

Regulatory & Digital Asset Update

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For Federated Hermes

2022 Trust Advisors Forum

Current Areas of Focus

- ▶ Congressional Revenue Raisers
 - ▶ Proposed Federal Transfer Tax Changes
 - ▶ Proposed Retirement Account Changes
- ▶ Federal Regulatory Guidance
 - ▶ DOL, SEC, FDIC guidance on fiduciary duties, investment options, & deposit insurance
 - ▶ Digital assets & novel charters
- ▶ Federal Tax Updates
 - ▶ IRS Notice 2022-06
 - ▶ Treasury & IRS Final Reg 1.14615-16
 - ▶ IRS Final Regs Section 67(e) Grantor Trust Deductions

Proposed Retirement Account Changes?

- ▶ **Contribution Limits:** Possible contribution limits on individual retirement plans of high-income taxpayers with large account balances
- ▶ **Minimum Distributions:** Possible increase in required RMDs for high-income owners with large retirement account balances
- ▶ **IRA Investments:** May restrict certain IRA investments based on account owner's status

Proposed Income Tax Changes?

- ▶ Increase the top individual income tax rate from 37% to 39.6%
- ▶ Tax capital gains and qualified dividends earned by individuals with income above \$1 million at ordinary income tax rates (i.e., 39.6%)
- ▶ Broaden the reach of the current 3.8% net investment income tax rate to apply to the above individuals, resulting in a combined top federal capital gains tax rate of 43.4%
- ▶ Eliminate any basis step-up for a decedent's gains in excess of \$1 million (or \$2.5 million for couples when combined with existing real estate exemptions)
- ▶ Increase income tax rates for those holding applicable partnership interests (so-called carried interest) to parallel ordinary income tax rates on their income
- ▶ Eliminate like-kind exchange gain deferral on gains exceeding \$500,000
- ▶ Permanently extend the restriction on excess business losses

Proposed Estate/Gift/GST Changes?

- ▶ None under Biden's American Families Plan
 - ▶ Keep 40% Estate Tax Rate
 - ▶ No Changes to \$12,060,000 Exemption or Portability—YET!
- ▶ Prior proposed legislation would have accelerated sunset of exclusions to pre-TCJA levels or lower
- ▶ American Families Plan initially contained proposed drastic overhaul of Grantor Trust Rules

Relevant Federal Tax Updates

- ▶ IRS Notice 2022-06
 - ▶ Guidance on when periodic payments from an individual account under a qualified retirement plan are considered a series of substantially equal periodic payments (SEPPs)
- ▶ Treasury & IRS Final Reg 1.4615-16
 - ▶ Pre-June 2015 IRS automatically issued closing letter for 706
 - ▶ Post-June 2015 IRS only issues closing letters upon request
 - ▶ New Reg \$67 fee for closing letter after 10/28/2011
- ▶ IRS Final Regs Section 67(e) Grantor Trust Deductions
 - ▶ October 2020 Final Reg confirmed that allowed deductions for non-grantor trusts under 67(e) are not misc. deductions temporarily suspended under TCJA

DOL Enforcement ESG Investments & Proxy Voting

- ▶ 11/13/2020 DOL final rule on “Financial Factors in Selecting Plan Investments”
 - ▶ 85 Fed Reg 72846 11/13/2020
 - ▶ Adopted amendments to “investment duties” regulation under ERISA generally requiring plan fiduciaries to selection investments based solely on “pecuniary factors”
- ▶ 12/16/2020 DOL final rule directed agencies review existing regs for inconsistency with final rule
- ▶ Stakeholders Responded!
- ▶ 3/10/2021 DOL Statement that it will not enforce final rule pending further review
 - ▶ Notably, DOL stated will still pursue and enforce statutory duty of prudence & Loyalty stated PTE 2020-02, “Improving Investment Advice for Workers and Retirees”

