

Administration and Identification of Digital Assets for Fiduciaries

Presented by:
Bruce D. Hendryx

Digital Assets: What's a Fiduciary to Do?

A major point of concern for any fiduciary is how to gather assets, protect those assets and ultimately make those assets productive. In making the decisions, the fiduciary document is the guidepost. When those assets prove to be difficult to identify, to value, to custody, the role of the fiduciary becomes even more difficult (and even precarious).

The Goals of this presentation therefore will be to:

- 1) Define Digital Assets;
- 2) Explain the duty of the fiduciary; and,
- 3) Insert statutory guidance around these assets.

Digital Assets present a very specific problem. By their very nature in some cases, they may be difficult to hold and administer. For Digital Assets with apparent economic value, it may be difficult to realize that value. Other Digital Assets may be of no cash value at all.

Are these really a “big deal”? The answer is an emphatic yes!

Digital Assets are growing RAPIDLY. Just consider the growth of the internet and a sample of technology companies.

A timeline of digital events:

- Birth of internet¹
 - o 1960's – Governmental Use (ARPANET)
 - o 1983 – Commercial application (TCP/IP)
- Selling/Social Media on the Internet:
 - o 1995 - EBay (AuctionWeb) started
 - o 2002 – Ebay acquires PayPal
 - o 2004 – Facebook launches. As of 2017 over 2 billion active users.²
 - o 2006 – Twitter launches³
 - o 2010 – Instagram launches⁴
 - o 2017 - E-Commerce and Conversion Statistics⁵;
 - *“The e-commerce industry is responsible for about \$2 trillion in annual sales.”*
 - *“Worldwide B2C e-commerce sales reached \$1.7 trillion in 2015, and it is estimated to reach \$2.35 trillion by 2018.”*
 - o 2017 - Social Media Statistics⁶:
 - *“There are 2.79 billion active social media users in the world. This is an increase of 21 percent from 2016.”*

¹ A Brief History of the Internet, http://www.usg.edu/galileo/skills/unit07/internet07_02.phtml

² <https://en.wikipedia.org/wiki/Facebook>

³ https://en.wikipedia.org/wiki/Timeline_of_Twitter

⁴ <https://instagram-press.com/blog/2010/10/06/instagram-launches-2/>

⁵ <https://hostingfacts.com/internet-facts-stats-2016/>

⁶ <https://hostingfacts.com/internet-facts-stats-2016/>

From this point forward, we will use the framework of the UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, REVISED (2015) (hereinafter UFADAA) to frame the discussion on how a fiduciary should consider Digital Assets. Section 2 of UFADAA provides critical definitions which follow below.

Defining Digital Assets:

UFADAA has set forth a definition of Digital Assets to help guide the fiduciary. According to UFADAA, “Digital asset means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”⁷

The above definition, is best defined by example. An electronic record is an e-mail. It is also an image or photograph which is saved on a smartphone, computer, website or perhaps a cloud account.

Other examples of Digital Assets would be domain names, digital music, digital literature or digital art. In addition, it is important to note that Digital Assets may provide information about tangible assets. For example, the Digital Asset could be a statement for a checking account at a local bank.

Under UFADAA, “. . . ‘digital asset’ expressly excludes underlying assets such as funds held in an online bank account.”⁸

It should be noted however, if an underlying asset is itself an electronic record, the electronic record in which the individual has a right or interest is a Digital Asset. An example would be bitcoin, because it is an electronic record reflected only as an electronic record.

Cryptocurrency:

We just referenced bitcoin. So, what is bitcoin? It is a cryptocurrency or virtual currency. Digital Assets also include cryptocurrencies. The IRS defines virtual currency, in IRS Notice 2014-21, as a “digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” According to Wikipedia, “a cryptocurrency is a digital or virtual currency that uses cryptography for security.”⁹ The reaction of the public, the marketplace and regulatory authorities to cryptocurrency, whether negative or positive, may be regarded as developing, on-going and variable. It is beyond the scope of this presentation to address cryptocurrency other than as an illustration of a type of Digital Asset. It should not to be regarded as an endorsement.

Below is a summary of certain statistics regarding cryptocurrency.¹⁰ As noted below, we can also see the intense volatility of these assets and the commensurate risk.

