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HOUSE OF REPRESENTATIVES

147th GENERAL ASSEMBLY

HOUSE BILL NO. 345
AS AMENDED BY
HOUSE AMENDMENT NO. 1
AND
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 12 OF THE DELAWARE CODE RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS AND DIGITAL ACCOUNTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 50. Fiduciary Access to Digital Assets and Digital Accounts.

§ 5001. Short Title.

This chapter may be cited as the "Fiduciary Access to Digital Assets and Digital Accounts Act."

§ 5002. Definitions.

As used in this chapter:

(1) "Account holder" means a decedent, a disabled person pursuant to Chapter 39 of this title, a principal of a durable personal power of attorney pursuant to Chapter 49A of this title, a settlor of a trust which was revocable until the time of the settlor's death or incapacity, or a trust, whether or not revocable, that invokes this chapter.

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

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(3) "Content of an electronic communication" means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(4) "Court" means the Court of Chancery for the State of Delaware.

(5) "Custodian" means a person that electronically stores digital assets or digital accounts of an account holder or otherwise has control over digital assets or digital accounts of the account holder. "Custodian" includes an electronic communication service, as the term is defined by the Electronic Communications Privacy Act, 18 U.S.C. § 2510, and a remote computing service, as the term is defined by the Stored Communications Act, 18 U.S.C. § 2711.

(6) "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 which currently exist or may exist as technology develops or such comparable items as technology develops, stored on any type of digital device, regardless of the ownership of the digital device upon which the digital asset is stored, including but not in any way limited to, email accounts, social network accounts, social media accounts, file sharing accounts, health insurance accounts, health care accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs thereto, and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

(7) "Digital asset" means data, text, emails, documents, audio, video, images, sounds, social media content, social networking content, codes, health care records, health insurance records, computer source codes, computer programs, software, software licenses, databases, or the like, including the usernames and passwords, created, generated, sent, communicated, shared, received, or stored by electronic means on a digital device. "Digital asset" does not include an underlying asset or liability that is governed under other provisions of this title.

(8) "Digital device" means an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information, and such electronic devices shall include, but not limited to, desktops, laptops, tablets, peripherals, servers, mobile telephones, smartphones, and any similar storage device which currently exists or may exist as technology develops or such comparable items as technology develops.

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

(10) "End User License Agreement" means an agreement between an account holder and a custodian establishing the rights and responsibilities of each. The term includes a terms-of-use agreement, terms-of-service agreement, privacy policy, terms and conditions, and license agreement.

(11) "Fiduciary" includes a personal representative appointed by the Register of Wills, a guardian appointed pursuant to Chapter 39 of this title, an agent under a durable personal power of attorney pursuant to Chapter 49A of this title, a trustee, or an adviser pursuant to § 3313 of this title.

(12) "Good Faith" means honesty in fact.

(13) "Governing Instrument" means a will, trust, a durable personal power of attorney pursuant to Chapter 49 or Chapter 49A of this title, order appointing a guardian over the property of the account holder, or other dispositive, appointive, or nominative instrument of any similar type.

(14) "Person" means an individual, corporation, statutory trust, estate, trust, partnership (general or limited), limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(15) "Valid Written Request" means a request made by a fiduciary with authority over the digital assets or digital accounts of another person that complies on its face with the requirements of § 5005 of this title.

§ 5003. Applicability.

This chapter applies to a grant of authority to a fiduciary over a digital account or a digital asset. Digital assets and digital accounts of an employer regularly used by an employee or contractor in the usual course of business are not subject to the provisions of this chapter.

§ 5004. Control of digital accounts and digital assets by a fiduciary.

(a) Except as otherwise provided by a governing instrument or court order, a fiduciary may exercise control over any and all rights in digital assets and digital accounts of an account holder, to the extent permitted under applicable state or federal law, including copyright law, or regulations or any end user license agreement.

(b) If a provision in an end user license agreement limits a fiduciary's access to or control over a digital asset or digital account of an account holder, the provision is void as against the strong public policy of this state, unless the account holder has agreed to the provision by an affirmative act separate from the account holder's assent to other provisions of the end user license agreement.

(c) A choice-of-law provision in an end user license agreement is unenforceable against a fiduciary action under this chapter to the extent the provision designates law that enforces or would enforce a limitation on a fiduciary's access to or control over digital assets or digital accounts that is void under subsection (b) of this section.

§ 5005. Recovery of digital assets and digital accounts from a custodian.

(a) A fiduciary with authority over digital assets or digital accounts of an account holder under this chapter shall have the same access as the account holder, and is deemed to (i) have the lawful consent of the account holder and (ii) be an authorized agent or user under all applicable state and federal law and regulations and any end user license agreement.

(b) Upon receipt of a valid written request sent pursuant to the requirements of subsection (c) of this section, from a fiduciary seeking access to, transfer of, copy of, or destruction of a digital asset or digital account, a custodian shall provide the fiduciary the applicable access, transfer, copy, or destruction of the digital asset or digital account, unless it would be technologically impracticable to provide access to, transfer of, copy of, or destruction of the digital asset or digital account to the fiduciary or to the account holder. Unless otherwise provided by a governing instrument or a court order, a fiduciary may access:

(1) the content of an electronic communication, as the term is defined by the Electronic Communications Privacy Act, 18 U.S.C. § 2510, sent or received by the account holder only if the custodian is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. § 2702(b);

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

(3) any other digital account or digital asset of the account holder.

