

The Basics of Digital Asset Planning and Administration

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How Big An Issue are Digital Assets?

Huge!

Digital assets are difficult to identify, to value, and to custody.

- These Assets are constantly changing
- The Definition keeps morphing

Consider the Landscape¹:

- 1960 – Internet Born (1983 – commercial use began)
- 1994 – Amazon (Ebay 1995)
- 2004 – Facebook (Twitter 2006, Instagram 2010)
- 2022 – eCommerce at \$6.5 Trillion (up from 2 Trillion in 2018)
 - Social Media: 4.14 billion users (up from 2.79 billion)

¹<https://hostingfacts.com/internet-facts-stats/>



Goals

- **Define Digital Assets;**
- **Review Planning Considerations;**
- **Explain the duty of the fiduciary; and,**
- **Insert statutory framework around these assets**



What is a Digital Asset?

- **Electronic records** in which individuals have a right or interest.
- “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.²
- “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.³

²UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, REVISED (2015), (UFADAA), Page 5

³UFADAA, Page 4

Examples

- An email, digital picture, PayPal account.
- Collectibles, Gaming Tokens, Fantasy Items
- Intrinsic vs. Market Value vs. Personal Value
- Cryptocurrencies: Bitcoin, Ethereum and other virtual currencies/ securities.
 - Market Cap⁴:
 - \$ 10BB (12-31-2013)
 - \$1.04TT (12-31-2021)
 - Very difficult to identify, quantify, highly volatile, subject to significant fraud.



PLANNING CONSIDERATIONS

- **Help Client understand “their” Digital Footprint**
 - Most People don’t think they have much “digital value”
 - Help them consider the “whats”
 - Cryptocurrency
 - Collectibles
 - Airline miles
 - Chipotle Points
- You might have some surprises.


- **Who should oversee my Digital Rights after my death?**
 - Ensure your Fiduciary has the ability (and willingness)
 - Special Fiduciary?
 - Directing Party?

- **What are the Client's secret items vs. those they want to share?**
 - Catalog those they want and verify those they do not.
 - Sync up Online Tools, User Agreements and Estate Plan
 - Know what items are life estates vs. full ownership
- **Write it down or secure it somewhere!**
 - List out those sites/assets
 - Provide instruction
 - Enable rights
 - Provide Passwords
 - Tell someone!

- **Passwords**
 - Provide passwords
 - Written vs. Electronic
 - What about your Phone? (Face ID?)
 - Be prepared for two-factor authentication.

