

# DRAFT

## SUMMARY

Enacts Revised Uniform Fiduciary Access to Digital Assets Act (2015).

Authorizes certain fiduciaries to access electronic communications and digital assets of certain persons or decedents. Sets forth procedures for obtaining access and control of digital assets. Sets forth responsibilities of custodian of digital assets.

## A BILL FOR AN ACT

Relating to access to digital assets.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. Sections 2 to 18 of this 2016 Act may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).**

**SECTION 2. As used in sections 2 to 18 of this 2016 Act:**

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

**(2) “Agent” means a person designated as an agent under a power of attorney in accordance with ORS 127.005 to 127.045.**

**(3) “Carries” means engages in the transmission of an electronic communication.**

**(4) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication and the electronic address of the person.**

**(5) “Conservator” has the meaning given that term in ORS 125.005.**

1       **(6) “Content of an electronic communication” means information**  
2 **concerning the substance or meaning of the communication that:**

3       **(a) Has been sent or received by a user;**

4       **(b) Is in electronic storage by a custodian providing an electronic**  
5 **communication service to the public or is carried or maintained by a**  
6 **custodian providing a remote computing service to the public; and**

7       **(c) Is not readily accessible to the public.**

8       **(7) “Court” means a circuit court in this state.**

9       **(8) “Custodian” means a person that carries, maintains, processes,**  
10 **receives or stores a digital asset of a user.**

11       **(9) “Designated recipient” means a person chosen by a user using**  
12 **an online tool to administer digital assets of the user.**

13       **(10) “Digital asset” means an electronic record in which an indi-**  
14 **vidual has a right or interest. “Digital asset” does not include an**  
15 **underlying asset or liability unless the asset or liability is itself an**  
16 **electronic record.**

17       **(11) “Electronic” means relating to technology having electrical,**  
18 **digital, magnetic, wireless, optical, electromagnetic or similar capa-**  
19 **bilities.**

20       **(12) “Electronic communication” has the meaning set forth in 18**  
21 **U.S.C. 2510(12).**

22       **(13) “Electronic communication service” means a custodian that**  
23 **provides to a user the ability to send or receive an electronic commu-**  
24 **nication.**

25       **(14) “Fiduciary” means a person that is an original, additional or**  
26 **successor personal representative, conservator, agent or trustee.**

27       **(15) “Information” means data, text, images, videos, sounds, codes,**  
28 **computer programs, software, databases and similar intelligence of**  
29 **any nature.**

30       **(16) “Online tool” means an electronic service provided by a custo-**  
31 **dian that allows the user, in an agreement distinct from the terms-**

1 of-service agreement between the custodian and the user, to provide  
2 directions for disclosure or nondisclosure of digital assets to a third  
3 person.

4 (17) “Person” means an individual, estate, business or nonprofit  
5 entity, public corporation, government or governmental subdivision,  
6 agency or instrumentality or other legal entity.

7 (18) “Personal representative” means an executor, administrator or  
8 special administrator, or a person legally authorized to perform sub-  
9 stantially the same functions.

10 (19) “Power of attorney” means a record that grants an agent au-  
11 thority to act in the place of a principal.

12 (20) “Principal” means an individual who grants authority to an  
13 agent in a power of attorney.

14 (21) “Protected person” means an individual for whom a  
15 conservator has been appointed. “Protected person” includes an indi-  
16 vidual for whom an application for the appointment of a conservator  
17 is pending.

18 (22) “Record” means information that is inscribed on a tangible  
19 medium or that is stored in an electronic or other medium and is re-  
20 trievable in perceivable form.

21 (23) “Remote computing service” means a custodian that provides  
22 to a user computer processing services or the storage of digital assets  
23 by means of an electronic communications system as defined in 18  
24 U.S.C. 2510(14).

25 (24) “Terms-of-service agreement” means an agreement that con-  
26 trols the relationship between a user and a custodian.

27 (25) “Trustee” means a fiduciary with legal title to property under  
28 an agreement or declaration that creates a beneficial interest in an-  
29 other person. “Trustee” includes a successor trustee.

30 (26) “User” means a person that has an account with a custodian.

