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SENATE BILL 59

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

INTRODUCED BY

Peter Wirth

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO ELECTRONIC RECORDS; ENACTING THE UNIFORM FIDUCIARY
ACCESS TO DIGITAL ASSETS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Uniform Fiduciary Access to Digital Assets Act:

A. "account holder" means a person that has entered
into a terms-of-service agreement with a custodian or a
fiduciary for the person;

B. "agent" means a person granted authority to act
for a principal under a power of attorney whether the person is
denominated an agent, attorney in fact or otherwise;

C. "carries" means engages in the transmission of

1 electronic communications;

2 D. "catalogue of electronic communications" means
3 information that identifies each person with which an account
4 holder has had an electronic communication, the time and date
5 of the communication and the electronic address of the person;

6 E. "conservator" means a person appointed by a
7 court to manage the estate of a protected person. The term
8 includes a limited conservator;

9 F. "content of an electronic communication" means
10 information concerning the substance or meaning of the
11 communication that:

12 (1) has been sent or received by an account
13 holder;

14 (2) is in electronic storage by a custodian
15 providing an electronic-communication service to the public or
16 is carried or maintained by a custodian providing a remote-
17 computing service to the public; and

18 (3) is not readily accessible to the public;

19 G. "court" means the district court;

20 H. "custodian" means a person that carries,
21 maintains, processes, receives or stores a digital asset of an
22 account holder;

23 I. "digital asset" means a record that is
24 electronic. The term does not include an underlying asset or
25 liability unless the asset or liability is itself a record that

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1 is electronic;

2 J. "durable", with reference to a power of
3 attorney, means not terminated by the principal's incapacity;

4 K. "electronic" means relating to technology having
5 electrical, digital, magnetic, wireless, optical,
6 electromagnetic or similar capabilities;

7 L. "electronic communication" has the meaning as
8 specified in 18 U.S.C. Section 2510(12);

9 M. "electronic-communication service" means a
10 custodian that provides to an account holder the ability to
11 send or receive an electronic communication;

12 N. "fiduciary" includes an original, additional,
13 successor or co-personal representative, conservator, agent or
14 trustee;

15 O. "governing instrument" means a will, trust,
16 power of attorney or other dispositive, appointive or
17 nominative instrument of a similar type;

18 P. "incapacity" has the meaning specified in
19 Section 45-5B-102 NMSA 1978;

20 Q. "information" means data, text, images, videos,
21 sounds, codes, computer programs, software, databases or the
22 like;

23 R. "person" means an individual, estate, trust,
24 business or nonprofit entity, public corporation, government or
25 governmental subdivision, agency or instrumentality or other

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1 legal entity;

2 S. "personal representative" means an executor,
3 administrator, special administrator, personal representative
4 or person that performs substantially the same function under
5 law of this state other than the Uniform Fiduciary Access to
6 Digital Assets Act;

7 T. "power of attorney" means a record that grants
8 an agent authority to act in the place of a principal whether
9 or not the term "power of attorney" is used. The term includes
10 a durable and nondurable power of attorney;

11 U. "principal" means an individual who grants
12 authority to an agent in a power of attorney;

13 V. "property" or "asset" means anything that may be
14 the subject of ownership, whether real or personal, tangible or
15 intangible or legal or equitable, or any interest or right
16 therein;

17 W. "protected person" means an individual for whom
18 a conservator has been appointed;

19 X. "record" means information that is inscribed on
20 a tangible medium or that is stored in an electronic or other
21 medium and is retrievable in perceivable form;

22 Y. "remote-computing service" means a custodian
23 that provides to an account holder computer processing services
24 or the storage of digital assets by means of an electronic
25 communications system, as the term "electronic communications

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1 system" is defined in 18 U.S.C. Section 2510(14);

2 Z. "settlor" means a person, including a testator,
3 who creates or contributes property to a trust. If more than
4 one person creates or contributes property to a trust, each
5 person is a settlor of the portion of the trust property
6 attributable to that person's contribution, except to the
7 extent another person has the power to revoke or withdraw that
8 portion;

9 AA. "terms-of-service agreement" means an agreement
10 that controls the relationship between an account holder and a
11 custodian;

12 BB. "terms of a trust" means the manifestation of
13 the settlor's intent regarding a trust's provisions as
14 expressed in the trust instrument or as may be established by
15 other evidence that would be admissible in a judicial
16 proceeding;

17 CC. "trust instrument" means an instrument executed
18 by the settlor that contains terms of the trust, including any
19 amendments thereto;

20 DD. "trustee" means a fiduciary with legal title to
21 property pursuant to a trust instrument that provides for a
22 beneficial interest in another; and

23 EE. "will" includes a codicil, testamentary
24 instrument that only appoints a personal representative and an
25 instrument that revokes or revises another testamentary

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1 instrument.

