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PROPOSED COMMITTEE AMENDMENT TO BE
PRESENTED AND DISCUSSED ON THURSDAY,
JANUARY 28, 2016.

Questions? Please contact Peggy Reinsch, Legislative Analyst
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L.D. 1177

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
127TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT “ ” to H.P. 809, L.D. 1177, Bill, “An Act To Enact the Recommendations of the Probate and Trust Law Advisory Commission Regarding the Maine Uniform Fiduciary Access to Digital Assets Act”

Amend the bill by striking out the title and substituting the following:

'An Act To Enact the Recommendations of the Probate and Trust Law Advisory Commission Regarding the Maine Revised Uniform Fiduciary Access to Digital Assets Act'

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'PART A

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

PREFATORY NOTE

The purpose of the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) is twofold. First, it gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible. Second, it gives custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications. The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user. It adheres to the traditional approach of trusts and estates law, which respects the intent of the user and promotes the fiduciary's ability to administer the user's property in accord with legally-binding fiduciary duties. The act removes barriers to a fiduciary's access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law. Existing law prohibits any fiduciary from violating fiduciary responsibilities by divulging or publicizing any information the fiduciary

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1 obtains while carrying out his or her fiduciary duties.

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

9 Digital assets are electronic records in which individuals have a right or interest. As
10 the number of digital assets held by the average person increases, questions surrounding
11 the disposition of these assets upon the individual's death or incapacity are becoming
12 more common. These assets, ranging from online gaming items to photos, to digital
13 music, to client lists, can have real economic or sentimental value. Yet few laws exist on
14 the rights of fiduciaries over digital assets. Holders of digital assets may not consider the
15 fate of their online presences once they are no longer able to manage their assets, and
16 may not expressly provide for the disposition of their digital assets or electronic
17 communications in the event of their death or incapacity. Even when they do, their
18 instructions may come into conflict with custodians' terms-of-service agreements. Some
19 Internet service providers have explicit policies on what will happen when an individual
20 dies, while others do not, and even where these policies are included in the
21 terms-of-service agreement, consumers may not be fully aware of the implications of
22 these provisions in the event of death or incapacity or how courts might resolve a conflict
23 between such policies and a will, trust instrument, or power of attorney.

24 The situation regarding fiduciaries' access to digital assets is less than clear, and is
25 subject to federal and state privacy and computer "hacking" laws as well as state probate
26 law. A minority of states has enacted legislation on fiduciary access to digital assets, and
27 numerous other states have considered, or are considering, legislation. Existing
28 legislation differs with respect to the types of digital assets covered, the rights of the
29 fiduciary, the category of fiduciary included, and whether the principal's death or
30 incapacity is covered. A uniform approach among states will provide certainty and
31 predictability for courts, users of Internet services, fiduciaries, and Internet service
32 providers. Revised UFADAA gives states precise, comprehensive, and easily accessible
33 guidance on questions concerning fiduciaries' ability to access the electronic records of a
34 decedent, protected person, principal, or a trust.

35 With regard to the general scope of the act, the act's coverage is inherently limited by
36 the definition of "digital assets." The act applies only to electronic records in which an
37 individual has a property right or interest, which do not include the underlying asset or
38 liability unless it is itself an electronic record.

39 The act is divided into 21 sections. Section 2 contains definitions of terms used
40 throughout the act.

41 Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who
42 have access to digital assets under Revised UFADAA, and carves out an exception for
43 digital assets of an employer used by an employee during the ordinary course of business.

1 Section 4 provides ways for users to direct the disposition or deletion of their digital
2 assets at their death or incapacity, and establishes a priority system in case of conflicting
3 instructions.

4 Section 5 establishes that the terms-of-service governing an online account apply to
5 fiduciaries as well as to users, and clarifies that a fiduciary cannot take any action that the
6 user could not have legally taken.

7 Section 6 gives the custodians of digital assets a choice for disclosing those assets to
8 fiduciaries. A custodian may, but need not, comply with a request for access by allowing
9 the fiduciary to reset the password and access the user's account. In many cases that will
10 be the simplest method of compliance. However, a custodian may also comply without
11 giving access to a user's account by simply giving a copy of all the user's digital assets to
12 the fiduciary. That method may be preferred for a social media account when a fiduciary
13 has no need for full access and control.

14 Sections 7 to 14 establish the rights of personal representatives, conservators, agents
15 acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to
16 different rules for the content of communications protected under federal privacy laws
17 and for other types of digital assets. Generally, a fiduciary will have access to a catalogue
18 of the user's communications, but not the content, unless the user consented to the
19 disclosure of the content.

20 Section 15 contains general provisions relating to the rights and responsibilities of the
21 fiduciary. Section 16 addresses compliance by custodians and grants immunity for any
22 acts taken in order to comply with a fiduciary's request under this act. Sections 17-21
23 address miscellaneous topics, including retroactivity, the effective date of the act, and
24 similar issues.

25 **Sec. A-1. 18-A MRSA, Art. 10** is enacted to read:

26 **ARTICLE 10**

27 **MAINE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL**
28 **ASSETS ACT**

29 **§10-101. Short title**

30 This Article may be known and cited as "the Maine Revised Uniform Fiduciary
31 Access to Digital Assets Act."

32 **§10-102. Definitions**

33 As used in this Act, unless the context otherwise indicates, the following terms have
34 the following meanings.

35 1. Account. "Account" means an arrangement under a terms of service agreement in
36 which a custodian carries, maintains, processes, receives or stores a digital asset of a user
37 or provides goods or services to a user.

