



99TH GENERAL ASSEMBLY

State of Illinois

2015 and 2016

SB1376

Introduced 2/18/2015, by Sen. Michael E. Hastings

SYNOPSIS AS INTRODUCED:

New Act

720 ILCS 5/17-51

720 ILCS 5/17-54

was 720 ILCS 5/16D-3

was 720 ILCS 5/16D-7

Creates the Uniform Fiduciary Access to Digital Assets Act. Defines terms. Provides procedures and requirements for the access and control by guardians, executors, agents, and other fiduciaries to the digital assets of persons who are deceased, under a legal disability, or subject to the terms of a trust. Adds provisions concerning: fiduciary authority; compliance by the account custodian; immunity; applicability; construction; and the Act's relation to federal laws governing electronic signatures. Makes corresponding changes in the Criminal Code of 2012.

LRB099 07681 HEP 27814 b

1 AN ACT concerning digital assets.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Uniform Fiduciary Access to Digital Assets Act.

6 Section 2. Definitions. In this Act:

7 (1) "Account holder" means a person that has entered
8 into a terms-of-service agreement with a custodian or a
9 fiduciary for the person.

10 (2) "Agent" means an attorney in fact granted authority
11 under a durable or nondurable power of attorney.

12 (3) "Carries" means engages in the transmission of
13 electronic communications.

14 (4) "Catalogue of electronic communications" means
15 information that identifies each person with which an
16 account holder has had an electronic communication, the
17 time and date of the communication, and the electronic
18 address of the person.

19 (5) "Guardian" means a person appointed by a court to
20 manage the estate of a living individual. The term includes
21 a standby or temporary guardian.

22 (6) "Content of an electronic communication" means
23 information concerning the substance or meaning of the

1 communication which:

2 (A) has been sent or received by an account holder;

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

7 (C) is not readily accessible to the public.

8 (7) "Court" means a court of competent jurisdiction.

9 (8) "Custodian" means a person that carries,
10 maintains, processes, receives, or stores a digital asset
11 of an account holder.

12 (9) "Digital asset" means a record that is electronic.
13 The term does not include an underlying asset or liability
14 unless the asset or liability is itself a record that is
15 electronic.

16 (10) "Electronic" means relating to technology having
17 electrical, digital, magnetic, wireless, optical,
18 electromagnetic, or similar capabilities.

19 (11) "Electronic communication" has the same meaning
20 as the definition in 18 U.S.C. Section 2510(12).

21 (12) "Electronic-communication service" means a
22 custodian that provides to an account holder the ability to
23 send or receive an electronic communication.

24 (13) "Fiduciary" means an original, additional, or
25 successor personal representative, guardian, agent, or
26 trustee.

1 (14) "Information" means data, text, images, videos,
2 sounds, codes, computer programs, software, databases, or
3 the like.

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

8 (16) "Personal representative" means an executor,
9 administrator, special administrator, or person that
10 performs substantially the same function under law of this
11 State other than this Act.

12 (17) "Power of attorney" means a record that grants an
13 agent authority to act in the place of a principal.

14 (18) "Principal" means an individual who grants
15 authority to an agent in a power of attorney.

16 (19) "Disabled person" means an individual for whom a
17 guardian has been appointed. The term includes an
18 individual for whom an application for the appointment of a
19 guardian is pending.

20 (20) "Record" means information that is inscribed on a
21 tangible medium or that is stored in an electronic or other
22 medium and is retrievable in perceivable form.

23 (21) "Remote computing service" means a custodian that
24 provides to an account holder computer processing services
25 or the storage of digital assets by means of an electronic
26 communications system, as defined in 18 U.S.C. Section

1 2510(14).

2 (22) "Terms-of-service agreement" means an agreement
3 that controls the relationship between an account holder
4 and a custodian.

5 (23) "Trustee" means a fiduciary with legal title to
6 property pursuant to an agreement or declaration that
7 creates a beneficial interest in another. The term includes
8 a successor trustee.

9 (24) "Will" includes a codicil, testamentary
10 instrument that only appoints an executor, and instrument
11 that revokes or revises a testamentary instrument.

12 Section 3. Applicability.

13 (a) This Act applies to:

14 (1) a fiduciary or agent acting under a will or power
15 of attorney executed before, on, or after the effective
16 date of this Act;

17 (2) a personal representative acting for a decedent who
18 died before, on, or after the effective date of this Act;

19 (3) a guardianship proceeding, whether pending in a
20 court or commenced before, on, or after the effective date
21 of this Act; and

22 (4) a trustee acting under a trust created before, on,
23 or after the effective date of this Act.

24 (b) This Act does not apply to a digital asset of an
25 employer used by an employee in the ordinary course of the

1 employer's business.

