

ESSB 5029 - H COMM AMD  
By Committee on Judiciary

ADOPTED 03/03/2016

1 Strike everything after the enacting clause and insert the  
2 following:

3 "NEW SECTION. **Sec. 1.** SHORT TITLE. This act may be known and  
4 cited as the revised uniform fiduciary access to digital assets act.

5 NEW SECTION. **Sec. 2.** DEFINITIONS. In this chapter:

6 (1) "Account" means an arrangement under a terms-of-service  
7 agreement in which a custodian carries, maintains, processes,  
8 receives, or stores a digital asset of the user or provides goods or  
9 services to the user.

10 (2) "Agent" means an attorney in fact granted authority under a  
11 durable or nondurable power of attorney.

12 (3) "Carries" means engages in the transmission of an electronic  
13 communication.

14 (4) "Catalogue of electronic communications" means information  
15 that identifies each person with which a user has had an electronic  
16 communication, the time and date of the communication, and the  
17 electronic address of the person.

18 (5) "Content of an electronic communication" means information  
19 concerning the substance or meaning of the communication which:

20 (a) Has been sent or received by a user;

21 (b) Is in electronic storage by a custodian providing an  
22 electronic communication service to the public or is carried or  
23 maintained by a custodian providing a remote computing service to the  
24 public; and

25 (c) Is not readily accessible to the public.

26 (6) "Court" means the superior court of each county.

27 (7) "Custodian" means a person that carries, maintains,  
28 processes, receives, or stores a digital asset of a user.

29 (8) "Designated recipient" means a person chosen by a user using  
30 an online tool to administer digital assets of the user.

1 (9) "Digital asset" means an electronic record in which an  
2 individual has a right or interest. The term does not include an  
3 underlying asset or liability unless the asset or liability is itself  
4 an electronic record.

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

8 (11) "Electronic communication" has the meaning set forth in 18  
9 U.S.C. Sec. 2510(12), as it existed on the effective date of this  
10 section.

11 (12) "Electronic communication service" means a custodian that  
12 provides to a user the ability to send or receive an electronic  
13 communication.

14 (13) "Fiduciary" means an original, additional, or successor  
15 personal representative, guardian, agent, or trustee.

16 (14) "Guardian" means a person appointed by a court to manage the  
17 estate or person, or both, of a living individual. The term includes  
18 a limited guardian or certified professional guardian.

19 (15) "Incapacitated person" means an individual for whom a  
20 guardian has been appointed.

21 (16) "Information" means data, text, images, videos, sounds,  
22 codes, computer programs, software, databases, or the like.

23 (17) "Online tool" means an electronic service provided by a  
24 custodian that allows the user, in an agreement distinct from the  
25 terms-of-service agreement between the custodian and user, to provide  
26 directions for disclosure or nondisclosure of digital assets to a  
27 third person.

28 (18) "Person" means an individual, estate, business or nonprofit  
29 entity, public corporation, government or governmental subdivision,  
30 agency, or instrumentality, or other legal entity.

31 (19) "Personal representative" means an executor, administrator,  
32 special administrator, or person that performs substantially the same  
33 function under law of this state other than this chapter.

34 (20) "Power of attorney" means a record that grants an agent  
35 authority to act in the place of a principal.

36 (21) "Principal" means an individual who grants authority to an  
37 agent in a power of attorney.

38 (22) "Record" means information that is inscribed on a tangible  
39 medium or that is stored in an electronic or other medium and is  
40 retrievable in perceivable form.

1 (23) "Remote computing service" means a custodian that provides  
2 to a user computer processing services or the storage of digital  
3 assets by means of an electronic communications system, as defined in  
4 18 U.S.C. Sec. 2510(14), as it existed on the effective date of this  
5 section.

6 (24) "Terms-of-service agreement" means an agreement that  
7 controls the relationship between a user and a custodian.

8 (25) "Trustee" means a fiduciary with legal title to property  
9 under an agreement or declaration that creates a beneficial interest  
10 in another. The term includes a successor trustee.

11 (26) "User" means a person that has an account with a custodian.

12 (27) "Will" includes a codicil, testamentary instrument that only  
13 appoints an executor, and instrument that revokes or revises a  
14 testamentary instrument.

