STATE OF OKLAHOMA

2nd Session of the 55th Legislature (2016)

SENATE BILL 1107

By: Holt

AS INTRODUCED

An Act relating to assets; creating the Uniform Fiduciary Access to Digital Assets Act; providing short title; defining terms; providing for application of the act to certain persons; providing exception; authorizing certain persons to disclose digital assets; providing effect of terms-of-service agreements for users of online tools; specifying methods a custodian of digital assets may authorize access; allowing charges for certain costs; providing method of disclosure of electronic communications of deceased user; providing alternate method of disclosure of digital assets of deceased user; specifying method of disclosure of digital assets to an agent of principal; providing alternate method; specifying method of disclosure of digital assets when held in trust; providing alternate method; specifying method of disclosure of digital assets to a conservator; stating fiduciary duties to apply to management of digital assets; providing scope of fiduciary duties; providing method of terminating certain accounts; providing method of compliance upon digital asset request; allowing for certain notification; allowing for denial of request under certain conditions; providing for immunity of liability; clarifying implication of act to federal laws; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:
SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.1 of Title 58, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Uniform Fiduciary Access to Digital Assets Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.2 of Title 58, unless there is created a duplication in numbering, reads as follows:

In the Uniform Fiduciary Access to Digital Assets Act:

1. "Absentee" means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending;

2. "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user;

3. "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney;

4. "Carries" means engages in the transmission of an electronic communication;

5. "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication and the electronic address of the person;
6. "Conservator" means a person appointed by a court pursuant to Section 362 of Title 60 of the Oklahoma Statutes to manage the estate of a living individual;

7. "Content of an electronic communication" means information concerning the substance or meaning of the communication which:
   a. has been sent or received by a user,
   b. 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
   c. is not readily accessible to the public;

8. "Court" means the district courts of the State of Oklahoma;

9. "Custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user;

10. "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user;

11. "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;

12. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;
13. "Electronic communication" has the meaning set forth in 18 U.S.C. Section 2510(12), as amended;

14. "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication;

15. "Fiduciary" means an original, additional or successor personal representative, conservator, agent, or trustee;

16. "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases or the like;

17. "Online tool" means 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;

18. "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality or other legal entity;

19. "Personal representative" means an executor, administrator, special administrator or person that performs substantially the same function under law of this state other than the Uniform Fiduciary Access to Digital Assets Act;

20. "Power of attorney" means a record that grants an agent authority to act in the place of a principal;
21. "Principal" means an individual who grants authority to an agent in a power of attorney;

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

23. "Remote computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14), as amended;

24. "Terms of service agreement" means an agreement that controls the relationship between a user and a custodian;

25. "Trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee;

26. "User" means a person that has an account with a custodian; and

27. "Will" includes a codicil, testamentary instrument that only appoints an executor and instrument that revokes or revises a testamentary instrument.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.3 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. The Uniform Fiduciary Access to Digital Assets Act applies to:
1. A fiduciary acting under a will or power of attorney executed before, on or after the effective date of this act;

2. A personal representative acting for a decedent who died before, on, or after the effective date of this act;

3. A conservatorship proceeding commenced before, on or after the effective date of this act; and

4. A trustee acting under a trust created before, on or after the effective date of this act.

B. The Uniform Fiduciary Access to Digital Assets Act applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

C. The Uniform Fiduciary Access to Digital Assets Act does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.4 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. A user may use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.
B. If a user has not used an online tool to give direction under subsection A of this section or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

C. A user's direction under subsection A or B of this section 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.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.5 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. The Uniform Fiduciary Access to Digital Assets Act does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

B. This act does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or represents.

C. A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law or by a terms-of-service agreement if the user has not provided direction under Section 4 of this act.
SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.6 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. When disclosing digital assets of a user under the Uniform Fiduciary Access to Digital Assets Act, the custodian may at its sole discretion:

1. Grant a fiduciary or designated recipient full access to the user's account;

2. 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 is charged; or

3. Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

B. A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this act.

C. A custodian need not disclose, under this act, a digital asset deleted by a user.

D. If a user directs or a fiduciary requests a custodian to disclose under this act some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden,
the custodian or fiduciary may seek an order from the court to disclose:

1. A subset limited by date of the user's digital assets;
2. All of the user's digital assets to the fiduciary or designated recipient;
3. None of the user's digital assets; or
4. All of the user's digital assets to the court for review in camera.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.7 of Title 58, unless there is created a duplication in numbering, reads as follows:

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the 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 administration or letters testamentary from the probate of the decedant's estate;
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

5. If requested by the custodian:
   a. a 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:
      (1) the user had a specific account with the custodian, identifiable by the information specified in subparagraph a of this paragraph,
      (2) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section 222, as amended, or other applicable law,
      (3) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications, or
      (4) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.
SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.8 of Title 58, unless there is created a duplication in numbering, reads as follows:

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the 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 letters of administration or letters testamentary from the probate of the decedant's estate; and

4. If requested by the custodian:
   a. a 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,
   c. an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate, or
   d. a finding by the court that:
(1) the user had a specific account with the
custodian, identifiable by the information
specified in subparagraph a of this paragraph, or
(2) disclosure of the user's digital assets is
reasonably necessary for administration of the
estate.