- 1 2. Agent. "Agent" means an attorney in fact granted authority under a durable or
2 nondurable power of attorney.
- 3 3. Carries. "Carries" means engages in the transmission of an electronic
4 communication.
- 5 4. Catalogue of electronic communications. "Catalogue of electronic
6 communications" means information that identifies each person with which a user has
7 had an electronic communication, the time and date of the communication and the
8 electronic address of the person.
- 9 5. Conservator. "Conservator" means a person appointed by a court to manage the
10 estate of a living individual. "Conservator" includes a limited conservator.
- 11 6. Content of an electronic communication. "Content of an electronic
12 communication" means information concerning the substance or meaning of an electronic
13 communication that:
 - 14 A. Has been sent or received by a user;
 - 15 B. Is in electronic storage by a custodian providing an electronic communication
16 service to the public or is carried or maintained by a custodian providing a remote
17 computing service to the public; and
 - 18 C. Is not readily accessible to the public.
- 19 7. Court. "Court" means any one of the several courts of probate of this State
20 established as provided in Title 4, sections 201 and 202.
- 21 8. Custodian. "Custodian" means a person that carries, maintains, processes,
22 receives or stores a digital asset of a user.
- 23 9. Designated recipient. "Designated recipient" means a person chosen by a user
24 using an online tool to administer digital assets of the user.
- 25 10. Digital asset. "Digital asset" means an electronic record in which an individual
26 has a right or interest. "Digital asset" does not include an underlying asset or liability
27 unless the asset or liability is itself an electronic record.
- 28 11. Electronic. "Electronic" means relating to technology having electrical, digital,
29 magnetic, wireless, optical, electromagnetic or similar capabilities.
- 30 12. Electronic communication. "Electronic communication" has the same meaning
31 as in 18 United States Code, Section 2510(12).
- 32 13. Electronic communication service. "Electronic communication service" means
33 a custodian that provides to a user the ability to send or receive an electronic
34 communication.
- 35 14. Fiduciary. "Fiduciary" means an original, additional or successor personal
36 representative, conservator, agent or trustee.
- 37 15. Information. "Information" means data, text, images, videos, sounds, codes,
38 computer programs, software and databases or the like.
- 39 16. Online tool. "Online tool" means an electronic service provided by a custodian
40 that allows a user, in an agreement distinct from the terms of service agreement between

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1 the custodian and user, to provide directions for disclosure or nondisclosure of digital
2 assets to a 3rd person.

3 17. Person. "Person" means an individual, estate, business or nonprofit entity,
4 public corporation, government or governmental subdivision, agency or instrumentality
5 or other legal entity.

6 18. Personal representative. "Personal representative" means an executor,
7 administrator, special administrator or person that performs substantially the same
8 function under the laws of this State other than this Act.

9 19. Power of attorney. "Power of attorney" means a record that grants an agent
10 authority to act in the place of a principal.

11 20. Principal. "Principal" means an individual who grants authority to an agent in a
12 power of attorney.

13 21. Protected person. "Protected person" means an individual for whom a
14 conservator has been appointed. "Protected person" includes an individual for whom an
15 application for the appointment of a conservator is pending.

16 22. Record. "Record" means information that is inscribed on a tangible medium or
17 that is stored in an electronic or other medium and is retrievable in perceivable form.

18 23. Remote computing service. "Remote computing service" means a custodian
19 that provides to a user computer processing services or the storage of digital assets by
20 means of an electronic communications system, as defined in 18 United States Code,
21 Section 2510(14).

22 24. Terms of service agreement. "Terms of service agreement" means an
23 agreement that controls the relationship between a user and a custodian.

24 25. Trustee. "Trustee" means a fiduciary with legal title to property pursuant to an
25 agreement or declaration that creates a beneficial interest in another person. "Trustee"
26 includes a successor trustee.

27 26. User. "User" means a person that has an account with a custodian.

28 27. Will. "Will" includes a codicil, a testamentary instrument that only appoints an
29 executor and an instrument that revokes or revises a testamentary instrument.

30 **Comment**

31 (Maine section 10-102 is based on the Revised Uniform Fiduciary Access to Digital
32 Assets Act Section 2.)

33 Many of the definitions are based on those in the Uniform Probate Code: agent (UPC
34 Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)),
35 electronic (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), person (UPC
36 Section 5B-101(6)), personal representative (UPC Section 1-201(35)), power of attorney
37 (UPC Section 5B-102(7)), principal (UPC Section 5B-102(9)), protected person (UPC
38 Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57)).
39 The definition of "information" is based on that in the Uniform Electronic Transactions
40 Act, Section 2, subsection (11). Many of the other definitions are either drawn from

1 federal law, as discussed below, or are new for this act.

2 The definition of "account" is broadly worded to encompass any contractual
3 arrangement subject to a terms-of-service agreement, but limited for the purpose of this
4 act by the requirement that the custodian carry, maintain, process, receive, or store a
5 digital asset of the user.

6 The definition of "digital asset" expressly excludes underlying assets such as funds
7 held in an online bank account. Because records may exist in both electronic and
8 non-electronic formats, this definition clarifies the scope of the act and the limitation on
9 the type of records to which it applies. The term includes types of electronic records
10 currently in existence and yet to be invented. It includes any type of electronically-stored
11 information, such as: 1) information stored on a user's computer and other digital devices;
12 2) content uploaded onto websites; and 3) rights in digital property. It also includes
13 records that are either the catalogue or the content of an electronic communication. See
14 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and
15 Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws*
16 *Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 388
17 (2014) (available at: <http://goo.gl/T9jX1d>).

18 The term "catalogue of electronic communications" is designed to cover log-type
19 information about an electronic communication such as the email addresses of the sender
20 and the recipient, and the date and time the communication was sent.

21 The term "content of an electronic communication" is adapted from 18 U.S.C.
22 Section 2510(8), which provides that content: "when used with respect to any wire, oral,
23 or electronic communication, includes any information concerning the substance, purport,
24 or meaning of that communication." The definition is designed to cover only content
25 subject to the coverage of Section 2702 of the Electronic Communications Privacy Act
26 (ECPA), 18 U.S.C. Section 2510 et seq.; it does not include content not subject to ECPA.
27 Consequently, the "content of an electronic communication", as used later throughout
28 Revised UFADAA, refers *only* to information in the body of an electronic message that is
29 not readily accessible to the public; if the information were readily accessible to the
30 public, it would not be subject to the privacy protections of federal law under ECPA. See
31 S. Rep. No. 99-541, at 36 (1986). Example: X uses a Twitter account to send a message.
32 If the tweet is sent only to other people who have been granted access to X's tweets, then
33 it meets Revised UFADAA's definition of "content of an electronic communication." But,
34 if the tweet is completely public with no access restrictions, then it does not meet the act's
35 definition of "content of an electronic communication." ECPA does not apply to private
36 e-mail service providers, such as employers and educational institutions. See 18 U.S.C.
37 Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and Peter John
38 Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent*
39 *Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404 (2014)
40 (available at: <http://goo.gl/T9jX1d>).

41 A "user" is a person that has an account with a custodian, and includes a deceased
42 individual that entered into the agreement while alive. A fiduciary can be a user when the
43 fiduciary opens the account.