⁷ UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, REVISED (2015) (UFADAA), p4

⁸ UFADAA, p6

⁹ <https://www.investopedia.com/terms/c/cryptocurrency.asp>

¹⁰ <https://coinmarketcap.com/all/views/all/>

Cryptocurrencies (including Bitcoin) Market Information			
	Information as of		
	12/31/2013	12/30/2016	12/31/2017
All Cryptocurrencies			
Market Capitalization	10,059,549,969.00	17,708,400,000.00	572,573,375,760.00
Number of Cryptocurrencies	66	644	1,335
Bitcoin			
Price	\$724.05	\$878.81	\$13,170.18

Cryptocurrencies (including Bitcoin) Market Information				
	Information as of			Pct
	12/31/2017	2/7/2018	Difference	Change
All Cryptocurrencies				
Market Capitalization	\$572,573,375,760	\$385,431,995,161	(\$187,141,380,599)	-32.68%
Number of Cryptocurrencies	1,335	1,506	171	12.81%
Number of Markets	8,198	8,608	410	5.00%
Bitcoin				
Price	\$13,170.18	\$8,210.10	(\$4,960.08)	-37.66%
Mkt Cap	\$196,926,723,120	\$138,351,884,392	(\$58,574,838,728)	-29.74%
Pct of mkt	34.39%	35.90%		
	Number of days:	38		

It is noteworthy that certain U.S. regulatory agencies have taken differing views in defining cryptocurrency. The issue can be seen in a May 31, 2016 open letter by the Chamber of Digital Commerce to the Office of the Comptroller of the Currency (OCC).¹¹

For example the U.S. Commodity Futures Trading Commission ("CFTC") has deemed bitcoin to be a commodity. The Security Exchange Commission ("SEC"), meanwhile, is looking at bitcoin through the lens of a security, even without officially declaring it so. Further, multiple departments within the U.S. Department of the Treasury regulate bitcoin in different ways, including FinCEN, which regulates bitcoin as a currency, and the Internal Revenue Service, which regulates it as property¹².

What we should know: Again, the reference point to address Fiduciaries' specific concerns regarding Digital Assets, for purposes of this presentation, is UFADAA as enacted by various state legislatures. In those states where it has not been adopted, it may be a useful reference point.

So, if we feel comfortable that a Digital Asset does exist in an estate or trust. What must we do? Balance our understanding of these assets using sound fiduciary principles for oversight of unique assets with the support of the laws applicable to Digital Assets and fiduciary responsibilities. The OCC's "Unique and Hard-to-Value Assets" booklet of the OCC's Comptroller's Handbook, August 2012¹³ may help establish some guidelines for this oversight.

¹¹ www.DigitalChamber.org

¹² <https://www.occ.treas.gov/topics/responsible-innovation/comments/comments-digital-chamber-commerce.pdf>

¹³ OCC Bulletin 2012-22, **Unique and Hard-to-Value Assets: New Comptroller's Handbook Booklet**

Oversight for Digital Assets:

Fiduciaries should consider addressing the unique nature of these assets and possible constructs to create policies/procedures, utilize experts for that oversight and create risk management processes to ensure consistency. The list below may help set forth those considerations:

- Expertise
 - o Do you have internal experts who can identify the risk issues?
 - o If you don't have internal experts can or should you hire/delegate these responsibilities?
- System Capabilities:
 - o Do you have systems in place (e.g., for assets having value)?
 - o Can or should you use a supplemental system?
- Risk Management –
 - o What type of Risk Management process is in place?
 - o Committee Structure – Investment and Fiduciary Risk
 - o Have protocols/guides or policies/procedures been developed?
 - Are there guidance and oversight standards for these assets?
 - How do you analyze
 - Practicalities
 - Risk
 - Valuation
 - Review
 - Fees

Consider Risk:

- Understanding the Risk:
 - o Operational Risk – Risk due to poor controls/systems
 - o Compliance Risk – Risk for failure to follow legal requirements
 - o Strategic Risk – Risk of over-extending oneself
 - o Reputational Risk – Risk to reputation for failing to oversee
- Find Ways to Mitigate Risk:
 - o Create robust risk management/oversight system,
 - o Empower/fund the areas that will oversee these assets
 - o Ensure Risks can be assessed – Quantify those risks.
 - o Create Risk Controls – Protocols/Guidelines, Policies/Procedures, systems/internal oversight
 - Review at acceptance/ongoing review

Applying UFADAA to the Oversight of Digital Assets

These risk management tools then must be addressed in the context of the unique considerations for Digital Assets.