2 SECTION 3. [NEW MATERIAL] APPLICABILITY.--

3 A. The Uniform Fiduciary Access to Digital Assets
4 Act applies to:

5 (1) a personal representative or agent acting
6 under a will or power of attorney executed before, on or after
7 January 1, 2016;

8 (2) a personal representative acting for a
9 decedent who died before, on or after January 1, 2016;

10 (3) a conservatorship proceeding, whether
11 pending in a court or commenced before, on or after January 1,
12 2016; and

13 (4) a trustee acting under a trust created
14 before, on or after January 1, 2016.

15 B. The Uniform Fiduciary Access to Digital Assets
16 Act does not apply to a digital asset of an employer used by an
17 employee in the ordinary course of the employer's business.

18 SECTION 4. [NEW MATERIAL] ACCESS BY PERSONAL
19 REPRESENTATIVE TO DIGITAL ASSET OF DECEDENT.--Subject to
20 Subsection B of Section 8 of the Uniform Fiduciary Access to
21 Digital Assets Act and unless otherwise ordered by the court or
22 provided in the will of a decedent, the personal representative
23 of the decedent has the right to access:

24 A. the content of an electronic communication that
25 the custodian is permitted to disclose under the federal

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1 Electronic Communications Privacy Act of 1986, as amended, 18
2 U.S.C. Section 2702(b);

3 B. any catalogue of electronic communications sent
4 or received by the decedent; and

5 C. any other digital asset in which at death the
6 decedent had a right or interest.

7 SECTION 5. [NEW MATERIAL] ACCESS BY CONSERVATOR TO
8 DIGITAL ASSET OF PROTECTED PERSON.--Subject to Subsection B of
9 Section 8 of the Uniform Fiduciary Access to Digital Assets
10 Act, the court, after an opportunity for hearing pursuant to
11 Chapter 45, Article 5 NMSA 1978, may grant a conservator the
12 right to access:

13 A. the content of an electronic communication that
14 the custodian is permitted to disclose under the federal
15 Electronic Communications Privacy Act of 1986, as amended, 18
16 U.S.C. Section 2702(b);

17 B. any catalogue of electronic communications sent
18 or received by the protected person; and

19 C. any other digital asset in which the protected
20 person has a right or interest.

21 SECTION 6. [NEW MATERIAL] ACCESS BY AGENT TO DIGITAL
22 ASSET OF PRINCIPAL.--

23 A. To the extent a power of attorney expressly
24 grants an agent authority over the content of an electronic
25 communication of the principal and subject to Subsection B of

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1 Section 8 of the Uniform Fiduciary Access to Digital Assets
2 Act, the agent has the right to access the content of an
3 electronic communication that the custodian is permitted to
4 disclose under the federal Electronic Communications Privacy
5 Act of 1986, as amended, 18 U.S.C. Section 2702(b).

6 B. Subject to Subsection B of Section 8 of the
7 Uniform Fiduciary Access to Digital Assets Act and unless
8 otherwise ordered by the court or provided by a power of
9 attorney, an agent has the right to access:

10 (1) any catalogue of electronic communications
11 sent or received by the principal; and

12 (2) any other digital asset in which the
13 principal has a right or interest.

14 SECTION 7. [NEW MATERIAL] ACCESS BY TRUSTEE TO DIGITAL
15 ASSET.--

16 A. Subject to Subsection B of Section 8 of the
17 Uniform Fiduciary Access to Digital Assets Act and unless
18 otherwise ordered by the court or provided in a trust, a
19 trustee that is an original account holder has the right to
20 access any digital asset held in trust, including any catalogue
21 of electronic communications of the trustee and the content of
22 an electronic communication.

23 B. Subject to Subsection B of Section 8 of the
24 Uniform Fiduciary Access to Digital Assets Act and unless
25 otherwise ordered by the court or provided in a trust, a

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1 trustee that is not an original account holder has the right to
2 access:

3 (1) the content of an electronic communication
4 that the custodian is permitted to disclose under the federal
5 Electronic Communications Privacy Act of 1986, as amended, 18
6 U.S.C. Section 2702(b);

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

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

13 SECTION 8. [NEW MATERIAL] FIDUCIARY AUTHORITY.--

14 A. A fiduciary that is an account holder or has the
15 right under the Uniform Fiduciary Access to Digital Assets Act
16 to access a digital asset of an account holder:

17 (1) subject to the terms-of-service agreement,
18 copyright law and other applicable law, may take any action
19 concerning the asset to the extent of the account holder's
20 authority and the fiduciary's power under:

21 (a) the law of this state other than the
22 Uniform Fiduciary Access to Digital Assets Act; and

23 (b) the governing instrument;

24 (2) has, for the purpose of applicable
25 electronic privacy laws, the lawful consent of the account

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1 holder for the custodian to divulge the content of an
2 electronic communication to the fiduciary; and

3 (3) is, for the purpose of applicable computer
4 fraud and unauthorized computer access laws, an authorized
5 user.