SECTION 9. NEW LAW     A new section of law to be codified
in the Oklahoma Statutes as Section 1091.9 of Title 58, unless there
is created a duplication in numbering, reads as follows:

To the extent a power of attorney expressly grants an agent
authority over the content of electronic communications sent or
received by the principal and unless directed otherwise by the
principal or the court, a custodian shall disclose to the agent the
content if the agent gives the custodian:

1. A written request for disclosure in physical or electronic
form;

2. An original or 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:
a. a number, username, address or other unique subscriber
or account identifier assigned by the custodian to
identify the principal's account, or

b. evidence linking the account to the principal.

SECTION 10.  NEW LAW  A new section of law to be codified
in the Oklahoma Statutes as Section 1091.10 of Title 58, unless
there is created a duplication in numbering, reads as follows:

Unless otherwise ordered by the court, directed by the principal
or provided by a power of attorney, a custodian shall 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 digital assets,
orther than the content of electronic communications, of the
principal if the agent gives the custodian:

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:
a. a number, username, address or other unique subscriber
or account identifier assigned by the custodian to
identify the principal's account, or

b. evidence linking the account to the principal.

SECTION 11. NEW LAW A new section of law to be codified
in the Oklahoma Statutes as Section 1091.11 of Title 58, unless
there is created a duplication in numbering, reads as follows:

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

SECTION 12. NEW LAW A new section of law to be codified
in the Oklahoma Statutes as Section 1091.12 of Title 58, unless
there is created a duplication in numbering, reads as follows:

Unless otherwise ordered by the court, directed by the user or
provided in a trust, a custodian shall disclose to a trustee that is
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 custodian
in the account of the trust if the trustee gives the custodian:

1. A written request for disclosure in physical or electronic
form;
2. A certified copy of the trust instrument that 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:
   a. a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account, or
   b. evidence linking the account to the trust.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.13 of Title 58, unless there is created a duplication in numbering, reads as follows:

   Unless otherwise ordered by the court, directed by the user or provided in a trust, a custodian shall disclose, to a trustee that is 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 custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

   1. A written request for disclosure in physical or electronic form;
2. A certified copy of the trust instrument;

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:
   a. a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account, or
   b. evidence linking the account to the trust.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.14 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. After an opportunity for a hearing under the state conservatorship law pursuant to Section 361 et seq. of Title 60 of the Oklahoma Statutes, the court may grant a conservator access to the digital assets of an absentee.

B. Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by an absentee and any digital assets, other than the content of electronic communications, in which the absentee has a right or interest if the conservator gives the custodian:
   1. A written request for disclosure in physical or electronic form;
2. A certified copy of the court order that gives the
conservator authority over the digital assets of the absentee; and

3. If requested by the custodian:
   a. a number, username, address or other unique subscriber
      or account identifier assigned by the custodian to
      identify the account of the absentee, or
   b. evidence linking the account to the absentee.

C. A conservator with general authority to manage the assets of
an absentee may request a custodian of the digital assets of the
absentee to suspend or terminate an account of the absentee for good
cause. A request made under this section must be accompanied by a
certified copy of the court order giving the conservator authority
over the protected person's property.

SECTION 15. NEW LAW     A new section of law to be codified
in the Oklahoma Statutes as Section 1091.15 of Title 58, unless
there is created a duplication in numbering, reads as follows:

A. The legal duties imposed on a fiduciary charged with
managing tangible property apply to the management of digital
assets, including:
   1. The duty of care;
   2. The duty of loyalty; and
   3. The duty of confidentiality.

B. A fiduciary's authority with respect to a digital asset of a
user:
1. Except as otherwise provided in Section 4 of this act, is subject to the applicable terms of service;

2. Is subject to other applicable law, including copyright law;

3. Is limited by the scope of the fiduciary's duties; and

4. May not be used to impersonate the user.

C. A fiduciary with authority over the property of a decedent, absentee, principal or settlor has the right to access any digital asset in which the decedent, absentee, principal or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

D. A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, absentee, principal or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including the Oklahoma Computer Crimes Act.

E. A fiduciary with authority over the tangible, personal property of a decedent, absentee, principal or settlor:

1. Has the right to access the property and any digital asset stored in it; and

2. Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including the Oklahoma Computer Crimes Act.
F. A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

G. A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

1. If the user is deceased, a certified copy of the death certificate of the user;

2. A certified copy of the letters of administration or letters testamentary from the probate of the decedent's estate, court order, power of attorney or trust giving the fiduciary authority over the account; and

3. If requested by the custodian:
   a. a 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 the user had a specific account with the custodian, identifiable by the information specified in subparagraph a of this paragraph.

SECTION 16. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.16 of Title 58, unless there is created a duplication in numbering, reads as follows:
A. Not later than sixty (60) days after receipt of the information required under Sections 7 through 14 of the Uniform Fiduciary Access to Digital Assets Act, a custodian shall comply with a request under this act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

B. An order under subsection A of this section directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. Section 2702, as amended.

C. A custodian may notify the user that a request for disclosure or to terminate an account was made under this act.

D. A custodian may deny a request under this act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

E. This act does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this act to obtain a court order which:

1. Specifies that an account belongs to the absentee or principal;

2. Specifies that there is sufficient consent from the absentee or principal to support the requested disclosure; and
3. Contains a finding required by law other than this act.

F. A custodian and its officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with this act.

SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.17 of Title 58, unless there is created a duplication in numbering, reads as follows:

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 18. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1091.18 of Title 58, unless there is created a duplication in numbering, reads as follows:

The Uniform Fiduciary Access to Digital Assets Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 19. This act shall become effective November 1, 2016.