31 (27) “Will” includes a codicil, testamentary instrument that only

1 appoints an executor and instrument that revokes or revises a  
2 testamentary instrument.

3 **SECTION 3.** (1) Sections 2 to 18 of this 2016 Act apply to:

4 (a) A fiduciary acting under a will or power of attorney executed  
5 before, on or after the effective date of this 2016 Act;

6 (b) A personal representative acting for a decedent who died before,  
7 on or after the effective date of this 2016 Act;

8 (c) A conservatorship proceeding commenced before, on or after the  
9 effective date of this 2016 Act; and

10 (d) A trustee acting under a trust created before, on or after the  
11 effective date of this 2016 Act.

12 (2) Sections 2 to 18 of this 2016 Act apply to a custodian if the user  
13 resides in this state or resided in this state at the time of the user's  
14 death.

15 (3) Sections 2 to 18 of this 2016 Act do not apply to a digital asset  
16 of an employer used by an employee in the ordinary course of the  
17 employer's business.

18 **SECTION 4.** (1) A user may use an online tool to direct the custo-  
19 dian to disclose or not to disclose some or all of the user's digital as-  
20 sets, including the content of electronic communications. If the online  
21 tool allows the user to modify or delete a direction at all times, a di-  
22 rection regarding disclosure using an online tool overrides a contrary  
23 direction by the user in a will, trust, power of attorney or other re-  
24 cord.

25 (2) If a user has not used an online tool to give direction under  
26 subsection (1) of this section, or if the custodian has not provided an  
27 online tool, the user may allow or prohibit in a will, trust, power of  
28 attorney or other record disclosure to a fiduciary of some or all of the  
29 user's digital assets, including the content of electronic communi-  
30 cations sent or received by the user.

31 (3) A user's direction under subsection (1) or (2) of this section

1 overrides a contrary provision in a terms-of-service agreement that  
2 does not require the user to act affirmatively and distinctly from the  
3 user's assent to the terms of service.

4 **SECTION 5.** (1) Sections 2 to 18 of this 2016 Act do not change or  
5 impair a right of a custodian or a user under a terms-of-service  
6 agreement to access and use digital assets of the user.

7 (2) Sections 2 to 18 of this 2016 Act do not give a fiduciary any new  
8 or expanded rights other than those held by the user for whom, or for  
9 whose estate, the fiduciary acts or represents.

10 (3) A fiduciary's access to digital assets may be modified or elimi-  
11 nated by a user, by federal law or by a terms-of-service agreement if  
12 the user has not provided direction under section 4 of this 2016 Act.

13 **SECTION 6.** (1) When disclosing digital assets of a user under  
14 sections 2 to 18 of this 2016 Act, the custodian may, in the custodian's  
15 sole discretion:

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

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

21 (c) Provide a fiduciary or designated recipient a copy in a record  
22 of any digital asset that, on the date the custodian received the re-  
23 quest for disclosure, the user could have accessed if the user were  
24 alive and had full capacity and access to the account.

25 (2) A custodian may assess a reasonable administrative charge for  
26 the cost of disclosing digital assets under sections 2 to 18 of this 2016  
27 Act.

28 (3) A custodian need not disclose under sections 2 to 18 of this 2016  
29 Act a digital asset deleted by a user.

30 (4) If a user directs, or a fiduciary requests, a custodian to disclose  
31 some, but not all, of the user's digital assets under sections 2 to 18 of

1 this 2016 Act, the custodian need not disclose the digital assets if seg-  
2 regation of the digital assets would impose an undue burden on the  
3 custodian. If the custodian believes the direction or request imposes  
4 an undue burden, the custodian or fiduciary may seek an order from  
5 the court to disclose:

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

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

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

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

11 **SECTION 7.** If a deceased user consented to, or a court directs,  
12 disclosure of the contents of electronic communications of the user,  
13 the custodian shall disclose to the personal representative of the estate  
14 of the user the content of an electronic communication sent or re-  
15 ceived by the user if the personal representative gives the custodian:

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

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

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

20 (4) Unless the user provided direction using an online tool, a copy  
21 of the user's will, trust, power of attorney or other record evidencing  
22 the user's consent to disclosure of the content of electronic commu-  
23 nications; and