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

2 A "custodian" includes any entity that provides or stores electronic data of a user.

3 The fiduciary's access to a record defined as a "digital asset" does not mean that the
4 fiduciary *owns* the asset or may engage in transactions with the asset. Consider, for
5 example, a fiduciary's legal rights with respect to funds in a bank account or securities
6 held with a broker or other custodian, regardless of whether the bank, broker, or
7 custodian has a brick-and-mortar presence. This act affects electronic records concerning
8 the bank account or securities, but does not affect the authority to engage in transfers of
9 title or other commercial transactions in the funds or securities, even though such
10 transfers or other transactions might occur electronically. Revised UFADAA only deals
11 with the right of the fiduciary to access all relevant electronic communications and digital
12 assets accessible through the online account. An entity may not refuse to provide access
13 to online records any more than the entity can refuse to provide the fiduciary with access
14 to hard copy records.

15 An "electronic communication" is a particular type of digital asset subject to the
16 privacy protections of the Electronic Communications Privacy Act. It includes email,
17 text messages, instant messages, and any other electronic communication between private
18 parties. The definition of "electronic communication" is that set out in 18 U.S.C. Section
19 2510(12):

20 An "electronic communication" means any transfer of signs, signals, writing, images,
21 sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,
22 electromagnetic, photoelectronic or photooptical system that affects interstate or foreign
23 commerce, but does not include—

24 (A) any wire or oral communication;

25 (B) any communication made through a tone-only paging device;

26 (C) any communication from a tracking device (as defined in section 3117 of this
27 title); or

28 (D) electronic funds transfer information stored by a financial institution in a
29 communications system used for the electronic storage and transfer of funds.

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

1 A "fiduciary" under this act occupies a status recognized by state law, and a
2 fiduciary's powers under this act are subject to the relevant limits established by other
3 state laws.

4 An "online tool" is a mechanism by which a user names an individual to manage the
5 user's digital assets after the occurrence of a future event, such as the user's death or
6 incapacity. The named individual is referred to as the "designated recipient" in the act to
7 differentiate the person from a fiduciary. A designated recipient may perform many of
8 the same tasks as a fiduciary, but is not held to the same legal standard of conduct.

9 The term "record" includes information available in both tangible and electronic
10 media. The act applies only to electronic records.

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

18 **§10-103. Applicability**

19 **1. Applicable date.** This Act applies to:

20 A. A fiduciary or agent acting under a will or power of attorney executed before, on
21 or after January 1, 2017;

22 B. A personal representative acting for a decedent who died before, on or after
23 January 1, 2017;

24 C. A conservatorship proceeding commenced before, on or after January 1, 2017;
25 and

26 D. A trustee acting under a trust created before, on or after January 1, 2017.

27 **2. User resident of this State.** This Act applies to a custodian if the user resides in
28 this State or resided in this State at the time of the user's death.

29 **3. Digital asset of employer.** This Act does not apply to a digital asset of an
30 employer used by an employee in the ordinary course of the employer's business.

31 **Comment**

32 (Maine section 10-103 is based on the Revised Uniform Fiduciary Access to Digital
33 Assets Act Section 3.)

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

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

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

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

12 Company Y is not a custodian subject to the act. Under Section 2(8), a custodian
13 must carry, maintain or store a user's digital assets. A user under Section 2(26) must have
14 an account and an account, in turn, is defined under Section 2(1) as a contractual
15 arrangement subject to a terms-of-service agreement. Company Y, like most employers,
16 did not enter into a terms-of-service agreement with D, so Y is not a custodian.

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

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

31 **§10-104. User direction for disclosure of digital assets**

32 **1. Use of online tool.** A user may use an online tool to direct the custodian to
33 disclose or not to disclose some or all of the user's digital assets, including the content of
34 electronic communications. If the online tool allows the user to modify or delete a
35 direction at all times, a direction regarding disclosure using an online tool overrides a
36 contrary direction by the user in a will, trust, power of attorney or other record.

37 **2. No online tool used.** If a user has not used an online tool to give direction under
38 subsection 1 or if the custodian has not provided an online tool, the user may allow or
39 prohibit in a will, trust, power of attorney or other record disclosure to a fiduciary of
40 some or all of the user's digital assets, including the content of electronic communications
41 sent or received by the user.

1 This section clarifies that, to the extent that a custodian gives a fiduciary access to an
2 account pursuant to Section 6, the account's terms-of-service agreement applies equally to
3 the original user and to a fiduciary acting for the original user. A fiduciary is subject to
4 the same terms and conditions of the user's agreement with the custodian. This section
5 does not require a custodian to permit a fiduciary to assume a user's terms-of-service
6 agreement if the custodian can otherwise comply with Section 6.

7 **§10-106. Procedure for disclosing digital assets**

8 **1. Disclosure at discretion of custodian.** When disclosing digital assets of a user
9 under this Act, the custodian may at its sole discretion:

10 A. Grant a fiduciary or designated recipient full access to the user's account;

11 B. Grant a fiduciary or designated recipient partial access to the user's account
12 sufficient to perform the tasks with which the fiduciary or designated recipient is
13 charged; or

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

17 **2. Administrative charge.** A custodian may assess a reasonable administrative
18 charge for the cost of disclosing digital assets under this Act.

19 **3. Deleted digital assets.** A custodian need not disclose under this Act a digital
20 asset deleted by a user.

21 **4. Undue burden on custodian; court order to disclose.** If a user directs or a
22 fiduciary requests a custodian to disclose under this Act some, but not all, of the user's
23 digital assets, the custodian need not disclose the assets if segregation of the assets would
24 impose an undue burden on the custodian. If the custodian believes the direction or
25 request imposes an undue burden, the custodian or fiduciary may seek an order from the
26 court to disclose:

27 A. A subset limited by date of the user's digital assets;

28 B. All of the user's digital assets to the fiduciary or designated recipient;

29 C. None of the user's digital assets; or

30 D. All of the user's digital assets to the court for review in camera.

31 **Comment**

32 (Maine section 10-106 is based on the Revised Uniform Fiduciary Access to Digital
33 Assets Act Section 6.)

34 This section governs a custodian's response to a request for disclosure of a user's
35 digital assets.

36 Subsection (a) gives the custodian of digital assets a choice of methods for disclosing
37 digital assets to an authorized fiduciary. Each custodian has a different business model
38 and may prefer one method over another.

1 Subsection (b) allows a custodian to assess a reasonable administrative charge for the
2 cost of disclosure. This is intended to be analogous to the charge any business may
3 assess for administrative tasks outside the ordinary course of its business to comply with
4 a court order.