- Knowing that different fiduciary roles may influence different solutions.
- Understanding the unique characteristics of Digital Assets.
- Recognizing the potential impact of governing documents (e.g., Will/Trust/On-Line Tool/Terms of Service Agreement) and the Law.
- Robust Legal Review Process

For fiduciaries who have accepted the role of personal representative or trustee, for example, the applicability of UFADAA is determined under UFADAA Section 3. below.

Section 3) Applicability. Applies to various fiduciary situations:

- Fiduciary acting under a will or POA
- Personal Representative acting for a decedent
- Conservator or Guardian
- Trustee

For example, in the case of a Decedent's Estate, has the Decedent made a provision for the allowance or prohibition of disclosure to the Fiduciary of some or all of the Decedent's Digital Assets, including the content of electronic communications sent or received by the Decedent? If so, the question is, how did the Decedent make that provision?

Section 4) User Direction for Disclosure of Digital Assets.

- a. **ONLINE TOOL EXISTS** (User has used it):
If User has directed the Custodian via an online tool to allow or disallow the disclosure of information to a designated recipient, the direction will **OVERRIDE** a contrary direction in the will, trust or POA if the online tool allows the User to modify or delete a direction at all times.
- b. **ONLINE TOOL EXISTS** (User has not used it) **OR NO ONLINE TOOL EXISTS**:
User may so allow or prohibit such disclosure in a will, trust, POA or other record.
- c. User's direction in a. or b. overrides a contrary provision in a Terms of Service Agreement that does not require the User to act affirmatively and distinctly from the User's assent to the Terms of Service. Otherwise, Terms of Service provisions apply.

Section 5) Terms of Service Agreement.

- a. UFADAA does not change rights of Custodian or user to access and use Digital Assets of the user.
- b. UFADAA gives no new rights to Fiduciary or designated recipient other than those held by the User.
- c. Fiduciary's or designated recipient's access to Digital Assets may be modified or eliminated by User, Federal Law or Terms of Service Agreement if User has not provided direction under Section 4.

Factors related to UFADAA provisions:

- 1) Determine if the will/trust provides for disposition/protection of the Digital Asset? Determine if will/trust contains a direction to allow or disallow the disclosure of information to the Fiduciary.
 - Does the Terms of Service Agreement apply?
 - What rights might the fiduciary have to protect and access those assets?
 - If the Custodian provides for Online Tools and the User (protected party) has:
 - a. Provided rights to the fiduciary or other parties to access these electronic records, the Custodian should grant access accordingly.
 - b. Directed that no access be granted, presumably the Custodian will not grant access.
 - If the Online Tools are not filled out or do not exist then direct language in the fiduciary document will be considered.
- 2) Consider other laws:
 - o Fiduciary Laws (obligation of fiduciary to preserve value of the assets of a trust/estate).

- UFADAA: “Revised UFADAA gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries’ ability to access the electronic records of a decedent, protected person, principal, or a trust.”¹⁴
 - Privacy Laws (protecting the rights of the decedent to privacy even after death)
 - Hacking Laws (protecting consumers from someone accessing accounts for which they have no right)
 - Electronic Communications Privacy Act (ECPA)¹⁵, is legislation which limits access to communications of a User without authority. The protection of privacy is a major factor in cases involving Digital Assets. See also Computer Fraud and Abuse Act.¹⁶
- 3) Note protected interests: The key piece of information which is protected is the user’s “content” which includes information in the body of an electronic communication that is “not readily accessible to the public. . . .”¹⁷
- For example: an email, Facebook or Twitter communication that is limited to one or a limited number of recipients is deemed protected. However a public communication (where anyone can see the communication) is not protected.
- 4) Consider options for obtaining information:
- a. **Communication Log:** If a Custodian declines to provide the Fiduciary with access to electronically stored communications, the Fiduciary may seek a log of communications (e.g., a log of emails stating the sender, recipient, date and time).
 - b. **Online Tool:** An online tool may be a consideration for oversight of an account. An online tool is defined in Section 2. of UFADAA as “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.” It is also described as “a mechanism by which a user names an individual to manage the user’s digital assets after the occurrence of a future event, such as the user’s death or incapacity. The named individual is referred to as the “designated recipient” in the act to differentiate the person from a fiduciary. A designated recipient may perform many of the same tasks as a fiduciary, but is not held to the same legal standard of conduct.”¹⁸
- Thus, if a person anticipates his or her demise and, through an online tool, names a designated recipient to have full access, the designated recipient would have the ability to access those records covered by the online tool. It is advisable to know the law and legal obligations prior to access.
- c. **Employer Property:** Note, if a Digital Asset is the property of the Employer of the decedent/protected party, the Digital Asset is NOT covered by UFADAA¹⁹.