15 NEW SECTION. **Sec. 3.** APPLICABILITY. (1) This chapter applies  
16 to:

17 (a) A fiduciary acting under a will or power of attorney executed  
18 before, on, or after the effective date of this section;

19 (b) A personal representative acting for a decedent who died  
20 before, on, or after the effective date of this section;

21 (c) A guardian acting for an incapacitated person appointed  
22 before, on, or after the effective date of this section;

23 (d) A trustee acting under a trust created before, on, or after  
24 the effective date of this section; and

25 (e) A custodian if the user resides in this state or resided in  
26 this state at the time of the user's death.

27 (2) This chapter does not apply to a digital asset of an employer  
28 used by an employee in the ordinary course of the employer's  
29 business.

30 NEW SECTION. **Sec. 4.** USER DIRECTION FOR DISCLOSURE OF DIGITAL  
31 ASSETS. (1) A user may use an online tool to direct the custodian to  
32 disclose to a designated recipient or not to disclose some or all of  
33 the user's digital assets, including the content of electronic  
34 communications. If the online tool allows the user to modify or  
35 delete a direction at all times, a direction regarding disclosure  
36 using an online tool overrides a contrary direction by the user in a  
37 will, trust, power of attorney, or other record.

1 (2) If a user has not used an online tool to give direction under  
2 subsection (1) of this section or if the custodian has not provided  
3 an online tool, the user may allow or prohibit in a will, trust,  
4 power of attorney, or other record, disclosure to a fiduciary of some  
5 or all of the user's digital assets, including the content of  
6 electronic communications sent or received by the user.

7 (3) A user's direction under subsection (1) or (2) of this  
8 section overrides a contrary provision in a terms-of-service  
9 agreement that does not require the user to act affirmatively and  
10 distinctly from the user's assent to the terms-of-service agreement.

11 NEW SECTION. **Sec. 5.** TERMS-OF-SERVICE AGREEMENT. (1) This  
12 chapter does not change or impair a right of a custodian or a user  
13 under a terms-of-service agreement to access and use digital assets  
14 of the user.

15 (2) This chapter does not give a fiduciary or a designated  
16 recipient any new or expanded rights other than those held by the  
17 user for whom, or for whose estate, the fiduciary or designated  
18 recipient acts or represents.

19 (3) A fiduciary's or designated recipient's access to digital  
20 assets may be modified or eliminated by a user, by federal law, or by  
21 a terms-of-service agreement if the user has not provided direction  
22 under section 4 of this act.

23 NEW SECTION. **Sec. 6.** PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

24 (1) When disclosing digital assets of a user under this chapter, the  
25 custodian may at its sole discretion:

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

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

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

35 (2) A custodian may assess a reasonable administrative charge for  
36 the cost of disclosing digital assets under this chapter.

37 (3) A custodian need not disclose under this chapter a digital  
38 asset deleted by a user.

1 (4) If a user directs or a fiduciary or designated recipient  
2 requests a custodian to disclose under this chapter some, but not  
3 all, of the user's digital assets, the custodian need not disclose  
4 the assets if segregation of the assets would impose an undue burden  
5 on the custodian. If the custodian believes the direction or request  
6 imposes an undue burden, the custodian or the fiduciary or designated  
7 recipient may seek an order from the court to disclose:

8 (a) A subset limited by date of the user's digital assets;

9 (b) All of the user's digital assets to the fiduciary or  
10 designated recipient;

11 (c) None of the user's digital assets; or

12 (d) All of the user's digital assets to the court for review in  
13 camera.

14 NEW SECTION. **Sec. 7.** DISCLOSURE OF CONTENT OF ELECTRONIC  
15 COMMUNICATIONS OF DECEASED USER. If a deceased user consented to or a  
16 court directs disclosure of the contents of electronic communications  
17 of the user, the custodian shall disclose to the personal  
18 representative of the estate of the user the content of an electronic  
19 communication sent or received by the user if the personal  
20 representative gives the custodian:

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

23 (2) A certified copy of the death certificate of the user;

24 (3) A certified copy of the letter of appointment of the  
25 representative, or a small estate affidavit or court order;

26 (4) Unless the user provided direction using an online tool, a  
27 copy of the user's will, trust, power of attorney, or other record  
28 evidencing the user's consent to disclosure of the content of  
29 electronic communications; and

30 (5) If requested by the custodian:

31 (a) A number, user name, address, or other unique subscriber or  
32 account identifier assigned by the custodian to identify the user's  
33 account;

34 (b) Evidence linking the account to the user; or

35 (c) A finding by the court that:

36 (i) The user had a specific account with the custodian,  
37 identifiable by the information specified in (a) of this subsection;

38 (ii) Disclosure of the content of electronic communications of  
39 the user would not violate 18 U.S.C. Sec. 2701 et seq. and 47 U.S.C.