DOL Fiduciary Advice Exemption

- ▶ PTE 2020-02 “Improving Investment Advice for Workers and Retirees”
 - ▶ Adopted by DOL 12/18/2020 DOL
 - ▶ Investment Advice must be in best interest
 - ▶ Effective 2/16/2021

- ▶ Following 5th Circuit Opinion, DHS issued Field Advisory Bulletin stating it would not pursue prohibited transaction claims against investment advisor fiduciaries who worked “diligently & in good faith to comply with impartial conduct standards” under new PTE

- ▶ Impartial Conduct Standard Components:
 - ▶ Best Interest standard
 - ▶ Reasonable Compensation Standard
 - ▶ Requirement to not make misleading statements about investment transactions

SEC Accredited Investor Amendments

- ▶ 8/26/2020 SEC adopted amendments to the definition of “Accredited investor”
- ▶ Effective 12/8/2020
- ▶ Definition expanded:
 - ▶ Individual Investors who hold professional certification or affiliation
 - ▶ Holds Series 7, 65 or 82
 - ▶ Knowledgeable employees of private fund issuer
 - ▶ “Family offices” with \$5M AUM & their “family clients” (e.g., family members, charities, trusts)
 - ▶ Additional entities, e.g. IA registered with SEC or state. LLCs more than \$5m assets
- ▶ “Qualified Institutional Buyer” definition (purchasers of restricted securities) amended to include “accredited institutional investors,” such as trusts with more than \$100 MM AUM (e.g., bank CTFs and CITs)

FDIC Proposal on Deposit Insurance Rules for Trusts

- ▶ FDIC published proposed rule to amend insurance for trust accounts on 7/20/2021
- ▶ Would merge Rev and Irrev Trusts into a new “trust accounts” category that would include:
 - ▶ (1) informal revocable trust deposits (POD);
 - ▶ (2) formal revocable trust deposits; and
 - ▶ (3) irrevocable trust deposits.
- ▶ Does not affect deposit rules for trusts for which bank is trustee
- ▶ Insurance for “trust accounts” would be calculated:
 - ▶ \$250,000 multiplied by number of trust beneficiaries, not to exceed five, regardless of whether revocable or irrevocable, and regardless of contingencies or the allocation of funds among the beneficiaries
 - ▶ Contingent trust beneficiaries whose interest arises upon the death of another are “ineligible beneficiaries” under the proposal and not entitled to separate insurance
 - ▶ Total “trust account” insurance would be limited at each IDI to \$1,250,000.

OCC Guidance on National Trust Companies

- ▶ Interpretive Letter 1176 January 11, 2021
 - ▶ National trust bank limit its activities to those permissible for a state trust bank or company "even if those state authorized activities are not necessarily considered fiduciary in nature under 12 U.S.C. § 92a and 12 C.F.R. Part 9." (e.g., nonfiduciary custody of assets such as cryptocurrency)
 - ▶ The Letter also discusses standards for "assessing whether an activity is conducted in a fiduciary capacity, and the implications for chartering de novo institutions and approving the conversion of state institutions, along with the permissibility of certain activities for existing national banks that do not have fiduciary powers."

Recent Interagency Guidance on Third-Party Relationships

- ▶ Proposed Interagency Guidance on Third-Party Relationships: Risk Management
- ▶ Third-Party Relationships: Conducting Due Diligence on Financial Technology Companies: A Guide for Community Banks

Digital Assets

- ▶ Increased interest from clients in cryptocurrencies and NFTs
- ▶ Many other types of digital assets
- ▶ Investment considerations
 - ▶ Duties and authority in the relationship
 - ▶ Price volatility and valuation
 - ▶ Legal/regulatory treatment
 - ▶ Custody of digital assets
- ▶ Fiduciary considerations
 - ▶ Access
 - ▶ Duties
- ▶ Agency perspectives
 - ▶ OCC
 - ▶ FDIC
 - ▶ FRB

Why Are Digital Assets Relevant?