¹⁴ UFADAA, p2

¹⁵ Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. Section 2701

¹⁶ 18 U.S.C., Section 1030

¹⁷ UFADAA, p6

¹⁸ UFADAA, p8

¹⁹ UFADAA, p9

- d. **Application of Law:** UFADAA applies to Custodians based on the state in which that party resided at the time (where UFADAA was enacted) the event occurred (death, transfer to IRREV Trust, etc).²⁰

Next: Consider the steps for accessing these Digital Assets. Query whether the Custodian will seek to block access.

Section 6) PROCEDURE FOR DISCLOSING DIGITAL ASSETS. Custodian

- a. May at its **sole discretion**:
 - o Grant full access
 - o Grant partial access (to meet fiduciary's duties)
 - o Provide a copy of a Digital Asset that the user could have accessed if the user was able to do so
- b. May assess a reasonable administrative charge.
- c. Need not disclose a Digital Asset deleted by user.
- d. If only some Digital Assets are to be disclosed, no need to disclose if "undue burden".
However, Custodian or fiduciary can seek a court order to disclose:
 - o All, some or none of the items.
 - o A private (or in camera) review of all Digital Assets in front of the court can also be requested.

Disclosing Digital Assets: The Custodian is charged with protecting those assets²¹.

- **Query whether a Custodian will require a Court Order to protect against claims.**
- **The requests for information should be specific.**
- **Query whether a User's direction in an online tool or the fiduciary document provide for disclosure.**

Accessing Content vs. Non-Content Communications:

The following sections relate to access to Content-Based communications vs. Non-Content and are specifically from UFADAA. Under federal law, the main issues are that Content-Based communications require "lawful consent"²². UFADAA provides for Fiduciary access to Content-Based communications and Non-Content communications under certain circumstances as described in the statute.²³ Content is again the actual communications by a party within private emails or other private electronic communications. Non-Content is a catalogue showing that a private email was sent with dates/times and recipient information (but not the actual text of the communication).

Estates (Sections 7-8)

SECTION 7. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER.

²⁰ UFADAA, p9

²¹ 18 U.S.C. Section 2702 (a)

²² 18 U.S.C. Section 2702 (b)(1) and (b)(3).

²³ UFADAA, p15.

If User consented to or if a court orders disclosure, Custodian shall disclose if the representative of the Estate gives:

- 1) Written request
- 2) Certified copy of death certificate
- 3) Legal Docs (court order, letter of appointment, etc.)
- 4) Copy of will, trust, POA, etc, (unless User provided access by User Tool)
- 5) Custodian may request that the Estate representative provide:
 - a. Acct identifiers
 - b. Evidence to link user to the account
 - c. Court finding
 - i. That gives a and b
 - ii. Confirmation that disclosure does not violate law (including Unlawful Access to Stored Communications)²⁴
 - iii. If User Consent was not from an online tool, provision of user consent
 - iv. Disclosure is reasonably necessary for administration of the Estate

Query whether a Custodian will require a court order when the User has directed that the Fiduciary have access in an on-line tool or other declaration.

SECTION 8. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER.

Unless otherwise prohibited by the User or a court, a Custodian shall disclose a “catalogue of electronic communications” sent/received by the user and “digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:”

- 1) Written request
- 2) Certified copy of death certificate
- 3) Legal Docs (court order, letter of appointment, etc.)
- 4) Custodian may request:
 - a. Account Number (or other identifier)
 - b. Evidence to link user to the account
 - c. An affidavit that disclosure is reasonably necessary for administration of the Estate; or,
 - d. Court finding
 - i. That User had an account identifiable per a above or,
 - ii. Disclosure is reasonably necessary for administration of the Estate

Note: Section 7 relates to the Content of the Electronic Communication made by a decedent. Content refers to the actual writings within an electronic communication. This would include the content of emails sent or received by the User.