5 Subsection (c) states that any digital asset deleted by the user need not be disclosed,
6 even if recoverable by the custodian. Deletion is assumed to be a good indication that the
7 user did not intend for a fiduciary to have access.

8 Subsection (d) addresses requests that are unduly burdensome because they require
9 segregation of digital assets. For example, a fiduciary's request for disclosure of "any
10 email pertaining to financial matters" would require a custodian to sort through the full
11 list of emails and cull any irrelevant messages before disclosure. If a custodian receives
12 an unduly burdensome request of this sort, it may decline to disclose the digital assets,
13 and either the fiduciary or custodian may seek guidance from a court.

14 **§10-107. Disclosure of content of electronic communications of deceased user**

15 If a deceased user consented to or a court directs disclosure of the contents of
16 electronic communications of the user, the custodian shall disclose to the personal
17 representative of the estate of the user the content of an electronic communication sent or
18 received by the user if the representative gives the custodian:

19 **1. Written request.** A written request for disclosure in physical or electronic form;

20 **2. Death certificate.** A copy of the death certificate of the user;

21 **3. Letters of appointment, small estate affidavit or court order.** A copy of the
22 letters of appointment of the personal representative or a small estate affidavit or court
23 order;

24 **4. Record of consent to disclosure.** Unless the user provided direction using an
25 online tool, a copy of the user's will, trust, power of attorney or other record evidencing
26 the user's consent to disclosure of the content of electronic communications; and

27 **5. Information requested by custodian.** If requested by the custodian:

28 **A. A number, username, address or other unique subscriber or account identifier**
29 **assigned by the custodian to identify the user's account;**

30 **B. Evidence linking the account to the user; or**

31 **C. A finding by the court that:**

32 **(1) The user had a specific account with the custodian, identifiable by the**
33 **information specified in paragraph A;**

34 **(2) Disclosure of the content of electronic communications of the user would not**
35 **violate 18 United States Code, Section 2701 et seq., 47 United States Code,**
36 **Section 222 or other applicable law;**

37 **(3) Unless the user provided direction using an online tool, the user consented to**
38 **disclosure of the content of electronic communications; or**

1 the request is limited, and does not, for example, include video, Tweet, instant message or
2 other forms of communication.

3 Second, if the custodian requests, then the personal representative can be required to
4 establish that the requested information is necessary for estate administration and the
5 account is attributable to the decedent. Different custodians may have different
6 procedures. Thus a custodian may request that the personal representative obtain a court
7 order, and such an order must include findings that: 1) the user had a specific account
8 with the custodian, 2) that disclosure of the content of electronic communications of the
9 user would not violate the SCA or other law, 3) unless the user provided direction using
10 an online tool, that the user consented to disclosure of the content of electronic
11 communications, or 4) that disclosure of the content of electronic communications of a
12 user is reasonably necessary for administration of the estate.

13 **§10-108. Disclosure of other digital assets of deceased user**

14 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a
15 custodian shall disclose to the personal representative of the estate of a deceased user a
16 catalogue of electronic communications sent or received by the user and digital assets,
17 other than the content of electronic communications, of the user if the representative
18 gives the custodian:

- 19 **1. Written request.** A written request for disclosure in physical or electronic form;
20 **2. Death certificate.** A copy of the death certificate of the user;
21 **3. Letters of appointment, small estate affidavit or court order.** A copy of the
22 letters of appointment of the personal representative or a small estate affidavit or court
23 order; and
24 **4. Information requested by custodian.** If requested by the custodian:
25 **A. A number, username, address or other unique subscriber or account identifier**
26 **assigned by the custodian to identify the user's account;**
27 **B. Evidence linking the account to the user;**
28 **C. An affidavit stating that disclosure of the user's digital assets is reasonably**
29 **necessary for administration of the estate; or**
30 **D. A finding by the court that:**
31 **(1) The user had a specific account with the custodian, identifiable by the**
32 **information specified in paragraph A; or**
33 **(2) Disclosure of the user's digital assets is reasonably necessary for**
34 **administration of the estate.**

35 **Comment**

36 (Maine section 10-108 is based on the Revised Uniform Fiduciary Access to Digital
37 Assets Act Section 8.)

1 As in Section 7, when requesting disclosure of non-content, the fiduciary must write
2 or email the custodian.

3 Section 8 requires disclosure of all other digital assets, unless prohibited by the
4 decedent or directed by the court, once the personal representative provides a written
5 request, a death certificate and a certified copy of the letter of appointment. In addition,
6 the custodian may request a court order, and such an order must include findings that the
7 decedent had a specific account with the custodian and that disclosure of the decedent's
8 digital assets is reasonably necessary for administration of the estate. Thus, Section 8 was
9 intended to give personal representatives default access to the "catalogue" of electronic
10 communications and other digital assets not protected by federal privacy law.

11 **§10-109. Disclosure of content of electronic communications of principal**

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

16 **1. Written request.** A written request for disclosure in physical or electronic form;

17 **2. Power of attorney.** An original or copy of the power of attorney expressly
18 granting the agent authority over the content of electronic communications of the
19 principal;

20 **3. Agent's certificate.** A certification by the agent, under penalty of perjury, that the
21 power of attorney is in effect; and

22 **4. Information requested by custodian.** If requested by the custodian:

23 **A. A number, username, address or other unique subscriber or account identifier**
24 **assigned by the custodian to identify the principal's account; or**

25 **B. Evidence linking the account to the principal.**

26 **Comment**

27 (Maine section 10-109 is based on the Revised Uniform Fiduciary Access to Digital
28 Assets Act Section 9.)

29 An agent has access to the content of electronic communications only when the
30 power of attorney explicitly grants access. Section 10 concerns disclosure of other digital
31 assets of the principal.

32 When a power of attorney contains the consent of the principal, ECPA does not
33 prevent the agent from exercising authority over the content of an electronic
34 communication. See the Comments to Section 7. There should be no question that an
35 explicit delegation of authority in a power of attorney constitutes authorization from the
36 user to access digital assets and provides "lawful consent" to allow disclosure of the
37 content of an electronic communication from an electronic communication service or a
38 remote computing service pursuant to applicable law. Both authorization and lawful
39 consent are important because 18 U.S.C. Section 2701 deals with intentional access

1 without authorization and 18 U.S.C. Section 2702 allows a service provider to disclose
2 with lawful consent. Federal courts have not yet interpreted how ECPA affects a
3 fiduciary's efforts to access the content of an electronic communication. E.g., *In re*
4 *Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

5 When requesting access, the agent must write or email the custodian (see the
6 comments in Section 7). The agent must also give the custodian an original or copy of the
7 power of attorney expressly granting the agent authority over the contents of electronic
8 communications of the principal to the agent and a certification by the agent, under
9 penalty of perjury, that the power of attorney is in effect. In addition, if requested by the
10 custodian, the agent must provide a unique subscriber or account identifier assigned by
11 the custodian to identify the principal's account or other evidence linking the account to
12 the principal.

