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BILL ANALYSIS



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House Bill 5034 (Substitute H-1 as passed by the House)
Sponsor: Representative Anthony G. Forlini
House Committee: Communications and Technology
Senate Committee: Judiciary

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CONTENT

The bill would create the "Fiduciary Access to Digital Assets Act" to provide for disclosure of digital assets to a fiduciary or designated recipient. The bill would do the following:

- Allow a user to use an online tool to direct a digital custodian to disclose or not to disclose some or all of the user's digital assets, including the contents of electronic communications.**
- Allow a user who had not used an online tool for that purpose to allow or prohibit disclosure of digital assets in a will, trust, power of attorney, or other record.**
- Specify requirements for a digital custodian's disclosure of digital assets.**
- Prescribe procedures for disclosure of a user's digital assets to a personal representative of the user's estate, an agent with power of attorney, a trustee, or a conservator.**
- Specify duties of a fiduciary with regard to managing a user's digital assets.**
- Specify a digital custodian's responsibilities in complying with the proposed Act.**
- Authorize an interested person to file a petition to limit, eliminate, or modify a personal representative's powers with respect to a decedent's digital assets.**
- Specify the scope of the proposed Act.**

Definitions

"User" would mean a person that has an account with a digital custodian. "Digital custodian" would mean a person that carries, maintains, processes, receives, or stores a user's digital asset. "Digital asset" would mean an electronic record in which a user has a right or interest. It would not include an underlying asset or liability unless the asset or liability were itself an electronic record.

"Fiduciary" would mean a person who is an original, additional, or successor personal representative, conservator, agent, or trustee. "Agent" would mean an attorney-in-fact granted authority under a durable or nondurable power of attorney.

"Online tool" would mean an electronic service provided by a digital custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the digital custodian and the user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

Direction to Disclose

A user could use an online tool to direct a digital custodian to disclose or not to disclose some or all of the user's digital assets, including the contents of electronic communications. If the online tool allowed the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool would override a contrary direction by the user in a will, trust, power of attorney, or other record.

If a user had not used an online tool to give direction to disclose or not to disclose digital assets, or if the digital custodian had not provided an online tool, the user could allow or prohibit disclosure of some or all of his or her digital assets, including the contents of electronic communications sent or received by the user, in a will, trust, power of attorney, or other record.

A user's direction under either of those options would override a contrary provision in a terms-of-service agreement that did not require the user to act affirmatively and distinctly from the user's assent to the agreement.

Disclosing Digital Assets

When disclosing a user's digital assets a digital custodian could, at its sole discretion, do any of the following:

- Grant a fiduciary or designated recipient full access to the user's account.
- Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient was charged.
- Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the digital custodian received the request for disclosure, the user could have had access to if he or she were alive and had full capacity and access to the account.

A digital custodian could assess a reasonable administrative charge for the cost of disclosing digital assets.

A digital custodian would not be required to disclose a digital asset deleted by a user.

If a user directed or a fiduciary requested a digital custodian to disclose some, but not all, of the user's digital assets, the digital custodian would not be required to disclose the requested digital assets if segregation of the requested digital assets would impose an undue burden on the digital custodian. If the digital custodian believed that the direction or request imposed an undue burden, the custodian or fiduciary could seek a court order to disclose any of the following:

- A subset of the user's digital assets, limited by date.
- All of the user's digital assets, to the fiduciary or designated recipient.
- None of the user's digital assets.
- All of the user's digital assets, to the court for review in camera (i.e., in chambers).

Disclosure to Personal Representative

If a deceased user consented to or a court directed disclosure of the contents of the user's electronic communications, a digital custodian would have to disclose to the user's personal representative the content of an electronic communication sent or received by the user if the personal representative gave the digital custodian all of the following:

- A written request for disclosure in physical or electronic form.
- A copy of the user's death certificate.

- A certified copy of the personal representative's letters of authority, a small-estate affidavit, or another court order.
- Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record showing the user's consent to disclosure of the contents of electronic communications.

In addition, if requested by the digital custodian, the personal representative would have to give the digital custodian any of the following:

- A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
- Evidence linking the account to the user.
- A finding by the court that 1) the user had a specific account with the digital custodian; 2) disclosure of the user's electronic communications would not violate certain Federal laws; 3) unless the user provided direction using an online tool, the user consented to disclosure; and 4) disclosure of the communications was reasonably necessary for administration of the estate.

Unless the user prohibited disclosure of digital assets or the court directed otherwise, a digital custodian would have to disclose to the estate's personal representative a catalogue of electronic communications sent or received by the user and the user's digital assets, other than the content of electronic communications, if the personal representative gave the digital custodian all of the following:

- A written request for disclosure in physical or electronic form.
- A copy of the user's death certificate.
- A certified copy of the personal representative's letters of authority, a small-estate affidavit, or a court order.