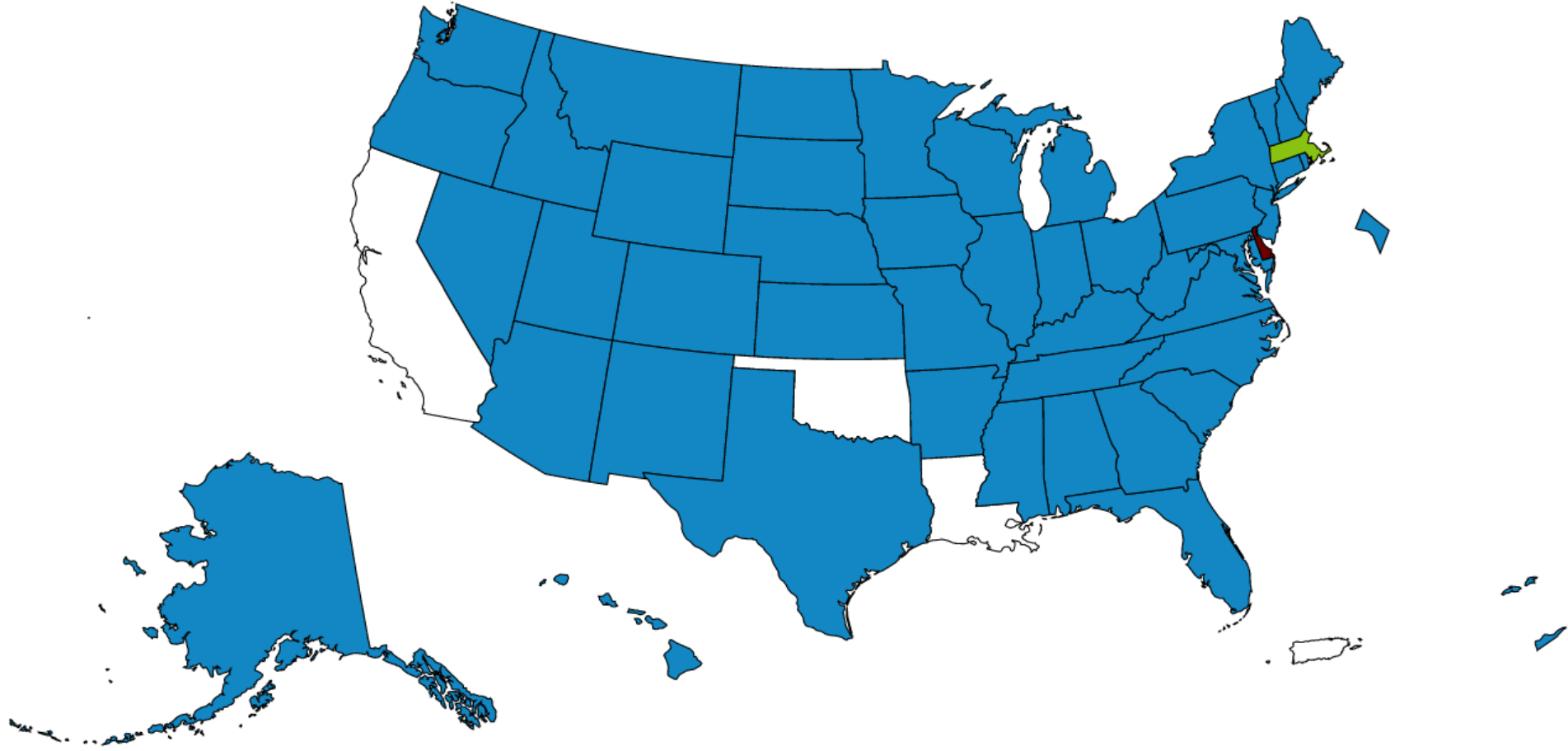
- **Access:**
 - Don't turn off the phone or other services.
 - Give others the "right" to access.
 - Confirm where those assets exist.
 - Legacy access?

- **Coordinate:**
 - Make sure estate directives coordinate with User Agreements
 - Give a trusted person the ability to access gate-keeping devices
 - Tell your attorney the names
 - Have a succession of individuals who can act
 - Keep Updating
- **Good Planning is the Key to Good Administration**



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

Enactment of UFADAA as of 2023



Enactment Map ● Introduced ● Enacted ● Prior Version Enacted

Goal: “Facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user.”⁵

- The law still protects privacy
- However, it clarifies protection of privacy in certain situations

Who is a Fiduciary under UFADAA?

- Personal Representatives;
- Conservators;
- Agents under a power of attorney; and,
- Trustees.

Defines the Custodian: person that carries, maintains, processes, receives, or stores a digital asset of a user.

Questions in Fiduciary Situations: Did the User consider his/her Digital Assets?

- If no, does the Fiduciary have the ability to act for them?
- If yes, consider: are these rights affected by :
 - Contract/Terms of Service Agreement
 - Statute and case law
 - Other limitations
 - Online Tools
 - Other document, e.g.: Will/Trust/POA



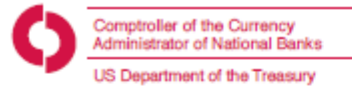
COORDINATION WITH THE OCC

What does the OCC look for?

