

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON H.B. NO. 2115

**RELATING TO THE
UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT.**

**BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION &
COMMERCE**

DATE: Monday, February 1, 2016, at 2:00 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: PETER HAMASAKI, Commissioner
Commission to Promote Uniform Legislation

To Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

This testimony is submitted on behalf of the Commission to Promote Uniform Legislation, which supports passage of the H. B. No. 2115, Relating to **FIDUCIARY ACCESS TO DIGITAL ASSETS**.

As you may recall during the 2015 legislative session, several bills to enact the Uniform Law Commission's ("ULC") Uniform Fiduciary Access to Digital Assets Act ("UFADAA") were introduced. This committee heard H.B. No. 745 and passed it out as amended House Draft 1.

Since the 2015 legislative session, the ULC has worked to address the concerns raised by the both the internet service providers, such as Google and Facebook, as well as various privacy advocates. As a result of these efforts, during the summer of 2015, the ULC adopted a revised version of UFADAA, which is being proposed for enactment in H.B. No. 2115. The ULC has secured the support of custodians Facebook and Google for its revisions (please see attached), and also has worked at the national level with privacy advocates such as the ACLU.

The purpose of Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) is to modernize fiduciary law for the Internet age. Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a terms-of-service agreement rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to

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act in that person's best interest. Revised UFADAA addresses four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

Revised UFADAA gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.

Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent

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received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under Revised UFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor that is distributing funds from the decedent's bank account will also have access to the decedent's virtual currency account (*e.g.*, bitcoin).

Under Revised UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, Revised UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.

Revised UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. It is a vital statute for the digital age, and we respectfully urge your favorable consideration of H.B. No. 2115. Thank you for your consideration of the Commission's testimony.

Encls.



25 Massachusetts Ave., NW
Washington, DC 20001
Phone: 202-346-1100

October 13, 2015

Ben Orzeske
Chief Counsel
Uniform Law Commission
111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602

Dear Mr. Orzeske:

I am writing to express Google's support for the Revised Uniform Fiduciary Access to Digital Assets Act. We are pleased to have found common accord with the Uniform Law Commission in both of our efforts to address access issues to digital information of decedents and others.

The revised Uniform Act accommodates the needs of settling and administering estates, providing full or limited access to information for guardians, holders of powers of attorney and others assisting people who may be incapacitated, while respecting the account holder's rights to privacy. In addition to commitments made to users, custodians' obligations under the federal Electronic Communications Privacy Act prohibit disclosures of content or account information except under specific circumstances. The Uniform Act appropriately recognizes these limitations and provides a consistent framework for anyone petitioning for information related to the contents of another's account.

Support for this legislation extends only as far as bills based on the Uniform Act remain consistent with it and we reserve the right to support or oppose individual bills based on the Uniform Act after their review.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Barnes", is positioned above the typed name.

Ron Barnes
Head of State Legislative Affairs

October 12, 2015

Uniform Law Commission
111 N. Wabash Avenue
Suite 1010
Chicago, Illinois 60602

Dear Uniform Law Commission:

Facebook appreciates the work of the ULC commissioners and staff in crafting a uniform act – the Revised Uniform Fiduciary Access to Digital Assets Act (“RUFADAA”) – which we believe creates a reasonable compromise regarding disposition of digital accounts upon death or incapacitation. We support the enactment of RUFADAA by state legislatures.

Recognizing that this is a sensitive issue involving an extremely complicated legal landscape and each state must conform RUFADAA to its own statutes, we will need to review proposed bills individually before determining our position. Uniformity in state law on this issue is important to Facebook and we are unlikely to support language that materially differs from RUFADAA.

Again, we appreciate the hard work of the ULC on this issue.

Sincerely,



Dan Sachs
Manager, State Policy
Facebook, Inc.

**SUPPLEMENTAL TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON H.B. NO. 2115

RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS.

**BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION &
COMMERCE**

DATE: Monday, February 1, 2016, at 2:00 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: Peter Hamasaki, Commissioner
Commission to Promote Uniform Legislation

To Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

This supplemental testimony is submitted on behalf of the Commission to Promote Uniform Legislation ("Commission"), which supports passage of the H. B. No. 2115, Relating to **FIDUCIARY ACCESS TO DIGITAL ASSETS**.

After submitting our testimony in support of H. B. No. 2115, the Commission was advised that the Uniform Law Commission's Executive Committee within the last few days adopted certain technical amendments to the revised Uniform Fiduciary Access to Digital Assets Act, which is the basis for H. B. No. 2115. The intent of these technical amendments is to make it clear that designated recipients (persons who are voluntarily named by the user, through the use of an "online tool," to receive access to the user's account when the user dies or becomes incapacitated), as well as fiduciaries, are obligated to follow copyright law. These changes are reflected in the attached amendments to new sections -4(a), -5(b) & (c), and -15(a) to be added by Section 1 of H. B. No. 2115. In addition, there is a revision to new section -16(a) to correct an internal reference.

We respectfully request that the Committee pass H. B. No. 2115 with these technical amendments. Thank you for your consideration of the Commission's testimony.

Encl.

Technical Amendments to H. B. No. 2115

§ -4 **User direction for disclosure of digital assets.** (a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

§ -5 **Terms-of-service agreement.** * * *

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

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

§ -15 **Fiduciary duty and authority.** * * *

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

(1) Except as otherwise provided in section -4, is subject to the applicable terms of service;

- (2) Is subject to other applicable law, including copyright law;
- (3) **In the case of a fiduciary,** [~~is~~is] limited by the scope of the fiduciary's duties; and
- (4) May not be used to impersonate the user.

§ **-16 Custodian compliance and immunity.** (a) Not later than sixty days after receipt of the information required under sections -7 through -[14]**15**, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

[Additional language bolded and double-underscored; deletions bracketed and struck-through.]