13 **§10-110. Disclosure of other digital assets of principal**

14 Unless otherwise ordered by the court, directed by the principal or provided by a
15 power of attorney, a custodian shall disclose to an agent with specific authority over
16 digital assets or general authority to act on behalf of a principal a catalogue of electronic
17 communications sent or received by the principal and digital assets, other than the content
18 of electronic communications, of the principal if the agent gives the custodian:

19 **1. Written request.** A written request for disclosure in physical or electronic form;

20 **2. Power of attorney.** An original or a copy of the power of attorney that gives the
21 agent specific authority over digital assets or general authority to act on behalf of the
22 principal;

23 **3. Agent's certificate.** A certification by the agent, under penalty of perjury, that the
24 power of attorney is in effect; and

25 **4. Information requested by custodian.** If requested by the custodian:

26 **A.** A number, username, address or other unique subscriber or account identifier
27 assigned by the custodian to identify the principal's account; or

28 **B.** Evidence linking the account to the principal.

29 **Comment**

30 (Maine section 10-110 is based on the Revised Uniform Fiduciary Access to Digital
31 Assets Act Section 10.)

32 This section establishes that the agent has default authority over all of the principal's
33 digital assets, other than the content of the principal's electronic communications. When
34 requesting access, the agent must write or email the custodian (see the comments in
35 Section 7).

36 The agent must also give the custodian an original or copy of the power of attorney
37 and a certification by the agent, under penalty of perjury, that the power of attorney is in
38 effect. Also, if requested by the custodian, the agent must provide a unique subscriber or

1 account identifier assigned by the custodian to identify the principal's account, or some
2 evidence linking the account to the principal.

3 **§10-111. Disclosure of digital assets held in trust is when trustee is original user**

4 Unless otherwise ordered by the court or provided in a trust, a custodian shall
5 disclose to a trustee that is an original user of an account any digital asset of the account
6 held in trust, including a catalogue of electronic communications of the trustee and the
7 content of electronic communications.

8 **Comment**

9 (Maine section 10-111 is based on the Revised Uniform Fiduciary Access to Digital
10 Assets Act Section 11.)

11 Section 11 provides that trustees who are original users can access all digital assets
12 held in the trust. There should be no question that a trustee who is the original user will
13 have full access to all digital assets. This includes the content of electronic
14 communications, as access to content is presumed with respect to assets for which the
15 trustee is the initial user. A trustee may have title to digital assets when the trustee opens
16 an account as trustee; under those circumstances, the trustee can access the content of
17 each digital asset that is in an account for which the trustee is the original user, not
18 necessarily each digital asset held in the trust.

19 **§10-112. Disclosure of contents of electronic communications held in trust when**
20 **trustee is not original user**

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

- 26 **1. Written request.** A written request for disclosure in physical or electronic form;
- 27 **2. Trust instrument or certification of trust.** A certified copy of the trust
28 instrument or a certification of the trust under Title 18-B, section 1013 that includes
29 consent to disclosure of the content of electronic communications to the trustee;
- 30 **3. Trustee's certification.** A certification by the trustee, under penalty of perjury,
31 that the trust exists and the trustee is a currently acting trustee of the trust; and
- 32 **4. Information requested by custodian.** If requested by the custodian:
- 33 **A.** A number, username, address or other unique subscriber or account identifier
34 assigned by the custodian to identify the trust's account; or
- 35 **B.** Evidence linking the account to the trust.

36 **Comment**

37 (Maine section 10-112 is based on the Revised Uniform Fiduciary Access to Digital
38 Assets Act Section 12.)

1 For accounts that are transferred into a trust by the settlor or in another manner, a
2 trustee is not the original user of the account, and the trustee's authority is qualified.
3 Thus, Section 12, governing disclosure of content of electronic communications from
4 those accounts, requires consent.

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

21 The underlying trust documents and default trust law will supply the allocation of
22 responsibilities between and among trustees. When requesting access, the trustee must
23 write or email the custodian (see comments to Section 7). The trustee must also give the
24 custodian an original or copy of the trust that includes consent to disclosure of the content
25 of electronic communications to the trustee and a certification by the trustee, under
26 penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of
27 the trust. Also, if requested by the custodian, the trustee must provide a unique subscriber
28 or account identifier assigned by the custodian to identify the trust's account, or some
29 evidence linking the account to the trust.

30 **§10-113. Disclosure of other digital assets held in trust when trustee is not original**
31 **user**

32 Unless otherwise ordered by the court, directed by the user or provided in a trust, a
33 custodian shall disclose to a trustee that is not an original user of an account a catalogue
34 of electronic communications sent or received by an original or successor user and stored,
35 carried or maintained by the custodian in an account of the trust and any digital assets,
36 other than the content of electronic communications, in which the trust has a right or
37 interest if the trustee gives the custodian:

- 38 **1. Written request.** A written request for disclosure in physical or electronic form;
39 **2. Trust instrument or certification of trust.** A certified copy of the trust
40 instrument or a certification of the trust under Title 18-B, section 1013;
41 **3. Trustee's certification.** A certification by the trustee, under penalty of perjury,
42 that the trust exists and the trustee is a currently acting trustee of the trust; and
43 **4. Information requested by custodian.** If requested by the custodian:

1 A. A number, username, address or other unique subscriber or account identifier
2 assigned by the custodian to identify the trust's account; or

3 B. Evidence linking the account to the trust.

4 **Comment**

5 (Maine section 10-113 is based on the Revised Uniform Fiduciary Access to Digital
6 Assets Act Section 13.)

7 Section 13 governs digital assets other than the contents of electronic
8 communications, so it does not require the settlor's consent.

9 When requesting access, the trustee must write or email the custodian (see Comments
10 to Section 7).

11 The trustee must also give the custodian an original or copy of the trust, and a
12 certification by the trustee, under penalty of perjury, that the trust exists and that the
13 trustee is a currently acting trustee of the trust. Also, if requested by the custodian, the
14 trustee must provide a unique subscriber or account identifier assigned by the custodian
15 to identify the trust's account, or some evidence linking the account to the trust.