- Expertise
- System Capabilities
- Robust Risk Management

Guidance: Comptroller's Handbook

As of January 6, 2012, this guidance applies to federal savings associations in addition to national banks.*



AM-UA

Unique and Hard-to-Value Assets

Comptroller's Handbook

August 2012



Expert Advisors

Questions:

- Can you Custody these assets?
- Can you **identify risk issues?**
- **Expertise.**
 - Both at the point of acquisition AND during administration.
 - What is the impact of these assets on administration and on the portfolio?
- Do you have the **systems** to track the assets?
- Can you **invest** these assets pursuant to your fiduciary duty?
- **Do you have ROBUST Policies and Procedures to guide your oversight of these assets?**



Risks

Balance Risk Management with Uniqueness of Digital Assets:

- Do you understand your risks?
- Consider what type of fiduciary role you have?
- Committee Structure – should exist to review Investment and Fiduciary Risk for these assets
- Understand Service Agreements for underlying accounts
 - Are there Online Tools? Did the User provide other guidance? Do they conflict?
- What about situations where there are no Service Agreements?
- Legal Review Process



UFADAA Provisions

Section 3: Applicability

UFADAA applies to **Fiduciaries** including:

- POA
- Personal Representatives/Executors
- Conservators (Guardians)
- Trustees

Section 4: User Direction

Did the User provide guidance?

- In the fiduciary document
- Through Online Tools

Section 5: Service Agreement

Did the Service Agreement provide guidance?

- Does the Service Agreement restrict access?
- How does that conflict or agree with Section 4.

Content vs. Communication Log: Restrictions differ based on what you seek and the scope of authority given by User to have access.

Section 6: Procedure for Disclosing Digital Assets

Query whether Custodian will seek to block access.

- Custodian has Sole Discretion on what access it will grant (Full/partial/copy).
- May require a court order.
- **As a fiduciary, you must determine the **scope of your authority** under an online tool or the will/trust/POA.**
- **What type of access do you seek?**
 - Full access to information?
 - Limited access (such as a catalogue of emails).

Estates (Sections 7-8):

Overall, these provisions provide clear standards where electronic information may be disclosed.

- Content (Communications):
 - Clear limitations.
 - Court Orders may be required.
 - No right to access if a violation of law
- Non-Content (other Digital Assets):
 - Still in writing
 - May still require Court Order

Content vs. Non-Content for POA (Sections 9-10)

- Content: If directly provided, Agent may request.
- Non-Content: Provide a catalogue of electronic communications (may require a court order).

Content vs. Non-Content for Trustee (Sections 11-13)

- Section 11: All Information **shall** be provided to Trustee if Trustee is also Settlor/Grantor (User)
- Section 12-13: Trustee is NOT Original User
 - Content and Non-Content: Will be provided if User provided direct consent.
 - For Content: Direction must be very specific
 - Non-Content: Direction may be more general

Content vs. Non-Content for Conservator (Section 14)

- Content: No access will be provided to Conservator
- Non-Content: Will be provided if Court Order

Fiduciary Duties:

- Identical to duties for “tangible” assets
- May not Impersonate the user
- If Authority exists, same access as the User

Custodial Duties:

- 60 day response
- May REQUIRE a court order
- Orders **MUST**:
 - Be specific
 - Show that compliance will not violate law
 - Absolve custodian from liability

Process: Ask consistent questions:

- What is it? Do you understand it?
- Can you custody the asset?
- Do you have Internal or need External Oversight?
- Unique Risks?
- Can you administer the asset?

Make sure you know how you will:


- Value
- Insure
- Custody
- Adjust to changes



Summary

Digital Assets require constant vigilance.

- 1) Prepare – We must understand these assets.
- 2) Plan – Educate the Client and coordinate their estate plan with their digital ownership and documentation.
- 3) Prepare for Administration:
 - Can we Custody these assets
 - Expertise: Do we have it or can we get it?
 - OCC Oversight
 - Review
 - Value
 - Rigorous Risk Oversight
 - Systems that will drive needed reporting
 - Legal integration



Change is ever present. Digital Assets are becoming more prevalent and more valuable. They will be part of our future estates.

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