(c) A valid written request under subsection (b) of this section must:

(1) If by a personal representative, be accompanied by a certified copy of the letters testamentary or letters of administration which grant authority to the personal representative to administer the estate of the deceased account holder;

(2) If by a guardian, be accompanied by a certified copy of the court order that gives the guardian authority over the property of the disabled person;

(3) If by an agent, be accompanied by a certified copy of the power of attorney that authorizes the agent to exercise authority over the affairs of the principal and which includes an authorization regarding the principal's digital assets or digital accounts and, if the power of attorney provides that the agent's power to access a digital account or digital asset is conditioned upon the account holder being incapacitated, be accompanied by a certification from a licensed physician or an order of the Court stating the account holder is incapacitated;

(4) If by a trustee, be accompanied by a certified copy of the trust instrument, or a certification of trust pursuant to § 3591 of this title, and, if the trustee's power to access a digital account or digital asset is conditioned upon the account holder being incapacitated, be accompanied by a certification from a licensed physician or an order of the Court stating the account holder is incapacitated; or

(5) If by a fiduciary not otherwise specified herein, be accompanied by a certified copy of the governing instrument that authorizes the fiduciary to exercise authority over digital assets or digital accounts, or in the case of a fiduciary whose authority is granted in a trust instrument, a certification of trust pursuant to § 3591 of this title.

(d) A custodian shall comply with a valid written request not later than 60 days after receipt of the valid written request. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(e) For purposes of this section, a "certified copy" of a trust, power of attorney, certification of trust, or governing instrument means a copy accompanied by an affidavit attesting that the copy is a true, exact, complete and unaltered photocopy of the original, and that to the best of the affiant's knowledge, said document remains in full force and effect.

§ 5006. Custodian Immunity.

(a) Except as otherwise provided in subsection (b) of this section:

(1) A custodian shall accept a valid written request that complies on its face with the requirements of § 5005 of this title;

(2) A custodian shall accept a valid written request that is originally written in English or is translated into English, under oath of the translator.

(b) A custodian is not required to accept a valid written request if:

(1) The custodian is not otherwise required to engage in a transaction with the account holder in the same circumstances;

(2) Engaging in a transaction with the fiduciary or the account holder in the same circumstances would be inconsistent with applicable state or federal law, including copyright law, or regulations or any end user license agreement; or

(3) The custodian has actual knowledge that the fiduciary does not have the authority to perform the act requested.

(c) A custodian that in good faith accepts a valid written request without actual knowledge that it is void, invalid, or terminated, that the purported fiduciary's authority is void, invalid, or terminated, or that the fiduciary is exceeding or improperly exercising the fiduciary's authority may rely upon such valid written request as if it were genuine, valid and still

in effect, the fiduciary's authority were genuine, valid and still in effect, and the fiduciary had not exceeded and had properly exercised the authority.

(d) For purposes of this section, a custodian that conducts activities through employees is without actual knowledge of a fact relating to a valid written request, an account holder, or a fiduciary if the employee conducting the transaction involving the valid written request is without actual knowledge of the fact. Notification of revocation of a valid written request by an account holder or fiduciary to an officer of any custodian shall constitute actual notice to all employees.

(e) A custodian that refuses in violation of this section to accept a valid written request from a fiduciary that complies with § 5005(c) of this title is subject to:

(1) A court order compelling compliance with the valid written request; and

(2) Liability for damages, including reasonable attorney's fees and costs, incurred in any action or proceeding that confirms the validity or authority of a fiduciary to act, or compels acceptance of the fiduciary's valid written request under § 5005(c) of this title.

(g) A custodian acting in good faith is immune from liability for an action done in compliance with this chapter.

(h) A custodian acting in good faith is immune from civil liability for the custodian's accidental destruction of any digital asset or digital account subject to this chapter.

§ 5007. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that act, 15 U.S.C. § 7003(b).

Section 2. Amend § 49A-201(b), Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 49A-201. Grant of general authority; authority that requires specific grant.

(b) An agent under a personal power of attorney may do the following on behalf of the principal or with the principal's property only if the personal power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(6) Exercise fiduciary powers that the principal has authority to delegate; ~~or~~

(7) Reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest~~.~~; or

(8) Exercise all rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Digital Accounts Act, Chapter 50 of this title.

Section 3. Amend § 3923(d), Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3923. Powers of the guardian of the property.

(d) Except as modified by the order of guardianship, the guardian of the property may act without Court authorization or confirmation to reasonably accomplish the purpose for which the guardian is appointed to:

(12) Execute and deliver all instruments which will accomplish or facilitate the exercise of powers vested in the guardian; ~~and~~

(13) Hold a security in the name of the nominee or other forms without disclosure of guardianships so that title to the security may pass by delivery, but the guardian is liable for any acts of the nominee in connection with the stock so held~~.~~; and

(14) Exercise all rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Accounts Act, Chapter 50 of this title.

Section 4. Amend § 3325, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3325. Specific powers of trustee.

Without limiting the authority conferred by § 3324 of this title, a trustee may:

(29) Merge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust; ~~and~~

(30) Take such actions as are necessary to cause gains from the sale or exchange of trust assets, as determined for federal income-tax purposes, to be taxed for federal income-tax purposes as part of a distribution of income (including income which has been increased by an adjustment from principal to income under § 61-104 of this title), a unitrust distribution, or a distribution of principal to a beneficiary~~.~~; and

(31) Exercise all rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Accounts Act, Chapter 50 of this title.

Section 5. This Act shall become effective on January 1, 2015.

Section 6. This Act shall be liberally construed to effectuate the General Assembly's intent to allow the access and control set forth in the Act. Furthermore, it is the will of the General Assembly that this Act be interpreted as legislative authorization pursuant to the good faith defense contained within the Electronic Communications Privacy Act, 18 U.S.C. § 2707(e)(1).