- ▶ Estimated Three Hundred Million internet users in North America alone per World Internet Usage Statistics
 - ▶ 90.3% of the North American Population
 - ▶ 208% Grown Rate in Usage
- ▶ Growing number of websites and types of accounts
- ▶ Children's increasing use of internet and social media
 - ▶ Children 50x more likely to be subject to ID theft
 - ▶ Children generating more electronic assets
- ▶ McAfee Study: \$54,722 average "perceived" value of digital estate for U.S. Citizen as of 2011



What are “digital assets”?

- ▶ Social networking accounts
- ▶ Electronic mail accounts
- ▶ Electronic blogs/domain names & contents
- ▶ Digital photos/writings/messages/posts
- ▶ Loyalty programs (points/miles)?
- ▶ Virtual Property (gaming property)?
- ▶ Bitcoin?

Cryptocurrency

- ▶ 46 million Americans own bitcoin – about 22% of adults.
- ▶ Despite cryptocurrencies' names like “currency,” “gold,” or “coin”, they aren't currency but more like goods.
- ▶ Cryptocurrencies are *digital* and fall under federal and state digital assets laws.
- ▶ Under RUFADAA, online management systems or Terms of Service Agreement (TOSAs) are atop the hierarchy.
- ▶ Cryptocurrency beneficiary designation or elections for the account will take precedence over account instructions listed in a will, trust or power of attorney documents.
- ▶ Cryptocurrencies are stored mostly on blockchain technology that requires a private key (a strength) but a lost password or asset might be almost impossible to recover.
- ▶ Reportable on death tax returns.
- ▶ Place password on digital vault with FA (or Atty/CPA) or place on encrypted flash drives and external hardware to store digitally.

Why Plan for Digital Assets?

- ▶ Financial value
- ▶ Sentimental value
- ▶ Lessen burden on personal representative and loved ones
- ▶ Copyright concerns
- ▶ Prevent identity theft
- ▶ Prevent theft of property/loss to estate
- ▶ Litigation concerns
- ▶ Privacy

Federal Regulation of Digital Assets

- ▶ Security or commodity?
 - ▶ Security – Securities & Exchange Commission regulation
 - ▶ Commodity – Commodity Futures Trading Commission regulation
- ▶ Joint Action of FDIC, FRB, and OCC
 - ▶ Goal is to create interagency policies
 - ▶ Early goal – common vocabulary of digital assets
- ▶ OCC letters re: permitting banks to custody cryptocurrency
- ▶ Infrastructure Investment and Jobs Act (Nov. 15, 2021)
 - ▶ Expanded def'n of broker – probably includes crypto, digital wallet providers
- ▶ Proposed federal legislation

OCC Guidance on Custody of Cryptocurrency

- ▶ Interpretive Letter 1170: national banks and federal thrifts may custody cryptocurrencies for customers
- ▶ “OCC concludes that providing cryptocurrency custody services, including holding unique cryptographic keys associated with cryptocurrency, is a modern form of traditional bank activities related to custody services. Crypto custody services may extend beyond passively holding ‘keys.’”
- ▶ Banks may use subcustodian to hold assets

FDIC RFI on Digital Assets

- ▶ FDIC sought comments on current and potential digital asset activities in areas such as payments, lending, investments, deposits, custody
- ▶ ABA letter commented on the need for:
 - ▶ Consistent taxonomy on digital assets
 - ▶ Regulatory clarity regarding what digital asset activity is permissible for a bank
 - ▶ Consistent regulation of banks and non-banks engaged in digital asset activity

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT



HA, ES
RLAW



Case Review: In re Estate of Ellsworth, (Mich. Prob. Ct. 2005)



- ▶ Justin Ellsworth died intestate at age 20 on November 13, 2004 while serving on active duty in Iraq.
- ▶ Justin's father John Ellsworth was appointed Personal Representative of his estate and sought access to the contents of his son's e-mail account to scrapbook and assist in wrapping up his affairs.
- ▶ Terms of Service Justin agreed to with Yahoo:
 - ▶ *No Right of Survivorship and Non-Transferability.* You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.