16 **§10-114. Disclosure of digital assets to conservator of protected person**

17 **1. Court order granting access.** After an opportunity for a hearing under Article 5,
18 Part 4, the court may grant a conservator access to the digital assets of a protected person.

19 **2. Disclosure by custodian.** Unless otherwise ordered by the court or directed by
20 the user, a custodian shall disclose to a conservator the catalogue of electronic
21 communications sent or received by a protected person and any digital assets, other than
22 the content of electronic communications, in which the protected person has a right or
23 interest if the conservator gives the custodian:

24 A. A written request for disclosure in physical or electronic form;

25 B. A certified copy of the court order that gives the conservator authority over the
26 digital assets of the protected person; and

27 C. If requested by the custodian:

28 (1) A number, username, address or other unique subscriber or account identifier
29 assigned by the custodian to identify the account of the protected person; or

30 (2) Evidence linking the account to the protected person.

31 **3. Request to suspend or terminate account.** A conservator with general authority
32 to manage the assets of a protected person may request a custodian of the digital assets of
33 the protected person to suspend or terminate an account of the protected person for good
34 cause. A request made under this subsection must be accompanied by a copy of the court
35 order giving the conservator authority over the protected person's property.

36 **Comment**

1 (Maine section 10-114 is based on the Revised Uniform Fiduciary Access to Digital
2 Assets Act Section 14.)

3 When a conservator is appointed to represent a protected person's interests, the
4 protected person may still retain some right to privacy in their personal communications.
5 Therefore, Section 14 does not permit conservators to request disclosure of a protected
6 person's electronic communications on the basis of the conservatorship order alone. To
7 access a protected person's digital assets and a catalogue of electronic communications, a
8 conservator must be specifically authorized by the court to do so. This requirement for
9 express judicial authority over digital assets does not limit the fiduciary's authority over
10 the underlying assets, such as funds held in a bank account. The meaning of the term
11 "hearing" will vary from state to state according to state law and procedures.

12 State law will establish the criteria for when a court will grant power to the
13 conservator. For example, UPC Section 5-411(c) requires the court to consider the
14 decision the protected person would have made as well as a list of other factors. Existing
15 state law may also set out the requisite standards for a conservator's actions. The
16 conservator must exercise authority in the interests of the protected person. When
17 requesting access to digital assets in which the protected person has a right or interest, the
18 conservator must write or email the custodian (see comments to Section 7).

19 The conservator must also give the custodian a certified copy of the court order that
20 gives the conservator authority over the protected person's digital assets. Also, if
21 requested by the custodian, the conservator must provide a unique subscriber or account
22 identifier assigned by the custodian to identify the protected person's account, or some
23 evidence linking the account to the protected person. The custodian is required to disclose
24 the digital assets so requested.

25 Under subsection (c), a conservator with general authority to manage the assets of the
26 protected person may request suspension or termination of the protected person's account,
27 for good cause.

28 **§10-115. Fiduciary duty and authority**

29 **1. Fiduciary's legal duties.** The legal duties imposed on a fiduciary charged with
30 managing tangible property apply to the management of digital assets, including:

- 31 A. The duty of care;
32 B. The duty of loyalty; and
33 C. The duty of confidentiality.

34 **2. Limitations on fiduciary's authority.** A fiduciary's authority with respect to a
35 digital asset of a user:

- 36 A. Except as otherwise provided in section 10-104, is subject to the applicable terms
37 of service agreement;
38 B. Is subject to other applicable law, including copyright law;
39 C. Is limited by the scope of the fiduciary's duties; and

1 D. May not be used to impersonate the user.

2 3. Right to access. A fiduciary with authority over the property of a decedent,
3 protected person, principal or settlor has the right to access any digital asset in which the
4 decedent, protected person, principal or settlor had a right or interest and that is not held
5 by a custodian or subject to a terms of service agreement.

6 4. Authorized user. A fiduciary acting within the scope of the fiduciary's duties is
7 an authorized user of the property of the decedent, protected person, principal or settlor
8 for the purpose of applicable computer fraud and unauthorized computer access laws,
9 including Title 17-A, chapter 18.

10 5. Fiduciary's authority to access; authorized user. A fiduciary with authority
11 over the tangible, personal property of a decedent, protected person, principal or settlor:

12 A. Has the right to access the property and any digital asset stored in it; and

13 B. Is an authorized user for the purpose of computer fraud and unauthorized
14 computer access laws, including Title 17-A, chapter 18.

15 6. Disclosure of information to terminate account. A custodian may disclose
16 information in an account to a fiduciary of a user when the information is required to
17 terminate an account used to access digital assets licensed to the user.

18 7. Request for termination. A fiduciary of a user may request a custodian to
19 terminate the user's account. A request for termination must be in writing, in either
20 physical or electronic form, and accompanied by:

21 A. If the user is deceased, a copy of the death certificate of the user;

22 B. A copy of the letters of appointment of the personal representative or a small
23 estate affidavit, court order, power of attorney or trust giving the fiduciary authority
24 over the account; and

25 C. If requested by the custodian:

26 (1) A number, username, address or other unique subscriber or account identifier
27 assigned by the custodian to identify the user's account;

28 (2) Evidence linking the account to the user; or

29 (3) A finding by the court that the user had a specific account with the custodian,
30 identifiable by the information specified in subparagraph (1).

31 **Comment**

32 (Maine section 10-115 is based on the Revised Uniform Fiduciary Access to Digital
33 Assets Act Section 15.)

34 The original version of UFADAA incorporated fiduciary duties by reference to "other
35 law." This proved to be confusing and led to enactment difficulty. Section 15 specifies
36 the nature, extent and limitation of the fiduciary's authority over digital assets.
37 Subsection (a) expressly imposes all fiduciary duties to the management of digital assets,
38 including the duties of care, loyalty and confidentiality. Subsection (b) specifies that a
39 fiduciary's authority over digital assets is subject to the terms-of-service agreement,

1 except to the extent the terms-of-service agreement provision is overridden by an action
2 taken pursuant to Section 4, and it reinforces the applicability of copyright and fiduciary
3 duties. Finally, Section 15(b) prohibits a fiduciary's authority being used to impersonate
4 a user. Section 15(c) permits the fiduciary to access all digital assets not in an account or
5 subject to a terms-of-service agreement. Section 15(d) further specifies that the fiduciary
6 is an authorized user under any applicable law on unauthorized computer access.