Section 8 relates to all other Digital Assets and also provides that a catalogue of electronic communications of the User may be requested by the Fiduciary.

Below: The Standards for Differing Fiduciary Roles are set out and are different.

- POA's look for specific rights of disclosure but still makes disclosure uncertain.

Powers of Attorney (Sections 9-10)

²⁴ 18 USC Code Sec. 2701 - Unlawful Access to Stored Communications

Section 9: DISCLOSURE OF THE CONTENT OF ELECTRONIC COMMUNICATIONS OF PRINCIPAL. If POA explicitly provides, then Agent may request that the content of Electronic Communications of Principal be disclosed. The Agent must provide certain information to the Custodian.

Section 10: DISCLOSURE OF OTHER DIGITAL ASSETS OF PRINCIPAL

IF POA provides general authority to act on behalf of a principal or specific authority over Digital Assets, the Custodian will provide a “catalogue” of electronic communications to the Agent or Digital Assets. Note: this does not include the actual content of electronic communications but does include other Digital Assets that are NOT electronic communications.

Trusts:

If Trustee is the Grantor/Settlor. Can provide that a Digital Asset be disclosed.

However, if the Trustee is not the Grantor/Settlor, there may be restrictions.

- o **Content: Must be clear consent to disclosure of content**
- o **Non-Content: No specific consent to disclose is needed.**

TRUSTS (UFADAA Sections 11-13)

SECTION 11. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS ORIGINAL USER.

Custodian shall disclose to that trustee any Digital Asset held in the trust including a catalogue and content of electronic communications.

SECTION 12. DISCLOSURE OF CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.

Unless otherwise ordered by court, directed by the User, or provided in a trust, a Custodian shall disclose to that trustee the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the Custodian in the account of the trust, if:

- 1) Written request
- 2) Certified copy of trust agreement (including direct consent to disclosure of content)
- 3) Trustee certification
- 4) Custodian may request that Trustee provide:
 - a. A number, user name, address (or other unique identifier) or
 - b. Evidence to link user to the trust

SECTION 13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a Custodian shall disclose a catalogue of electronic communications sent or received by an original or successor user and stored, carried or maintained by the Custodian in an account of the trust and any Digital Assets, other than electronic communications, in which the trust has a right or interest, if:

- 1) Written request
- 2) Certified copy of trust agreement
- 3) Trustee certification

- 4) Custodian may request that Trustee provide:
 - a. A number, user name, address (or other unique identifier) or
 - b. Evidence to link user to the trust

Guardians/Conservators:

Note: Conservators cannot access Content. However, with a Court Order, the Conservator can access a catalogue.

GUARDIAN/ CONSERVATOR (UFADAA SECTION 14)

SECTION 14. DISCLOSURE OF DIGITAL ASSETS TO [CONSERVATOR] OF [PROTECTED PERSON].

- a. Court may, after hearing, grant Conservator/Guardian access to Digital Assets of the protected person
- b. Unless otherwise ordered by the Court or directed by the User, a Custodian shall disclose to the Conservator/Guardian a catalogue of electronic communications if Conservator gives Custodian:
 1. Written request
 2. Certified copy of Court Order (which give Conservator/Guardian authority over the Digital Assets of the protected person)
 3. A number, username, address (or other unique identifier) or
 4. Evidence to link user to the account of the protected person

Balancing the duties of Fiduciary and Custodian

- **Fiduciaries** have identical duties for Digital Assets as for tangible property.
 - Authority is based on Terms of Service, copyright and Online Tools
 - Critical: **May not impersonate the user**
 - But, if authority,
 - 1) May access as though no Custodian/no service agreement.
 - 2) And, you are an authorized user, you are not subject to computer fraud
 - 3) If you have authority to tangible property which holds Digital Asset AND you are an authorized user, then you can access the Digital Assets.
 - Can request closure of account
 - o Custodian may disclose info in account if required to terminate the account.
- **Custodian** 60 day response. Otherwise, Fiduciary can go to court.
 - May require a court order
 - Order must be specific and show that compliance will not violate the provisions of the Voluntary Disclosure of Customer Communications or Records statute
 - Custodian is immune from liability for following this Act.

DUTIES OF FIDUCIARY, CUSTODIAN (Sections 15-16)

SECTION 15. Fiduciary Duty and Authority.