24 (5) If requested by the custodian:

25 (a) A number, user name, address or other unique subscriber or  
26 account identifier assigned by the custodian to identify the user's ac-  
27 count;

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

29 (c) A finding by the court that:

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

1 (B) Disclosure of the content of electronic communications of the  
2 user would not violate 18 U.S.C. 2701 et seq., 47 U.S.C. 222 or other  
3 applicable law;

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

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

9 **SECTION 8.** Unless the user prohibited disclosure of digital assets  
10 or the court directs otherwise, a custodian shall disclose to the per-  
11 sonal representative of the estate of a deceased user a catalogue of  
12 electronic communications sent or received by the user and digital  
13 assets, other than the content of electronic communications, of the  
14 user if the personal representative gives the custodian:

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

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

17 (3) A certified copy of the letter of appointment of the personal  
18 representative or a small estate affidavit or court order; and

19 (4) If requested by the custodian:

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

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

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

26 (d) A finding by the court that:

27 (A) The user had a specific account with the custodian, identifiable  
28 by the information specified in paragraph (a) of this subsection; or

29 (B) Disclosure of the user's digital assets is reasonably necessary  
30 for administration of the estate.

31 **SECTION 9.** To the extent a power of attorney expressly grants an

1 agent authority over the content of electronic communications sent  
2 or received by the principal and unless directed otherwise by the  
3 principal or the court, a custodian shall disclose to the agent the  
4 content if the agent gives the custodian:

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

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

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

11 (4) If requested by the custodian:

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

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

16 SECTION 10. Unless otherwise ordered by the court, directed by the  
17 principal or provided in a power of attorney, a custodian shall disclose  
18 to an agent with specific authority over digital assets or general au-  
19 thority to act on behalf of a principal a catalogue of electronic com-  
20 munications sent or received by the principal and digital assets, other  
21 than the content of electronic communications, of the principal if the  
22 agent gives the custodian:

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

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

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

29 (4) If requested by the custodian:

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

1 account; or

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

3 **SECTION 11.** Unless otherwise ordered by the court or provided in  
4 a trust, a custodian shall disclose to a trustee that is an original user  
5 of an account any digital asset of the account held in trust, including  
6 a catalogue of electronic communications of the trustee and the con-  
7 tent of electronic communications.

8 **SECTION 12.** Unless otherwise ordered by the court, directed by the  
9 user or provided in a trust, a custodian shall disclose to a trustee that  
10 is not an original user of an account the content of an electronic  
11 communication sent or received by an original or successor user and  
12 carried, maintained, processed, received or stored by the custodian in  
13 the account of the trust if the trustee gives the custodian:

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

15 (2) A certified copy of the trust instrument or a certification of the  
16 trust under ORS 130.860 that includes consent to disclosure of the  
17 content of electronic communications to the trustee;

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

21 (4) If requested by the custodian:

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

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

26 **SECTION 13.** Unless otherwise ordered by the court, directed by the  
27 user or provided in a trust, a custodian shall disclose to a trustee that  
28 is not an original user of an account a catalogue of electronic com-  
29 munications sent or received by an original or successor user and  
30 stored, carried or maintained by the custodian in an account of the  
31 trust and any digital assets, other than the content of electronic

1 **communications, in which the trust has a right or interest if the**  
2 **trustee gives the custodian:**

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

4 **(2) A certified copy of the trust instrument or a certification of the**  
5 **trust under ORS 130.860;**

6 **(3) A certification by the trustee, under penalty of perjury, that the**  
7 **trust exists and the trustee is a currently acting trustee of the trust;**  
8 **and**

9 **(4) If requested by the custodian:**

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

13 **(b) Evidence linking the account to the trust.**

14 **SECTION 14. (1) After an opportunity for a hearing, the court may**  
15 **grant a conservator access to the digital assets of a protected person.**

16 **(2) Unless otherwise ordered by the court or directed by the user,**  
17 **a custodian shall disclose to the conservator the catalogue of elec-**  
18 **tronic communications sent or received by a protected person and any**  
19 **digital assets, other than the content of electronic communications,**  
20 **in which the protected person has a right or interest if the conservator**  
21 **gives the custodian:**