7 Section 15(g) gives the fiduciary the option of requesting that an account be
8 terminated, if termination would not violate a fiduciary duty.

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

15 This section clarifies that the fiduciary has the same authority as the user if the user
16 were the one exercising the authority (note that, where the user has died, this means that
17 the fiduciary has the same access as the user had immediately before death). This means
18 that the fiduciary's authority to access the digital asset is the same as the user except
19 where, pursuant to Section 4, the user has explicitly opted out of fiduciary access. In
20 exercising its responsibilities, the fiduciary is subject to the duties and obligations
21 established pursuant to state fiduciary law and is liable for breach of those duties. Note
22 that even if the digital asset were illegally obtained by the user, the fiduciary would still
23 need access in order to handle that asset appropriately. There may, for example, be tax
24 consequences that the fiduciary would be obligated to report.

25 However, this section does not require a custodian to permit a fiduciary to assume a
26 user's terms-of-service agreement if the custodian can otherwise comply with Section 6.

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

32 Subsection (b) is designed to establish that the fiduciary is authorized to obtain or
33 access digital assets in accordance with other applicable laws. The language mirrors that
34 used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also
35 known as the Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see*,
36 *e.g.*, Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's*
37 *Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004). The subsection clarifies that
38 state law treats the fiduciary as "authorized" under comparable state laws criminalizing
39 unauthorized access.

40 State laws vary in their coverage but typically prohibit unauthorized computer access.
41 By defining the fiduciary as an authorized user in subsection (d), the fiduciary has

1 authorization under applicable law to access the digital assets under state computer
2 trespass laws.

3 Federal courts may look to these provisions to guide their interpretations of ECPA
4 and the federal Computer Fraud and Abuse Act (CFAA), but fiduciaries should
5 understand that federal courts may not view such provisions as dispositive in determining
6 whether access to a user's account violated federal criminal law.

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

13 *Example 1—Access to digital assets by personal representative.* D dies with a will
14 that is silent with respect to digital assets. D has a bank account for which D received
15 only electronic statements, D has stored photos in a cloud-based Internet account, and D
16 has an e-mail account with a company that provides electronic-communication services to
17 the public. The personal representative of D's estate needs access to the electronic bank
18 account statements, the photo account, and e-mails.

19 The personal representative of D's estate has the authority to access D's electronic
20 banking statements and D's photo account, which both fall under the act's definition of a
21 "digital asset." This means that, if these accounts are password-protected or otherwise
22 unavailable to the personal representative, then the bank and the photo account service
23 must give access to the personal representative when the request is made in accordance
24 with Section 8. If the terms-of-service agreement permits D to transfer the accounts
25 electronically, then the personal representative of D's estate can use that procedure for
26 transfer as well.

27 The personal representative of D's estate is also able to request that the e-mail
28 account service provider grant access to e-mails sent or received by D; ECPA permits the
29 service provider to release the catalogue to the personal representative. The service
30 provider also must provide the personal representative access to the content of an
31 electronic communication sent or received by D if the user has consented and the
32 fiduciary submitted the information required under Section 7. The bank may release the
33 catalogue of electronic communications or content of an electronic communication for
34 which it is the originator or the addressee because the bank is not subject to the ECPA.

35 *Example 2—Access to digital assets by agent.* X creates a power of attorney
36 designating A as X's agent. The power of attorney expressly grants A authority over X's
37 digital assets, including the content of an electronic communication. X has a bank
38 account for which X receives only electronic statements, X has stored photos in a
39 cloud-based Internet account, and X has a game character and in-game property
40 associated with an online game. X also has an e-mail account with a company that
41 provides electronic-communication services to the public.

42 A has the authority to access X's electronic bank statements, the photo account, the

1 game character and in-game property associated with the online game, all of which fall
2 under the act's definition of a "digital asset." This means that, if these accounts are
3 password-protected or otherwise unavailable to A as X's agent, then the bank, the photo
4 account service provider, and the online game service provider must give access to A
5 when the request is made in accordance with Section 10. If the terms-of-service
6 agreement permits X to transfer the accounts electronically, then A as X's agent can use
7 that procedure for transfer as well.

8 As X's agent, A is also able to request that the e-mail account service provider grant
9 access to e-mails sent or received by X; ECPA permits the service provider to release the
10 catalogue. The service provider also must provide A access to the content of an
11 electronic communication sent or received by X if the fiduciary provides the information
12 required under Section 9. The bank may release the catalogue of electronic
13 communications or content of an electronic communication for which it is the originator
14 or the addressee because the bank is not subject to the ECPA.

15 *Example 3—Access to digital assets by trustee.* T is the trustee of a trust established
16 by S. As trustee of the trust, T opens a bank account for which T receives only electronic
17 statements. S transfers into the trust to T as trustee (in compliance with a
18 terms-of-service agreement) a game character and in-game property associated with an
19 online game and a cloud-based Internet account in which S has stored photos. S also
20 transfers to T as trustee (in compliance with the terms-of-service agreement) an e-mail
21 account with a company that provides electronic-communication services to the public.

22 T is an original user with respect to the bank account that T opened, and T has the
23 ability to access the electronic banking statements under Section 11. T, as successor user
24 to S, may under Section 13 access the game character and in-game property associated
25 with the online game and the photo account, which both fall under the act's definition of a
26 "digital asset." This means that, if these accounts are password-protected or otherwise
27 unavailable to T as trustee, then the bank, the photo account service provider, and the
28 online game service provider must give access to T when the request is made in
29 accordance with the act. If the terms-of-service agreement permits the user to transfer the
30 accounts electronically, then T as trustee can use that procedure for transfer as well.

31 T as successor user of the e-mail account for which S was previously the user is also
32 able to request that the e-mail account service provider grant access to e-mails sent or
33 received by S; the ECPA permits the service provider to release the catalogue. The
34 service provider also must provide T access to the content of an electronic
35 communication sent or received by S if the fiduciary provides the information required
36 under Section 12. The bank may release the catalogue of electronic communications or
37 content of an electronic communication for which it is the originator or the addressee
38 because the bank is not subject to the ECPA.

39 **§10-116. Custodian compliance and immunity**

40 **1. Disclose or terminate upon request; court order.** Not later than 60 days after
41 receipt of the information required under sections 10-107 to 10-114, a custodian shall
42 comply with a request under this Act from a fiduciary or designated recipient to disclose

1 digital assets or terminate an account. If the custodian fails to comply, the fiduciary or
2 designated recipient may apply to the court for an order directing compliance.