In re Estate of Ellsworth, Cont'd

- ▶ On April 20, 2005, the Oakland County, Michigan Probate Court ordered Yahoo to deliver the contents of any and all e-mail, documents, and photos stored in the account of Justin Ellsworth, a deceased Yahoo user, to his father as Personal Rep via CD-ROM and written format
- ▶ Yahoo Complied!
 - ▶ May 20, 2005, Justin's father, John Ellsworth, reported to the court that he had received a CD-ROM and three bankers boxes of Justin's e-mail.
 - ▶ Among the more than 10,000 pages of material sent by Yahoo, Justin's father found correspondence from people he had never even heard of.
 - ▶ Around this time, Yahoo spokes person heard to have said digital assets are a "complicated and, in many ways, unchartered issue..."

Case Review: Ajemian v. Yahoo 84 N.E.3d 766 (Mass. 2017)



- ▶ Robert Ajemian set up a Yahoo email account with his brother, John Ajemian.
- ▶ John used the account as his main email address until his death in 2006.
- ▶ Personal Reps of John's intestate estate filed a complaint in the Massachusetts Probate Court seeking access to John's Yahoo email account and all email messages.
- ▶ Probate Court granted judgment for Yahoo, finding that the Federal Stored Communicates Act (SCA) prohibited Yahoo from disclosing the decedent's emails to his personal representatives.
- ▶ Appeals filed.

Ajemian v. Yahoo!, Inc., Con't

- ▶ On appeal to Massachusetts Supreme Court found Congress did not intend the SCA to preempt State Law, and because MA probate law allowed personal reps to give consent on behalf of decedent (health records, etc.), the SCA's lawful consent exception allowed access
- ▶ Held: Personal representatives of an estate can consent to the disclosure of the decedent's emails under the Federal Stored Communications Act (SCA), according to the Massachusetts Supreme Judicial Court (SJC).
- ▶ *But...*remanded to Probate Court to determine whether Yahoo's terms of service agreement with John constituted a valid contract between the decedent and Yahoo that "trump[s] the personal representatives' asserted property interest."
- ▶ Yahoo filed a writ of certiorari for review by the U.S. Supreme Court, which was denied. *Oath Holdings, Inc. v. Ajemian*, 84 N.E.3d 766 (Mass. 2017), *cert. denied*, 138 S.Ct. 1327 (U.S. Mar. 26, 2018) (No. 17-1005)

The Initial Solution: Inconsistent State Law Enactments

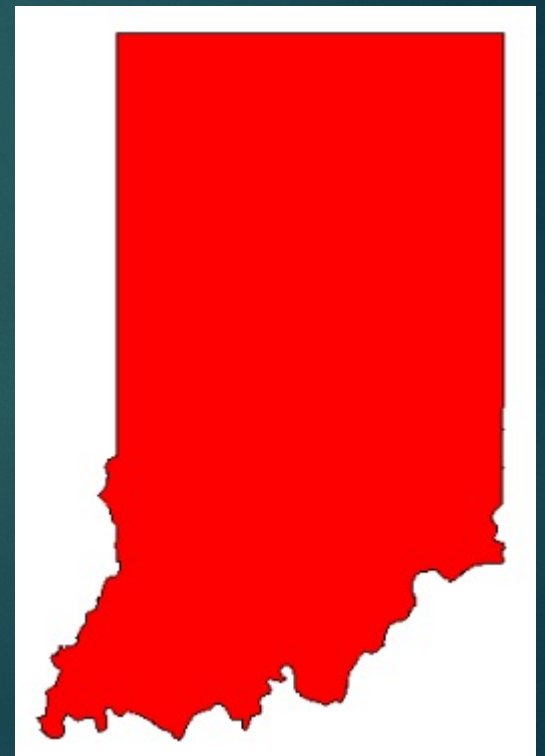


- ▶ 2002 California Law: Applied only to email w/o addressing personal reps
- ▶ 2005 Connecticut Law: Required email service providers furnish access and information to personal reps
- ▶ Rhode Island followed in 2007



Expansion of State Law Reach...