- a. Legal duties mirror those for tangible property
 1. Duty of care;

2. Duty of loyalty;
3. Duty of confidentiality.
- b. Fiduciary's authority with respect to a Digital Asset of a User:
 1. Subject to the applicable Terms of Service (except as otherwise provided in Section 4. [User Direction for Disclosure of Digital Assets] regarding User's grant of authority to the Fiduciary)
 2. Subject to copyright and other law²⁵;
 3. Limited to the scope of the fiduciary's duties;
 4. May not be used to impersonate the user.
- c. A Fiduciary with authority over the property of a user has the right to access any Digital Asset in which the decedent had a right or interest if not held by a Custodian or if there is no terms of service agreement.
- d. A Fiduciary acting within their scope of duties is an authorized user for purposes of computer fraud/unauthorized computer access laws.
- e. A Fiduciary with authority over the tangible, personal property of user:
 1. Has the right to access the property and any Digital Asset stored therein; and
 2. Is an authorized user for computer fraud and unauthorized-computer-access laws.
- f. Custodian may disclose information in the account if required to terminate the account used to access Digital Assets
- g. Fiduciary of user may request termination of an account. Request must be in writing; and,
 1. If user is deceased, include a certified death certificate
 2. A copy of letter of appointment, court order, etc.
 3. If requested by Custodian:
 - A. Account Number (or other identifier)
 - B. Evidence to link user to the account
 - C. Court finding that User had an account identifiable per A above.

SECTION 16. Custodian Compliance and Immunity.

- a. Custodian is required to comply with a request from Fiduciary within 60 days. Fiduciary may go to court for an order if Custodian does not comply.
- b. If Court Order received, it must show that compliance will not violate the provisions of the Voluntary Disclosure of Customer Communications or Records statute.²⁶
- c. Custodian may notify user
- d. Custodian may deny a request if Custodian knows of a lawful means of access
- e. The act does not limit a Custodian's right to require a Court Order that
 1. Specifies account belongs to Protected Party
 2. Specifies consent from Protected Party
 3. Contains a finding required by law. Note: that does not include this Act.
- f. The Custodian is immune from liability for following this Act.

If the Custodian complies with the court order in good faith, they will have immunity.

²⁵ Includes *Stored Communications Act (SCA)* aka Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. Section 2701. Unlawful access to stored communications

²⁶ The Stored Communications Act, 18 U.S.C. Section 2702 - Voluntary Disclosure of Customer Communications or Records

Sections 17-21 relate to Uniform Application, coordination with other laws and other constructive items.

Summary:

Ultimately, the Fiduciary must understand that oversight of Digital Assets requires specific knowledge of the laws and an expertise regarding these assets.

The above provisions describe the laws put forth by UFADAA, which should be considered in connection with solid oversight guidance. One tool for that guidance can be found for special/unique assets as set forth by the OCC.

As a dialogue point, Digital Assets may be found in these ways:

1. On devices: pictures, books and music on phones
2. On email, social media or other accounts
3. Payment accounts like Paypal, Amazon Pay, etc.

The access to Digital Assets for the above are covered under UFADAA. Thus, the path to overseeing these assets can be carefully navigated through the provisions of that Act and direction provided in the controlling fiduciary document. Bullet 1 focus on the control of the device or tangible personal property which may then provide information about Digital Assets and potential access as set forth in UFADAA. Bullets 2 and 3, focus on the need to understand restrictions (and potential guidance) regarding access as set forth in UFADAA subject to the User's naming a Designated Recipient on an On-Line Tool; the User's granting of authority to a Fiduciary in a will, trust, or other document to have access to Digital Assets; or the Terms of Service Agreement.

Less known, but potentially valuable Digital Assets also exist in the form of: Cryptocurrency.

- These assets provide some unique challenges. The challenge is in how you identify, access and protect this Digital Asset.
- Greatest Risk: Access to Digital Assets can often die with the user or be lost with a forgotten private key or wallet.

Questions/Takeaways:

- Are you prepared to discuss/administer these assets?
- Can you collect these assets, sufficient to liquidate?
- Are there concerns about accepting certain types of Digital Assets?

If you are going to take in these assets:

- Be prepared to clearly identify them in advance.
- Create or Hire the Expertise
- Seek Legal Counsel to help understand and balance the risk
- Enhance Your System Capabilities
- Have Clear Risk Management

The answer really is: Get ready. The growth of these assets will dictate your business tomorrow. Tomorrow is coming . . . fast!

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