2 Section 4. Access by personal representative to digital
3 asset of decedent. Subject to Section 8(b) and unless otherwise
4 ordered by the court or provided in the will of a decedent, the
5 personal representative of the decedent has the right to
6 access:

7 (1) the content of an electronic communication that the
8 custodian is permitted to disclose under the Electronic
9 Communications Privacy Act, 18 U.S.C. Section 2702(b);

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

12 (3) any other digital asset in which at death the
13 decedent had a right or interest.

14 Section 5. Access by guardian to digital asset of disabled
15 person. Subject to Section 8(b), the court, after an
16 opportunity for hearing under Article XIa of the Probate Act of
17 1975, may grant a guardian the right to access:

18 (1) the content of an electronic communication that the
19 custodian is permitted to disclose under the Electronic
20 Communications Privacy Act, 18 U.S.C. Section 2702(b);

21 (2) any catalogue of electronic communications sent or
22 received by the disabled person; and

23 (3) any other digital asset in which the disabled
24 person has a right or interest.

1 Section 6. Access by agent to digital asset of principal.

2 (a) To the extent a power of attorney expressly grants an
3 agent authority over the content of an electronic communication
4 of the principal and subject to Section 8(b), the agent has the
5 right to access the content of an electronic communication that
6 the custodian is permitted to disclose under the Electronic
7 Communications Privacy Act, 18 U.S.C. Section 2702(b).

8 (b) Subject to Section 8(b) and unless otherwise ordered by
9 the court or provided by a power of attorney, an agent has the
10 right to access:

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

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

15 Section 7. Access by trustee to digital asset.

16 (a) Subject to Section 8(b) and unless otherwise ordered by
17 the court or provided in a trust, a trustee that is an original
18 account holder has the right to access any digital asset held
19 in trust, including any catalogue of electronic communications
20 of the trustee and the content of an electronic communication.

21 (b) Subject to Section 8(b) and unless otherwise ordered by
22 the court or provided in a trust, a trustee that is not an
23 original account holder has the right to access:

24 (1) the content of an electronic communication that the

1 custodian is permitted to disclose under the Electronic
2 Communications Privacy Act, 18 U.S.C. Section 2702(b);

3 (2) any catalogue of electronic communications sent or
4 received by the original or any successor account holder;
5 and

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

8 Section 8. Fiduciary authority.

9 (a) A fiduciary that is an account holder or has the right
10 under this Act to access a digital asset of an account holder:

11 (1) subject to the terms-of-service agreement,
12 copyright law, and other applicable law, may take any
13 action concerning the asset to the extent of the account
14 holder's authority and the fiduciary's power under the law
15 of this State other than this Act;

16 (2) has, for the purpose of applicable electronic
17 privacy laws, the lawful consent of the account holder for
18 the custodian to divulge the content of an electronic
19 communication to the fiduciary; and

20 (3) is, for the purpose of applicable computer-fraud
21 and unauthorized-computer-access laws, including
22 Subdivision 30 of the Criminal Code of 2012, an authorized
23 user.

24 (b) Unless an account holder, after the effective date of
25 this Act, agrees to a provision in a terms-of-service agreement

1 that limits a fiduciary's access to a digital asset of the
2 account holder by an affirmative act separate from the account
3 holder's assent to other provisions of the agreement:

4 (1) the provision is void as against the strong public
5 policy of this State; and

6 (2) the fiduciary's access under this Act to a digital
7 asset does not violate the terms-of-service agreement even
8 if the agreement requires notice of a change in the account
9 holder's status.

10 (c) A choice-of-law provision in a terms-of-service
11 agreement is unenforceable against a fiduciary acting under
12 this Act to the extent the provision designates law that
13 enforces a limitation on a fiduciary's access to a digital
14 asset, and the limitation is void under subsection (b).

15 (d) As to tangible personal property capable of receiving,
16 storing, processing, or sending a digital asset, a fiduciary
17 with authority over the property of a decedent, disabled
18 person, principal, or settlor:

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

21 (2) is an authorized user for purposes of any
22 applicable computer-fraud and unauthorized-computer-access
23 laws, including Subdivision 30 of the Criminal Code of
24 2012.

25 Section 9. Compliance.

1 (a) If a fiduciary with a right under this Act to access a
2 digital asset of an account holder complies with subsection
3 (b), the custodian shall comply with the fiduciary's request in
4 a record for:

5 (1) access to the asset;

6 (2) control of the asset; and

7 (3) a copy of the asset to the extent permitted by
8 copyright law.

