelia, Deceased