3 **2. Finding that compliance not in violation.** An order under subsection 1 directing
4 compliance must contain a finding that compliance is not in violation of 18 United States
5 Code, Section 2702.

6 **3. Notification to user.** A custodian may notify the user that a request for disclosure
7 or to terminate an account was made under this Act.

8 **4. Denial of request if subsequent lawful access.** A custodian may deny a request
9 under this Act from a fiduciary or designated recipient for disclosure of digital assets or
10 to terminate an account if the custodian is aware of any lawful access to the account
11 following the receipt of the fiduciary's request.

12 **5. Court order.** This Act does not limit a custodian's ability to obtain or require a
13 fiduciary or designated recipient requesting disclosure or termination under this Act to
14 obtain a court order that:

15 A. Specifies that an account belongs to the protected person or principal;

16 B. Specifies that there is sufficient consent from the protected person or principal to
17 support the requested disclosure; and

18 C. Contains a finding required by law other than this Act.

19 **6. Immunity.** A custodian and its officers, employees and agents are immune from
20 liability for an act or omission done in good faith in compliance with this Act.

21 **Comment**

22 (Maine section 10-116 is based on the Revised Uniform Fiduciary Access to Digital
23 Assets Act Section 16.)

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

29 Direct liability could only arise from noncompliance with a judicial order issued
30 under Sections 7 to 15. Upon determination of a right of access under those sections, a
31 court may issue an order to grant access under Section 16. Section 16(b) requires that an
32 order directing compliance contain a finding that compliance is not in violation of 18
33 U.S.C. Section 2702. Noncompliance with that order would give rise to liability for
34 contempt. There is no immunity from this liability.

35 Indirect liability could arise from granting a right of access under this act. Access to
36 a digital asset might invade the privacy or harm the reputation of the decedent, protected
37 person, principal, or settlor, it might harm the family or business of the decedent,
38 protected person, principal, or settlor, and it might harm other persons. The grantor of
39 access to the digital asset is immune from liability arising out of any of these
40 circumstances if the grantor acted in good faith to comply with this act. If there is a

1 judicial order under Section 16, compliance with the order establishes good faith. Absent
2 a judicial order under Section 16, good faith must be established by the grantor's
3 assessment of the requirements of this act. Further, Section 16(e) allows the custodian to
4 verify that the account belongs to the person represented by the fiduciary.

5 **§10-117. Uniformity of application and construction**

6 In applying and construing this Act, consideration must be given to the need to
7 promote uniformity of the law with respect to its subject matter among states that enact it.

8 **§10-118. Relation to Electronic Signatures in Global and National Commerce Act**

9 This Act modifies, limits or supersedes the federal Electronic Signatures in Global
10 and National Commerce Act, 15 United States Code, Section 7001 et seq., but does not
11 modify, limit or supersede Section 101(c) of that Act, 15 United States Code, Section
12 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b)
13 of that Act, 15 United States Code, Section 7003(b).

14 **PART B**

15 **Sec. B-1. 18-A MRSA §5-931, sub-§(a), ¶¶(7) and (8),** as enacted by PL
16 2009, c. 292, §2 and affected by §6, are amended to read:

17 (7). Exercise fiduciary powers that the principal has authority to delegate; or

18 (8). Disclaim property, including a power of appointment; or

19 **Sec. B-2. 18-A MRSA §5-931, sub-§(a), ¶(9)** is enacted to read:

20 (9). Exercise authority over the content of an electronic communication of the
21 principal in accordance with the Maine Revised Uniform Fiduciary Access to Digital
22 Assets Act.

23 **PART C**

24 **Sec. C-1. Effective date.** This Act takes effect January 1, 2017.

25 **SUMMARY**

26 This amendment replaces the bill and enacts the Revised Uniform Fiduciary Access
27 to Digital Assets Act as the Maine Revised Uniform Fiduciary Access to Digital Assets
28 Act, Article 10 in the Maine Revised Statutes, Title 18-A. The Probate and Trust Law
29 Advisory Commission recommended enactment in the report submitted to the Joint
30 Standing Committee on Judiciary pursuant to Resolve 2013, chapter 27 as amended by
31 Resolve 2013, chapter 81.

32 The National Conference of Commissioners on Uniform State Laws approved the
33 Revised Uniform Fiduciary Access to Digital Assets Act in July 2015. Since the bill was
34 held over to the Second Regular Session of the 127th Legislature, the Probate and Trust
35 Law Advisory Commission recommended substituting the text of the Revised Uniform

1 Fiduciary Access to Digital Assets Act in the bill with the same changes for conformity to
2 Maine law as originally proposed.

3 The Prefatory Note and accompanying comments to the Maine Revised Uniform
4 Fiduciary Access to Digital Assets Act provide a summary and explanation of the
5 Revised Uniform Fiduciary Access to Digital Assets Act. The Revised Uniform
6 Fiduciary Access to Digital Assets Act provides an important update for the Internet age.
7 A generation ago, files were stored in cabinets, photos were stored in albums and mail
8 was delivered by a human being. Today, people are more likely to use the Internet to
9 communicate and store information. The Revised Uniform Fiduciary Access to Digital
10 Assets Act ensures users retain control of their digital property and can plan for its
11 ultimate disposition after their death but also takes into account the digital privacy that
12 users and those with whom they communicate have a right to expect under federal law
13 and the unique authentication issues inherent in a paperless record-keeping system.
14 Unless the user instructs otherwise, legally appointed fiduciaries will have the same
15 access to digital assets as they have always had to tangible assets and the same duty to
16 comply with the user's instructions.

17 This bill modifies the Revised Uniform Fiduciary Access to Digital Assets Act to be
18 consistent with existing Maine law with regard to conservators.

19 Part B amends the Maine Uniform Power of Attorney Act to specifically allow a
20 power of attorney to grant authority to enable the agent to access the content of an
21 electronic communication to be consistent with the grant of express authority required by
22 Section 9 of the Revised Uniform Fiduciary Access to Digital Assets Act, included in this
23 bill as the Maine Revised Statutes, Title 18-A, section 10-109.

24 Part C provides that the provisions of this bill take effect January 1, 2017.

PLEASE NOTE: Senator Johnson will be offering an amendment to the Revised Uniform Fiduciary Access to Digital Assets Act to address his concerns about custodians' responsibility and ability to verify fiduciaries' credentials when fiduciaries seek access to digital assets held by a custodian. Possible approaches include a registry of authorized fiduciaries which custodians would have to consult before providing access to digital assets.