22 **(a) A written request for disclosure in physical or electronic form;**

23 **(b) A certified copy of the court order that gives the conservator**  
24 **authority over the digital assets of the protected person; and**

25 **(c) If requested by the custodian:**

26 **(A) A number, user name, address or other unique subscriber or**  
27 **account identifier assigned by the custodian to identify the account**  
28 **of the protected person; or**

29 **(B) Evidence linking the account to the protected person.**

30 **(3) A conservator with general authority to manage the assets of a**  
31 **protected person may request a custodian of the digital assets of the**

1 **protected person to suspend or terminate the account of the protected**  
2 **person for good cause. A request made under this subsection must be**  
3 **accompanied by a certified copy of the court order giving the**  
4 **conservator authority over the protected person's property.**

5 **SECTION 15. (1) The legal duties imposed on a fiduciary charged**  
6 **with managing tangible property apply to the management of digital**  
7 **assets, including:**

8 **(a) The duty of care;**

9 **(b) The duty of loyalty; and**

10 **(c) The duty of confidentiality.**

11 **(2) A fiduciary's authority with respect to a digital asset of a user:**

12 **(a) Except as otherwise provided in section 4 of this 2016 Act, is**  
13 **subject to the applicable terms of service;**

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

15 **(c) Is limited by the scope of the fiduciary's duties; and**

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

17 **(3) A fiduciary with authority over the property of a decedent,**  
18 **protected person, principal or settlor has the right to access any dig-**  
19 **ital asset in which the decedent, protected person, principal or settlor**  
20 **has a right or interest and that is not held by a custodian or subject**  
21 **to a terms-of-service agreement.**

22 **(4) A fiduciary acting within the scope of the fiduciary's duties is**  
23 **an authorized user of the property of the decedent, protected person,**  
24 **principal or settlor for the purpose of applicable computer fraud and**  
25 **unauthorized computer access laws, including this state's laws on un-**  
26 **authorized computer access.**

27 **(5) A fiduciary with authority over the tangible, personal property**  
28 **of a decedent, protected person, principal or settlor:**

29 **(a) Has the right to access the property and any digital asset stored**  
30 **in the property; and**

31 **(b) Is an authorized user for the purpose of computer fraud and**

1 unauthorized computer access laws, including this state's laws on un-  
2 authorized computer access.

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

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

9 (a) If the user is deceased, a certified copy of the death certificate  
10 of the user;

11 (b) A certified copy of the letter of appointment of the personal  
12 representative, a small estate affidavit or court order, a court order,  
13 a power of attorney or a trust giving the fiduciary authority over the  
14 account; and

15 (c) If requested by the custodian:

16 (A) A number, user name, address or other unique subscriber or  
17 account identifier assigned by the custodian to identify the user's ac-  
18 count;

19 (B) Evidence linking the account to the user; or

20 (C) A finding by the court that the user had a specific account with  
21 the custodian, identifiable by the information specified in subpara-  
22 graph (A) of this paragraph.

23 SECTION 16. (1) Not later than 60 days after receipt of the infor-  
24 mation required under sections 7 to 15 of this 2016 Act, a custodian  
25 shall comply with a request from a fiduciary or designated recipient  
26 to disclose digital assets or terminate an account. If the custodian fails  
27 to comply, the fiduciary or designated recipient may apply to the court  
28 for an order directing compliance.

29 (2) An order under subsection (1) of this section directing compli-  
30 ance must contain a finding that compliance is not in violation of 18  
31 U.S.C. 2702.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under sections 2 to 18 of this 2016 Act.

(4) A custodian may deny a request under sections 2 to 18 of this 2016 Act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) Sections 2 to 18 of this 2016 Act do not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination to obtain a court order that:

(a) Specifies that an account belongs to the protected person or principal;

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(c) Contains a finding required by law other than under sections 2 to 18 of this 2016 Act.

(6) A custodian and the custodian's officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with sections 2 to 18 of this 2016 Act.

**SECTION 17.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the enacting states.

**SECTION 18.** Sections 2 to 18 of this 2016 Act modify, limit or supersede the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify, limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).