1 Sec. 222, existing on the effective date of this section, or other  
2 applicable law;

3 (iii) Unless the user provided direction using an online tool,  
4 the user consented to disclosure of the content of electronic  
5 communications; or

6 (iv) Disclosure of the content of electronic communications of  
7 the user is reasonably necessary for administration of the estate.

8 NEW SECTION. **Sec. 8.** DISCLOSURE OF OTHER DIGITAL ASSETS OF  
9 DECEASED USER. Unless the user prohibited disclosure of digital  
10 assets or the court directs otherwise, a custodian shall disclose to  
11 the personal representative of the estate of a deceased user a  
12 catalogue of electronic communications sent or received by the user  
13 and digital assets, other than the content of electronic  
14 communications of the user, if the representative gives the  
15 custodian:

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

18 (2) A certified copy of the death certificate of the user;

19 (3) A certified copy of the letter of appointment of the  
20 representative, or a small estate affidavit or court order; and

21 (4) If requested by the custodian:

22 (a) A number, user name, or address, or other unique subscriber  
23 or account identifier assigned by the custodian to identify the  
24 user's account;

25 (b) Evidence linking the account to the user;

26 (c) An affidavit stating that disclosure of the user's digital  
27 assets is reasonably necessary for administration of the estate; or

28 (d) A finding by the court that:

29 (i) The user had a specific account with the custodian,  
30 identifiable by the information specified in (a) of this subsection;  
31 or

32 (ii) Disclosure of the user's digital assets is reasonably  
33 necessary for administration of the estate.

34 NEW SECTION. **Sec. 9.** DISCLOSURE OF CONTENT OF ELECTRONIC  
35 COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney  
36 expressly grants an agent authority over the content of electronic  
37 communications sent or received by the principal and unless directed

1 otherwise by the principal or the court, a custodian shall disclose  
2 to the agent the content if the agent gives the custodian:

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

5 (2) An original or copy of the power of attorney expressly  
6 granting the agent authority over the content of electronic  
7 communications of the principal;

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

10 (4) If requested by the custodian:

11 (a) A number, user name, address, or other unique subscriber or  
12 account identifier assigned by the custodian to identify the  
13 principal's account; or

14 (b) Evidence linking the account to the principal.

15 NEW SECTION. **Sec. 10.** DISCLOSURE OF OTHER DIGITAL ASSETS OF  
16 PRINCIPAL. Unless otherwise ordered by the court, directed by the  
17 principal, or provided by a power of attorney, a custodian shall  
18 disclose to an agent with specific authority over digital assets or  
19 general authority to act on behalf of a principal a catalogue of  
20 electronic communications sent or received by the principal and  
21 digital assets, other than the content of electronic communications  
22 of the principal, if the agent gives the custodian:

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

25 (2) An original or a copy of the power of attorney that gives the  
26 agent specific authority over digital assets or general authority to  
27 act on behalf of the principal;

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

30 (4) If requested by the custodian:

31 (a) A number, user name, address, or other unique subscriber or  
32 account identifier assigned by the custodian to identify the  
33 principal's account; or

34 (b) Evidence linking the account to the principal.

35 NEW SECTION. **Sec. 11.** DISCLOSURE OF DIGITAL ASSETS HELD IN  
36 TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered by the  
37 court or provided in a trust, a custodian shall disclose to a trustee  
38 that is an original user of an account any digital asset of that

1 account held in trust, including a catalogue of electronic  
2 communications of the trustee and the content of electronic  
3 communications.