In addition, if requested by the digital custodian, the personal representative would have to give the digital custodian any of the following:

- A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
- Evidence linking the account to the user.
- An affidavit stating that disclosure of the user's digital assets was reasonably necessary for administration of the estate.
- A finding of the court that the user had a specific identifiable account with the digital custodian; and disclosure of the contents of the user's electronic communications was reasonably necessary for administration of the estate.

Disclosure to Agent with Power of Attorney

To the extent a power of attorney granted an agent authority over the content of electronic communications sent or received by the principal (a person who granted authority to an agent in a power of attorney) and unless directed otherwise by the principal or the court, a digital custodian would have to disclose to the agent the content of electronic communication if the agent gave the digital custodian all of the following:

- A written request for disclosure in physical or electronic form.
- An original or copy of the power of attorney granting the agent the authority over the content of the principal's electronic communications.
- An affidavit from the agent.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the principal's account, or evidence linking the account to the principal.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a digital custodian would have to disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and any of the principal's digital assets, other than the content of electronic communications, if the agent gave all of the following to the digital custodian:

- A written request for disclosure in physical or electronic form.
- An original or a copy of the power of attorney that gave the agent authority over digital assets or general authority to act on the principal's behalf.
- An affidavit from the agent.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custody to identify the principal account, or evidence linking the account to the principal.

Disclosure to a Trustee

Unless otherwise ordered by the court or provided in a trust, a digital custodian would have to disclose to the trustee that was an original user of an account any digital assets of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital custodian would have to disclose to a trustee that was not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the digital custodian in the account of the trust, if the trustee gave all of the following to the digital custodian:

- A written request for disclosure in physical or electronic form.
- A certificate of the trust that included consent to disclosure of the contents of electronic communications to the trustee.
- Certification of the trustee, under penalty of perjury, that the trust existed and that the trustee was a currently acting trustee of the trust.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account, or evidence linking the account to the trust.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital custodian would have to disclose to a trustee that was not an original user of an account a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the digital custodian in the trust's account and any digital assets, other than the content of electronic communications, in which the trust had a right or interest, if the trustee gave all of the following to the digital custodian:

- A written request for disclosure in physical or electronic form.
- A certificate of the trust under the Estates and Protected Individuals Code (EPIC).
- A certification of the trustee, under penalty of perjury, that the trust existed and that the trustee was a currently acting trustee of the trust.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account, or evidence linking the account to the trust.

Conservator's Access to Digital Assets

After an opportunity for a hearing, the court could grant a conservator access to the digital assets of a protected person.

Unless otherwise ordered by the court or directed by the user, a digital custodian would have to disclose to a conservator the catalogue of electronic communications sent or received by the protected person and any digital asset, other than the content of electronic communications, in which the protected person had a right or interest if the conservator gave all of the following to the digital custodian:

- A written request for disclosure in physical or electronic form.
- A certified copy of the court order that gave the conservator authority over the protected person's digital assets.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the protected person's account, or evidence linking the account to the protected person.

A conservator could request a digital custodian of a protected person's digital assets to suspend or terminate the protected person's account for good cause. A request would have to be accompanied by a certified copy of the conservator's letters of authority or other order appointing the conservator.

("Protected person" would include a protected individual; a legally incapacitated individual; a minor for whom a guardian, but not a conservator, has been appointed; and an individual who has a developmental disability. "Protected individual" would mean that term as defined in Section 1106 of EPIC, i.e., a minor or other individual for whom a conservator has been appointed or another protective order has been entered under Part 4 of Article V of the Code, which concerns the protection of property of an individual under a disability or a minor.)

Fiduciary Duties

The legal duties imposed on a fiduciary charged with managing tangible personal property would apply to the management of digital assets, including the duty of care, the duty of loyalty, and the duty of confidentiality.

All of the following would apply to a fiduciary's authority with respect to a user's digital assets:

- Except as otherwise provided in the proposed Act, it would be subject to the applicable terms-of-service agreement.
- It would be subject to other applicable laws, including copyright law.
- It would be limited to the scope of the fiduciary's duties.
- It could not be used to impersonate the user.

A fiduciary with authority over the property of a decedent, protected person, principal, or settlor would have the right to gain access to any digital asset in which the decedent, protected person, principal, or settlor had a right or interest and that was not held by a digital custodian or subject to a terms-of-service agreement. ("Settlor" would mean that term as defined in Section 7103 of EPIC, i.e., a person, including a testator or a trustee, who creates a trust.)

A fiduciary acting within the scope of his or her duties would be an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws.