6 B. Unless an account holder, after January 1, 2016,
7 agrees to a provision in a terms-of-service agreement that
8 limits a fiduciary's access to a digital asset of the account
9 holder by an affirmative act separate from the account holder's
10 assent to other provisions of the agreement:

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

13 (2) the fiduciary's access under the Uniform
14 Fiduciary Access to Digital Assets Act to a digital asset does
15 not violate the terms-of-service agreement even if the
16 agreement requires notice of a change in the account holder's
17 status.

18 C. A choice of law provision in a terms-of-service
19 agreement is unenforceable against a fiduciary acting under the
20 Uniform Fiduciary Access to Digital Assets Act to the extent
21 the provision designates law that enforces a limitation on a
22 fiduciary's access to a digital asset and the limitation is
23 void under Subsection B of this section.

24 D. As to tangible personal property capable of
25 receiving, storing, processing or sending a digital asset, a

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1 fiduciary with authority over the property of a decedent,
2 protected person, principal or settlor:

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

5 (2) is an authorized user for purposes of any
6 applicable computer fraud and unauthorized computer access
7 laws.

8 SECTION 9. [NEW MATERIAL] COMPLIANCE.--

9 A. If a fiduciary with a right under the Uniform
10 Fiduciary Access to Digital Assets Act to access a digital
11 asset of an account holder complies with Subsection B of this
12 section, the custodian shall comply with the fiduciary's
13 request in a record for:

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

18 B. If a request under Subsection A of this section
19 is made by:

- 20 (1) a personal representative with the right
21 of access under Section 4 of the Uniform Fiduciary Access to
22 Digital Assets Act, the request shall be accompanied by a
23 certified copy of letters testamentary, letters of
24 administration, affidavit pursuant to Section 45-3-1201 or
25 45-3-1205 NMSA 1978, closing statement pursuant to Section

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1 45-3-1204 NMSA 1978 or court order;

2 (2) a conservator with the right of access
3 under Section 5 of the Uniform Fiduciary Access to Digital
4 Assets Act, the request shall be accompanied by a certified
5 copy of the court order that gives the conservator authority
6 over the digital asset;

7 (3) an agent with the right of access under
8 Section 6 of the Uniform Fiduciary Access to Digital Assets
9 Act, the request shall be accompanied by a certified copy of
10 the power of attorney that authorizes the agent to exercise
11 authority over the digital asset and a certification or
12 affirmation of the agent, under penalty of perjury, that the
13 power of attorney is in effect; and

14 (4) a trustee with the right of access under
15 Section 7 of the Uniform Fiduciary Access to Digital Assets
16 Act, the request shall be accompanied by a certified copy of
17 the trust instrument, or a certification of the trust under
18 Section 46A-10-1013 NMSA 1978, that authorizes the trustee to
19 exercise authority over the digital asset.

20 C. A custodian shall comply with a request made
21 under Subsection A of this section not later than sixty days
22 after receipt. If the custodian fails to comply, the fiduciary
23 may apply to the court for an order directing compliance.

24 D. This section does not limit the right of a
25 person to obtain a copy of a trust instrument in a judicial

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1 proceeding concerning the trust.

2 SECTION 10. [NEW MATERIAL] CUSTODIAN IMMUNITY.--A
3 custodian and its officers, employees and agents are immune
4 from liability for an act or omission done in good faith in
5 compliance with the Uniform Fiduciary Access to Digital Assets
6 Act.

7 SECTION 11. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND
8 CONSTRUCTION.--In applying and construing the Uniform Fiduciary
9 Access to Digital Assets Act, consideration shall be given to
10 the need to promote uniformity of the law with respect to its
11 subject matter among states that enact it.

12 SECTION 12. [NEW MATERIAL] RELATION TO ELECTRONIC
13 SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform
14 Fiduciary Access to Digital Assets Act modifies, limits or
15 supersedes the federal Electronic Signatures in Global and
16 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does
17 not modify, limit or supersede Section 101(c) of that act, 15
18 U.S.C. Section 7001(c), or authorize electronic delivery of any
19 of the notices described in Section 103(b) of that act, 15
20 U.S.C. Section 7003(b).

21 SECTION 13. EFFECTIVE DATE.--The effective date of the
22 provisions of this act is January 1, 2016.