4 NEW SECTION. **Sec. 12.** DISCLOSURE OF CONTENT OF ELECTRONIC  
5 COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless  
6 otherwise ordered by the court, directed by the user, or provided in  
7 a trust, a custodian shall disclose to a trustee that is not an  
8 original user of an account the content of an electronic  
9 communication sent or received by an original or successor user and  
10 carried, maintained, processed, received, or stored by the custodian  
11 in the account of the trust if the trustee gives the custodian:

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

14 (2) A certified copy of the trust instrument, or a certification  
15 of the trust under RCW 11.98.075, that includes consent to disclosure  
16 of the content of electronic communications to the trustee;

17 (3) A certification by the trustee, under penalty of perjury,  
18 that the trust exists and the trustee is a currently acting trustee  
19 of the trust; and

20 (4) If requested by the custodian:

21 (a) A number, user name, address, or other unique subscriber or  
22 account identifier assigned by the custodian to identify the trust's  
23 account; or

24 (b) Evidence linking the account to the trust.

25 NEW SECTION. **Sec. 13.** DISCLOSURE OF OTHER DIGITAL ASSETS HELD  
26 IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise ordered by  
27 the court, directed by the user, or provided in a trust, a custodian  
28 shall disclose, to a trustee that is not an original user of an  
29 account, a catalogue of electronic communications sent or received by  
30 an original or successor user and stored, carried, or maintained by  
31 the custodian in an account of the trust and any digital assets,  
32 other than the content of electronic communications in which the  
33 trust has a right or interest, if the trustee gives the custodian:

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

36 (2) A certified copy of the trust instrument or a certification  
37 of the trust under RCW 11.98.075;



1 (3) A certification by the trustee, under penalty of perjury,  
2 that the trust exists and the trustee is a currently acting trustee  
3 of the trust; and

4 (4) If requested by the custodian:

5 (a) A number, user name, address, or other unique subscriber or  
6 account identifier assigned by the custodian to identify the trust's  
7 account; or

8 (b) Evidence linking the account to the trust.

9 NEW SECTION. **Sec. 14.** DISCLOSURE OF DIGITAL ASSETS TO GUARDIAN  
10 OF INCAPACITATED PERSON. (1) Unless otherwise ordered by the court, a  
11 guardian appointed due to a finding of incapacity under RCW  
12 11.88.010(1) has the right to access an incapacitated person's  
13 digital assets other than the content of electronic communications.

14 (2) Unless otherwise ordered by the court or directed by the  
15 user, a custodian shall disclose to a guardian the catalogue of  
16 electronic communications sent or received by an incapacitated person  
17 and any digital assets, other than the content of electronic  
18 communications, if the guardian gives the custodian:

19 (a) A written request for disclosure in physical or electronic  
20 form;

21 (b) Certified copies of letters of guardianship and the court  
22 order appointing the guardian; and

23 (c) If requested by the custodian:

24 (i) A number, user name, address, or other unique subscriber or  
25 account identifier assigned by the custodian to identify the account  
26 of the person; or

27 (ii) Evidence linking the account to the incapacitated person.

28 (3) A guardian may request a custodian of the incapacitated  
29 person's digital assets to suspend or terminate an account of the  
30 incapacitated person for good cause. A request made under this  
31 section must be accompanied by certified copies of letters of  
32 guardianship and the court order appointing the guardian.

33 NEW SECTION. **Sec. 15.** FIDUCIARY DUTY AND AUTHORITY. (1) The  
34 legal duties imposed on a fiduciary charged with managing tangible  
35 property apply to the management of digital assets, including:

36 (a) The duty of care;

37 (b) The duty of loyalty; and

38 (c) The duty of confidentiality.

1 (2) A fiduciary's or designated recipient's authority with  
2 respect to a digital asset of a user:

3 (a) Except as otherwise provided in section 4 of this act, is  
4 subject to the applicable terms-of-service agreement;

5 (b) Is subject to other applicable law, including copyright law;

6 (c) In the case of a fiduciary, is limited by the scope of the  
7 fiduciary's duties; and

8 (d) May not be used to impersonate the user.

9 (3) A fiduciary with authority over the property of a decedent,  
10 incapacitated person, principal, or settlor has the right to access  
11 any digital asset in which the decedent, incapacitated person,  
12 principal, or settlor had a right or interest and that is not held by  
13 a custodian or subject to a terms-of-service agreement.

14 (4) A fiduciary acting within the scope of the fiduciary's duties  
15 is an authorized user of the property of the decedent, incapacitated  
16 person, principal, or settlor for the purpose of applicable computer  
17 fraud and unauthorized computer access laws.