- ▶ 2007 Indiana Law:
 - ▶ Expanded beyond email to include custodians of “documents or information stored electronically” to furnish access and information to personal reps
 - ▶ Insufficient definitions and guidance
- ▶ 2010 Oklahoma Law:
 - ▶ Automatically vests personal rep with power to deal with digital assets after the death of account holder
 - ▶ Thought then to be the basis for “model law”
- ▶ Followed by Idaho in 2011
- ▶ Then Nebraska began working with FaceBook lobbyists on its law



Uniform Law Commission's UFADAA

- ▶ In January 2012, the Uniform Law Commission created a committee to “study the need for a feasibility of state legislation on fiduciary powers and authority “
- ▶ The original Uniform Fiduciary Access to Digital Access Act (UFADAA) was completed in 2014
- ▶ UFADAA granted fiduciaries access to digital assets as to other traditional property, i.e. part of estate and personal rep controls
- ▶ Problem: Inconsistent with User's Terms of Service, privacy, industry efforts to address the problems, and, maybe, Federal (and State) Fraud Laws
- ▶ In 2015, state law makers proposed UFADAA in more than half of the U.S. states, but under pressure and concerns of the opposition, only one state enacted a version of the law (Delaware).

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

- ▶ The ULC goes back drawing board, resulting in the 2015 RUFADAA, greatly reducing the authority of an executor to access digital assets.
- ▶ ULA RUFADAA Goals:
 - ▶ 1) Grant fiduciaries legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible.
 - ▶ 2) Grant custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications.

** The general goal of the Act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user

Under RUFADAA....

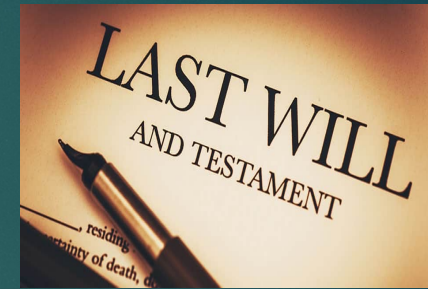
- ▶ Fiduciaries:
 - ▶ no longer have authority over the contents of electronic communications (private email, tweets, chats), unless the user explicitly consented to disclosure; and
 - ▶ can access to other types of digital assets upon petition the court with explanation as to why the asset is needed to administer the estate.
- ▶ Custodians may:
 - ▶ request court orders;
 - ▶ limit their compliance by providing access only to assets that are “reasonably necessary” for wrapping up the estate;
 - ▶ charge fees to comply with requests for access;
 - ▶ refuse unduly burdensome requests; and
 - ▶ may not provide access to deleted assets or joint accounts.

RUFADAA

- ▶ 48 States have enacted some law on digital assets
- ▶ 45 States have adopted RUFADAA in some form
 - ▶ Delaware has enacted UFADAA
 - ▶ Massachusetts has legislation based on RUFADAA pending
 - ▶ California has its own act, somewhat correlating to RUFADAA
 - ▶ Oklahoma has a one sentence provision
 - ▶ Louisiana has its own act

Who?

- ▶ Under Section 3 RUFADAA applies to fiduciaries:
 - ▶ Wills / Executors
 - ▶ Powers of Attorney / Agents
 - ▶ Conservatorship Proceedings / Protected Persons
 - ▶ Trusts / Trustees



- ▶ RUFADAA does not apply to a digital asset of an employer that is used by an employee in the ordinary course of the employer's business (Section 3)
- ▶ Does not apply to family members / friends who are not fiduciaries

What?