9 (b) If a request under subsection (a) is made by:

10 (1) a personal representative with the right of access
11 under Section 4, the request must be accompanied by a
12 certified copy of the letters of office or letters of
13 administration of the personal representative, a small
14 estate affidavit, or court order;

15 (2) a guardian with the right of access under Section
16 5, the request must be accompanied by a certified copy of
17 the court order that gives the guardian authority over the
18 digital asset;

19 (3) an agent with the right of access under Section 6,
20 the request must be accompanied by an original or a copy of
21 the power of attorney that authorizes the agent to exercise
22 authority over the digital asset and a certification of the
23 agent, under penalty of perjury, that the power of attorney
24 is in effect; and

25 (4) a trustee with the right of access under Section 7,
26 the request must be accompanied by a certified copy of the

1 trust instrument that authorizes the trustee to exercise
2 authority over the digital asset.

3 (c) A custodian shall comply with a request made under
4 subsection (a) not later than 60 days after receipt. If the
5 custodian fails to comply, the fiduciary may apply to the court
6 for an order directing compliance.

7 (d) Instead of furnishing a copy of the trust instrument
8 under subsection (b)(4), the trustee may provide a
9 certification of trust. The certification:

10 (1) must contain the following information:

11 (A) that the trust exists and the date the trust
12 instrument was executed;

13 (B) the identity of the settlor;

14 (C) the identity and address of the trustee;

15 (D) that there is nothing inconsistent in the trust
16 with respect to the trustee's powers over digital
17 assets;

18 (E) whether the trust is revocable and the identity
19 of any person holding a power to revoke the trust;

20 (F) whether a cotrustee has authority to sign or
21 otherwise authenticate; and

22 (G) whether all or fewer than all cotrustees are
23 required to exercise powers of the trustee;

24 (2) must be signed or otherwise authenticated by a
25 trustee;

26 (3) must state that the trust has not been revoked,

1 modified, or amended in a manner that would cause the
2 representations contained in the certification of trust to
3 be incorrect; and

4 (4) need not contain the dispositive terms of the
5 trust.

6 (e) A custodian that receives a certification under
7 subsection (d) may require the trustee to provide copies of
8 excerpts from the original trust instrument and later
9 amendments designating the trustee and conferring on the
10 trustee the power to act in the pending transaction.

11 (f) A custodian that acts in reliance on a certification
12 under subsection (d) without knowledge that the
13 representations contained in it are incorrect is not liable to
14 any person for so acting and may assume without inquiry the
15 existence of facts stated in the certification.

16 (g) A person that in good faith enters into a transaction
17 in reliance on a certification under subsection (d) may enforce
18 the transaction against the trust property as if the
19 representations contained in the certification were correct.

20 (h) A person that demands the trust instrument in addition
21 to a certification under subsection (d) or excerpts under
22 subsection (e) is liable for damages, including attorneys'
23 fees, if the court determines that the person did not act in
24 good faith in demanding the instrument.

25 (i) This Section does not limit the right of a person to
26 obtain a copy of a trust instrument in a judicial proceeding

1 concerning the trust.

2 Section 10. Custodian immunity. A custodian and its
3 officers, employees, and agents are immune from liability for
4 an act or omission done in good faith in compliance with this
5 Act.

6 Section 11. Uniformity of application and construction. In
7 applying and construing this uniform Act, consideration must be
8 given to the need to promote uniformity of the law with respect
9 to its subject matter among states that enact it.

10 Section 12. Relation to Electronic Signatures in Global and
11 National Commerce Act. This Act modifies, limits, or supersedes
12 the Electronic Signatures in Global and National Commerce Act,
13 15 U.S.C. Section 7001 et seq., but does not modify, limit, or
14 supersede Section 101(c) of that Act, 15 U.S.C. Section
15 7001(c), or authorize electronic delivery of any of the notices
16 described in Section 103(b) of that Act, 15 U.S.C. Section
17 7003(b).

18 Section 13. (Blank).

19 Section 14. The Criminal Code of 2012 is amended by
20 changing Sections 17-51 and 17-54 as follows:

1 (720 ILCS 5/17-51) (was 720 ILCS 5/16D-3)

2 Sec. 17-51. Computer tampering.

3 (a) A person commits computer tampering when he or she
4 knowingly and without the authorization of a computer's owner
5 or in excess of the authority granted to him or her:

6 (1) Accesses or causes to be accessed a computer or any
7 part thereof, a computer network, or a program or data;

8 (2) Accesses or causes to be accessed a computer or any
9 part thereof, a computer network, or a program or data, and
10 obtains data or services;

11 (3) Accesses or causes to be accessed a computer or any
12 part thereof, a computer network, or a program or data, and
13 damages or destroys the computer or alters, deletes, or
14 removes a computer program or data;

15 (4) Inserts or attempts to insert a program into a
16 computer or computer program knowing or having reason to
17 know that such program contains information or commands
18 that will or may:

19 (A) damage or destroy that computer, or any other
20 computer subsequently accessing or being accessed by
21 that computer;

22 (B) alter, delete, or remove a computer program or
23 data from that computer, or any other computer program
24 or data in a computer subsequently accessing or being
25 accessed by that computer; or

26 (C) cause loss to the users of that computer or the

1 users of a computer which accesses or which is accessed
2 by such program; or

3 (5) Falsifies or forges electronic mail transmission
4 information or other routing information in any manner in
5 connection with the transmission of unsolicited bulk
6 electronic mail through or into the computer network of an
7 electronic mail service provider or its subscribers.