Both of the following would apply to a fiduciary with authority over the tangible personal property of a decedent, protected person, principal, or settlor:

- The fiduciary would have the right to gain access to the property and any digital asset stored in it.

-- The fiduciary would be an authorized user for the purposes of computer fraud and unauthorized computer access laws.

A digital custodian could disclose information in an account to a user's fiduciary if the information were required to terminate an account used to gain access to digital assets licensed to the user.

A fiduciary could request a digital custodian to terminate the user's account. A request for termination would have to be in writing, in either physical or electronic form, and accompanied by all of the following:

- If the user were deceased, a copy of the user's death certificate.
- A certified copy of the personal representative's letters of authority, a small-estate affidavit, or a court order, power of attorney, or trust giving the fiduciary authority over the account.
- If requested by the digital custodian, a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account, evidence linking the account to the user, or a court finding that the user had a specific identifiable account with the digital custodian.

A fiduciary would be immune from liability for an action done in good faith in compliance with the proposed Act.

Digital Custodian's Compliance

Within 56 days after receiving information required under the proposed Act, a digital custodian would have to comply with a request made under the Act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the digital custodian failed to comply, the fiduciary or designated recipient could petition or otherwise apply to the court for an order directing compliance. An order directing compliance would have to contain a finding that compliance would not violate Federal law regarding disclosure of customer communications or records (18 USC 2702).

A digital custodian that received a certificate of trust under the proposed Act could require the trustee to provide copies or excerpts from the original trust instrument and later amendments that designated the trustee and, if the trustee were requesting content of electronic communications, that included consent to disclosure of the contents of electronic communications to the trustee.

A digital custodian or other person that demanded the trust instrument in addition to a certificate of trust or demanded excerpts would be liable for damages to the same extent as under Section 7913 of EPIC. (Under that section, a person making a demand for a trust instrument in addition to a certificate of trust or excerpts is liable for damages, costs, expenses, and legal fees if the court determines that the person was not acting pursuant to a legal requirement in demanding the trust instrument.)

A digital custodian could notify a user that a request for disclosure or to terminate an account was made under the proposed Act. A digital custodian could deny a request from a fiduciary or designated recipient for disclosure or to terminate an account if the digital custodian were aware of any lawful access to the account following the receipt of the request.

The proposed Act would not limit a digital custodian's ability to obtain, or to require a fiduciary or designated recipient requesting disclosure or termination of an account to obtain, a court order that did any of the following:

- Specified that an account belonged to the protected person or principal.

- Specified that there was sufficient consent from the protected person or principal to support the requested disclosure.
- Contained a finding required by law other than the proposed Act.

Interested Person's Petition

An interested person could file a petition in the court for an order to limit, eliminate, or modify the personal representative's powers with respect to a decedent's digital assets. On receipt of the petition, the court would have to set a date for a hearing on it. The hearing date would have to be not less than 14 days or more than 56 days after the date the petition was filed, except for good cause.

Scope of the Act

The proposed Act would apply to all of the following:

- A fiduciary acting under a will or power of attorney executed before, on, or after the Act's effective date.
- A personal representative acting for a decedent who died before, on, or after the effective date.
- A proceeding involving a conservator commenced before, on, or after the effective date.
- A trustee acting under a trust created before, on, or after the effective date.

The Act would apply to a digital custodian if the user lived in Michigan, or had lived in Michigan at the time of his or her death.

The Act would not impair an accrued right or an action taken in a proceeding before its effective date.

The Act would not apply to an employer's digital asset used by an employee in the ordinary course of business.

The Act would not change or impair a right of a digital custodian or a user under a terms-of-service agreement to gain access to and use the user's digital assets. It would not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acted or whom the fiduciary represented. A fiduciary's access to digital assets could be modified or eliminated by a user, Federal law, or a terms-of-service agreement if the user had not provided direction to disclose some or all digital assets.

The Act would not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

The Act would modify, limit, or supersede the Electronic Signatures in the Global and National Commerce Act (15 USC 7001-7006) but would not modify, limit, or supersede Section 7001(c) of that Act or authorize electronic delivery of any of the notices described in Section 7003(b) of that Act. (Section 7001(c) provides that the use of an electronic record to provide or make certain records available satisfies a statute, regulation, or other rule of law that requires certain information relating to a transaction in or affecting interstate or foreign commerce. Section 7003(b) identifies exceptions the Federal law.)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill could have a negative, though likely small, fiscal impact on the State and local governments. The provisions of the bill could lead to an increase in hearings regarding

electronic assets. If court fees were not enough to cover the additional cost, an increase in hearings could incrementally increase resource demands on court systems.

Fiscal Analyst: Ryan Bergan

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.