- ▶ Section 2(10) defines "digital asset" as 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.
- ▶ Digital Assets are Understood to Include:
 - ▶ Social networking accounts
 - ▶ Electronic mail accounts
 - ▶ Electronic blogs/domain names & contents
 - ▶ Digital photos/writings/messages/posts
 - ▶ Loyalty programs (points/miles)?
 - ▶ Virtual Property (gaming property)?
 - ▶ Bitcoin?



Why Necessary?

- ▶ Prior to RUFADAA, most states did not allow concrete authority to access digital information to fiduciaries
 - ▶ Access subject to “End User Agreement”” the automatic “yes” we give when presented with a software terms of service agreement
 - ▶ Some online service contracts allow a use to “legacy” third party that a user can name to grant access:
 - ▶ Only some online service contracts allow a “legacy” option, and many users don’t take advantage
- ▶ Necessary to enable a fiduciary to administer an estate with digital assets
 - ▶ How do you locate digital assets
 - ▶ There’s no shoebox of receipts, letters or bills coming in the mail
 - ▶ Custodians of the digital information (Facebook, Instagram, TikTok, Google, etc.) still rely on those contracts between the user and the digital platform

How do digital assets complicate administration?

- ▶ Digital assets (accounts/correspondence) are replacing traditional means of communication
- ▶ Forwarding USPS mail may not provide the fiduciary the info needed
- ▶ Are digital assets part of the estate?
- ▶ How are digital assets identified?
- ▶ How are digital assets accessed?
- ▶ How are digital assets disposed of?

Identifying Digital Assets?

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- ▶ Difficult to identify—no single “gatekeeper”
- ▶ Planning counterintuitive
 - ▶ Discouraged from recording passwords
 - ▶ Infinite sites, accounts each of which is encouraged to have different and increasingly complex passwords
 - ▶ Passwords updated periodically
- ▶ What about secrets meant to be kept?



Are digital assets part of a fiduciary estate?

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- ▶ Depends
- ▶ Copyright laws apply to original expressions (e.g. blogs) automatically
- ▶ Expressions made on websites which may have end-user agreements
- ▶ Accounts TOSAs or on-line elections
 - ▶ These will control if survive user's death
 - ▶ Compare GMAIL (can pass) to iTunes or Kindle (can't pass)

Hierarchy to access Digital Assets under RUFADAA Section 4?

Three “Tier” Priority System

“Tier 1” – Online Tools

- ▶ User’s affirmative use of on-line tool to grant/deny access controls
- ▶ If online tool allows user to modify or delete a direction at all times, the online tool overrides other contrary directions

“Tier 2” – Written Directions

- ▶ If online tool is not used or one is not provided –
- ▶ Direction can be provided in a Will, Trust, Power of Attorney, or other Record
- ▶ Disclosure to the fiduciary may be allowed or prohibited

“Tier 3” – Terms-of-Service Agreements

- ▶ Use of Tier 1 or Tier 2 overrides contrary terms in a TOSA that does not require the user to act affirmatively and distinctly from the user’s assent to the TOSA generally
- ▶ RUFADAA does not change or impair the rights of the custodian or user under a TOSA to access and use the digital assets
- ▶ RUFADAA does not expand the fiduciary’s rights beyond those of the user

Fiduciary access, generally....

- ▶ To access “content”, user must have consented or court must order
- ▶ Fiduciaries may generally access a “catalogue” unless user or court prohibited disclosure

Content v. Catalogue

Catalogue of electronic communications defined as info identifying:

- (1) each person that has had an electronic communication with a user;
- (2) the time and date of the electronic communication; and
- (3) the electronic address of the person under paragraph (1).

Content of an electronic communication defined as substance or meaning of electronic communication which:

- (1) has been sent or received by a user;
- (2) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
- (3) is not readily accessible to the public.