8 (a-5) Distributing software to falsify routing
9 information. It is unlawful for any person knowingly to sell,
10 give, or otherwise distribute or possess with the intent to
11 sell, give, or distribute software which:

12 (1) is primarily designed or produced for the purpose
13 of facilitating or enabling the falsification of
14 electronic mail transmission information or other routing
15 information;

16 (2) has only a limited commercially significant
17 purpose or use other than to facilitate or enable the
18 falsification of electronic mail transmission information
19 or other routing information; or

20 (3) is marketed by that person or another acting in
21 concert with that person with that person's knowledge for
22 use in facilitating or enabling the falsification of
23 electronic mail transmission information or other routing
24 information.

25 (a-10) For purposes of subsection (a), accessing a computer
26 network is deemed to be with the authorization of a computer's

1 owner if:

2 (1) the owner authorizes patrons, customers, or guests
3 to access the computer network and the person accessing the
4 computer network is an authorized patron, customer, or
5 guest and complies with all terms or conditions for use of
6 the computer network that are imposed by the owner; ~~or~~

7 (2) the owner authorizes the public to access the
8 computer network and the person accessing the computer
9 network complies with all terms or conditions for use of
10 the computer network that are imposed by the owner; or.

11 (3) The person accesses the computer network in
12 compliance with the Uniform Fiduciary Access to Digital
13 Assets Act.

14 (b) Sentence.

15 (1) A person who commits computer tampering as set
16 forth in subdivision (a)(1) or (a)(5) or subsection (a-5)
17 of this Section is guilty of a Class B misdemeanor.

18 (2) A person who commits computer tampering as set
19 forth in subdivision (a)(2) of this Section is guilty of a
20 Class A misdemeanor and a Class 4 felony for the second or
21 subsequent offense.

22 (3) A person who commits computer tampering as set
23 forth in subdivision (a)(3) or (a)(4) of this Section is
24 guilty of a Class 4 felony and a Class 3 felony for the
25 second or subsequent offense.

26 (4) If an injury arises from the transmission of

1 unsolicited bulk electronic mail, the injured person,
2 other than an electronic mail service provider, may also
3 recover attorney's fees and costs, and may elect, in lieu
4 of actual damages, to recover the lesser of \$10 for each
5 unsolicited bulk electronic mail message transmitted in
6 violation of this Section, or \$25,000 per day. The injured
7 person shall not have a cause of action against the
8 electronic mail service provider that merely transmits the
9 unsolicited bulk electronic mail over its computer
10 network.

11 (5) If an injury arises from the transmission of
12 unsolicited bulk electronic mail, an injured electronic
13 mail service provider may also recover attorney's fees and
14 costs, and may elect, in lieu of actual damages, to recover
15 the greater of \$10 for each unsolicited electronic mail
16 advertisement transmitted in violation of this Section, or
17 \$25,000 per day.

18 (6) The provisions of this Section shall not be
19 construed to limit any person's right to pursue any
20 additional civil remedy otherwise allowed by law.

21 (c) Whoever suffers loss by reason of a violation of
22 subdivision (a)(4) of this Section may, in a civil action
23 against the violator, obtain appropriate relief. In a civil
24 action under this Section, the court may award to the
25 prevailing party reasonable attorney's fees and other
26 litigation expenses.

1 (Source: P.A. 95-326, eff. 1-1-08; 96-1000, eff. 7-2-10;
2 96-1551, eff. 7-1-11.)

3 (720 ILCS 5/17-54) (was 720 ILCS 5/16D-7)

4 Sec. 17-54. Evidence of lack of authority. For the purposes
5 of Sections 17-50 through 17-52, the trier of fact may infer
6 that a person accessed a computer without the authorization of
7 its owner or in excess of the authority granted if the person
8 accesses or causes to be accessed a computer, which access
9 requires a confidential or proprietary code which has not been
10 issued to or authorized for use by that person. This Section
11 does not apply to a person who acquires access in compliance
12 with the Uniform Fiduciary Access to Digital Assets Act.

13 (Source: P.A. 96-1551, eff. 7-1-11.)

14 Section 15. (Blank).