18 (5) A fiduciary with authority over the tangible, personal  
19 property of a decedent, incapacitated person, principal, or settlor:

20 (a) Has the right to access the property and any digital asset  
21 stored in it; and

22 (b) Is an authorized user for the purpose of computer fraud and  
23 unauthorized computer access laws.

24 (6) A custodian may disclose information in an account to a  
25 fiduciary of the user when the information is required to terminate  
26 an account used to access digital assets licensed to the user.

27 (7) A fiduciary of a user may request a custodian to terminate  
28 the user's account. A request for termination must be in writing, in  
29 either physical or electronic form, and accompanied by:

30 (a) If the user is deceased, a certified copy of the death  
31 certificate of the user;

32 (b) A certified copy of the letter of appointment of the  
33 representative or a small estate affidavit or court order, court  
34 order, power of attorney, or trust giving the fiduciary authority  
35 over the account; and

36 (c) If requested by the custodian:

37 (i) A number, user name, address, or other unique subscriber or  
38 account identifier assigned by the custodian to identify the user's  
39 account;

40 (ii) Evidence linking the account to the user; or

1 (iii) A finding by the court that the user had a specific account  
2 with the custodian, identifiable by the information specified in  
3 (c)(i) of this subsection.

4 NEW SECTION. **Sec. 16.** CUSTODIAN COMPLIANCE AND IMMUNITY. (1)

5 Not later than sixty days after receipt of the information required  
6 under sections 7 through 15 of this act, a custodian shall comply  
7 with a request under this chapter from a fiduciary or designated  
8 recipient to disclose digital assets or terminate an account. If the  
9 custodian fails to comply, the fiduciary or designated recipient may  
10 apply to the court for an order directing compliance.

11 (2) An order under subsection (1) of this section directing  
12 compliance must contain a finding that compliance is not in violation  
13 of 18 U.S.C. Sec. 2702, as it existed on the effective date of this  
14 section.

15 (3) A custodian may notify the user that a request for disclosure  
16 or to terminate an account was made under this chapter.

17 (4) A custodian may deny a request under this chapter from a  
18 fiduciary or designated recipient for disclosure of digital assets or  
19 to terminate an account if the custodian is aware of any lawful  
20 access to the account following the receipt of the fiduciary's  
21 request.

22 (5) This section does not limit a custodian's ability to obtain  
23 or require a fiduciary or designated recipient requesting disclosure  
24 or termination under this chapter to obtain a court order which:

25 (a) Specifies that an account belongs to the incapacitated  
26 person, trustor, decedent, or principal;

27 (b) Specifies that there is sufficient consent from the  
28 incapacitated person, trustor, decedent, or principal to support the  
29 requested disclosure; and

30 (c) Contains a finding required by law other than this chapter.

31 (6) A custodian and its officers, employees, and agents are  
32 immune from liability for an act or omission done in good faith in  
33 compliance with this chapter.

34 NEW SECTION. **Sec. 17.** UNIFORMITY OF APPLICATION AND

35 CONSTRUCTION. In applying and construing this chapter, consideration  
36 must be given to the need to promote uniformity of the law with  
37 respect to its subject matter among states that enact it.

1        NEW SECTION.    **Sec. 18.**    RELATION TO ELECTRONIC SIGNATURES IN  
2 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or  
3 supersedes the electronic signatures in global and national commerce  
4 act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or  
5 supersede 15 U.S.C. Sec. 7001(c) or authorize electronic delivery of  
6 any of the notices described in 15 U.S.C. Sec. 7003(b).

7        NEW SECTION.    **Sec. 19.**    SEVERABILITY. If any provision of this  
8 act or its application to any person or circumstance is held invalid,  
9 the remainder of the act or the application of the provision to other  
10 persons or circumstances is not affected.

11       NEW SECTION.    **Sec. 20.**    Sections 1 through 19 of this act  
12 constitute a new chapter in Title 11 RCW."

13       Correct the title.

EFFECT: (1) Provides that a custodian's authority to not comply with a fiduciary's request for disclosure that creates an undue burden also applies to requests from designated recipients.

(2) Replaces a reference to "digital communications" with "electronic communications."

(3) Makes a number of other technical amendments to correct drafting errors.

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