Procedures for Custodians (Section 6)

- ▶ Custodians have options:
 - ▶ Grant full access to user's account
 - ▶ Grant partial access to user's account sufficient to perform tasks with which fiduciary is charged
 - ▶ Provide a copy in a record of any digital asset that the user could have accessed if the user were alive / capacitated at the time of the request
- ▶ Custodian may impose a reasonable administrative charge
- ▶ Custodian need not disclose digital assets that were deleted by user

Court Direction (Section 6(d))

- ▶ Custodian may seek a court order if the direction or request imposes an undue burden, requesting direction as to what must / may be disclosed:
 - ▶ Subset limited by date of the user's digital assets
 - ▶ All of the user's digital assets
 - ▶ None of the user's digital assets
 - ▶ All of the user's digital assets to the court for review in camera

Fiduciary Access to Digital Assets in Tangible Personal Property (Section 15)

- ▶ When acting as a fiduciary -
 - ▶ Fiduciary has authority over user's property containing digital assets not subject to terms of service agreement (e.g. not with custodian) the same access, authority, and rights as user
 - ▶ Fiduciary acting within the scope of duties is an authorized user for purposes of applicable computer fraud and unauthorized computer access laws.
 - ▶ Consider photos or documents on the computer (or external) hard drive

Fiduciary Duties? (Section 15)

When acting as a fiduciary –

- ▶ Some state laws impose same duty as applies to tangible personal property to management of digital assets
 - ▶ Care, Loyalty, and Confidentiality
 - ▶ Fiduciary generally governed by terms of service and applicable law
 - ▶ May not impersonate user, etc.
- ▶ What duty does fiduciary have to access or account for, safeguard, or dispose of digital assets?
 - ▶ Consider photos/writings on computer

Considerations?

1) What is being requested?

- ▶ Access to content requires express authority from user or court
 - ▶ See Section 7 for Personal Rep
 - ▶ See Section 9 for Agent
 - ▶ See Section 14(a) for Conservator of Protected Person
 - ▶ See Section 12 for Non-User Trustee

- ▶ Access to catalogue requires general fiduciary authority unless prohibited by user or court
 - ▶ See Section 8 for Personal Rep
 - ▶ See Section 10 for Agent
 - ▶ See Section 13 Non-User Trustee
 - ▶ See Section 14(b) for Conservator of Protected Person

2) Did the user affirmatively use on-line tool?

- ▶ If online tool grants, proceed with proof of authority
- ▶ If online tool prohibits, obtain court order

3) If user did not affirmatively use online tool, is there an instrument governing access?

- ▶ If instrument grants access, then proceed with proof of authority per statute
- ▶ If instrument prohibits, then obtain court order

Section 9 Agent's Access to Principal's Content

- ▶ Applicable when principal expressly granted authority in POA and no contrary direction from principal via online tool or the Court
- ▶ Custodian shall disclose content upon receipt of:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) an original or a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
 - (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
 - (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
 - (ii) evidence linking the account to the principal

Section 10 Disclosure of Catalogue to Agent

- ▶ Applicable when neither principal nor court prohibits access
- ▶ Custodian shall disclose to Agent with general authority to act on behalf of principal a catalogue (not content) upon receipt of:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
 - (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
 - (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
 - (ii) evidence linking the account to the principal.

Section 14 Disclosure to Conservator

- ▶ 14(a) Court may grant conservator access to content upon hearing
- ▶ 14(b) Absent contrary direction by user or court, custodian shall disclose catalogue (not content) upon receipt of:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) a certified copy of the court order which gives the guardian of the estate authority over the digital assets of the protected person; and
 - (3) if requested by the custodian:
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or
 - (ii) evidence linking the account to the protected person.
- ▶ 14(c) Grants conservator general authority to suspend or terminate an account with cause upon production of certified copy of order appointing conservator

Section 12 Non-User Trustee's Access to Content

- ▶ Applicable when trust, user, and court do not prohibit access
- ▶ When Trust instrument grants access to content, a custodian shall disclose content upon receipt of:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) a certified copy of the trust instrument or a certification of the trust (under UTC Section 1013), which includes consent to disclosure of the content of electronic communications to the trustee;
 - (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
 - (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
 - (ii) evidence linking the account to the trust.

Section 13 Disclosure of Catalogue to Non-User Trustee

- ▶ Applicable when trust, user, and court do not prohibit access
- ▶ Custodian shall disclose to a trustee a catalogue (and not content) in which the trust has a right or interest upon receipt of:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) a certified copy of the trust instrument or a certification of the trust (under UTC Section 1013);
 - (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
 - (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
 - (ii) evidence linking the account to the trust.

Section 7 Personal Rep Access to Content

- ▶ Applicable when decedent consented to or court grants access to content
- ▶ Personal Rep provides to custodian:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) a certified copy of the death certificate of the user;
 - (3) a certified copy of the letters of appointment, small estate affidavit, or court order;
 - (4) unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure of the content of electronic communications; and

Section 7 (con't)

(5) **if requested by the custodian:**

(A) any number, username, address or other unique subscriber or account identifier, assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (i);

(ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Ch. 121 (relating to stored wire and electronic communications and transactional records access), section 222 of the Communications Act of 1934 (48 Stat. 1064, 47 U.S.C. § 222) or other applicable law;

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

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

Section 8 Disclosure of Catalogue to Personal Representative

- ▶ Applicable where neither decedent nor court prohibits access
- ▶ Custodian shall provide catalogue to Personal Rep upon receipt of the following:
 - (1) a written request for disclosure in physical or electronic form;
 - (2) a certified copy of the death certificate of the user;
 - (3) a certified copy of the letters; and
 - (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - (ii) evidence linking the account to the user; (iii) an affidavit by the personal representative stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
 - (iv) a finding of the court that:
 - (A) the user had a specific account with the custodian identifiable by the information specified in subparagraph (i); or
 - (B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

Planning Tips During Estate Planning Phase?

- ▶ Discuss Nature and Extent of Digital Assets & “Estate” with Clients
 - ▶ Consider questionnaire
 - ▶ Consider economic and/or sentimental value
- ▶ Discuss Clients’ Intent
- ▶ Include Language in Planning Documents to Grant Fiduciaries Appropriate Access to Digital Asses
 - ▶ Financial POAs
 - ▶ Trusts
 - ▶ Wills
- ▶ Entrust passwords or grant immediate access to reliable source
 - ▶ Provide Instructions
 - ▶ Engage services of on-line afterlife company
 - ▶ Deal with RIA for cryptocurrency “vault”
- ▶ Minimize size of digital estate

Planning Tips When Named as Fiduciary?

- ▶ Encourage clients to let you know when your organization is named as a fiduciary
- ▶ Provide general information to clients about need to address access to their digital assets and why access is important – regardless of whom they appoint as their fiduciaries
- ▶ Have procedures in place to identify and obtain digital assets that are necessary to fiduciary appointment based on the laws in your jurisdiction

Planning Tips for Custodians?

- ▶ Banks and Trust Companies will often hold digital assets needed by clients' fiduciaries
- ▶ Be aware of the law in your jurisdiction but be aware that the law of the client's or fiduciary's jurisdiction might be relevant
- ▶ Clearly set out requirements for access to digital assets
- ▶ Set up methods for clients to proactively allow access to their digital assets through TOSA's and other online tools, as well as specific statements of intent

Planning Tips for Fiduciaries?

- ▶ Encourage clients to provide information on fiduciary appointments – executors, trustees, agents
- ▶ Ask clients to provide documents when your organization is appointed as a fiduciary
- ▶ Provide general information to clients about the importance of the client planning for digital assets by giving fiduciaries access

Final Thoughts

- ▶ Be aware of the law in your jurisdiction – each state that passes RUFADAA can, and many have, made their own tweaks, and some have passed something different
- ▶ Prepare clients – inform them of the importance of planning for digital assets and encourage them to make arrangements
- ▶ Have policies in place to address issues that arise concerning digital assets – both from the custodian side and the fiduciary side
- ▶ Read Federated Hermes' "Access to Digital Asset Guide" for checklists, etc.