

State of South Dakota

NINETY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2017

940Y0088

HOUSE BILL NO. 1080

Introduced by: Representatives Johns, Haugaard, Holmes, Lust, Ring, Schoenfish, Smith,
and Turbiville and Senator Kennedy

1 FOR AN ACT ENTITLED, An Act to adopt the Uniform Fiduciary Access to Digital Assets
2 Act.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That the code be amended by adding a NEW SECTION to read:

5 Terms used in this Act mean:

- 6 (1) "Account," any arrangement under a terms-of-service agreement in which a custodian
7 carries, maintains, processes, receives, or stores a digital asset of the user or provides
8 goods or services to the user;
- 9 (2) "Agent," any attorney in fact granted authority under a durable power of attorney
10 pursuant to § 59-7-2.1 or nondurable power of attorney pursuant to chapter 59-2;
- 11 (3) "Carries," engages in the transmission of an electronic communication;
- 12 (4) "Catalogue of electronic communications," information that identifies each person
13 with whom a user has had an electronic communication, the time and date of the
14 communication, and the electronic address of the person;
- 15 (5) "Conservator," any person appointed by a court to manage the estate of a living



- 1 individual or protected person, including a limited conservator;
- 2 (6) "Content of an electronic communication," information concerning the substance or
3 meaning of the communication that has been sent or received by a user; is in
4 electronic storage by a custodian providing an electronic communication service to
5 the public or is carried or maintained by a custodian providing a remote computing
6 service to the public; and is not readily accessible to the public;
- 7 (7) "Court," a court of competent jurisdiction;
- 8 (8) "Custodian," any person who carries, maintains, processes, receives, or stores a
9 digital asset of a user;
- 10 (9) "Designated recipient," any person chosen by the user of an online tool to administer
11 digital assets of the user;
- 12 (10) "Digital asset," any electronic record in which an individual has a right or interest.
13 The term does not include an underlying asset or liability unless the asset or liability
14 is itself an electronic record;
- 15 (11) "Electronic," relating to technology having electrical, digital, magnetic, wireless,
16 optical, electromagnetic, or similar capabilities;
- 17 (12) "Electronic communication," has the meaning set forth in 18 U.S.C. Section
18 2510(12), as of January 1, 2017;
- 19 (13) "Electronic-communication service," any custodian who provides to a user the ability
20 to send or receive an electronic communication;
- 21 (14) "Fiduciary," any person who is an original, additional, or successor personal
22 representative, conservator, agent, or trustee;
- 23 (15) "Information," data, text, images, videos, sounds, codes, computer programs,
24 software, databases, or similar intelligence of any nature;

- 1 (16) "Online tool," any electronic service provided by a custodian that allows the user, in
2 an agreement distinct from the terms-of-service agreement between the custodian and
3 user, to provide directions for disclosure or nondisclosure of digital assets to a third
4 person;
- 5 (17) "Person," any individual, estate, business or nonprofit entity, public corporation,
6 government or governmental subdivision, agency, or instrumentality, or other legal
7 entity;
- 8 (18) "Personal representative," any executor, administrator, special administrator, or any
9 person who performs substantially the same function under the law governing that
10 person's status other than this Act;
- 11 (19) "Power of attorney," any record that grants an agent authority to act in the place of
12 a principal;
- 13 (20) "Principal," any individual who grants authority to an agent in a power of attorney;
- 14 (21) "Protected person," any individual for whom a conservator has been appointed,
15 including an individual for whom an application for the appointment of a conservator
16 is pending;
- 17 (22) "Record," information that is inscribed on a tangible medium or that is stored in an
18 electronic or other medium and is retrievable in perceivable form;
- 19 (23) "Remote-computing service," any custodian who provides to the public computer
20 processing services or the storage of digital assets by means of an electronic
21 communications system as defined in 18 U.S.C. Section 2510(14), as of January 1,
22 2017;
- 23 (24) "Terms-of-service agreement," any agreement that controls the relationship between
24 a user and a custodian;

1 (25) "Trustee," any fiduciary, including a successor trustee, with legal title to property
2 under an agreement or declaration that creates a beneficial interest in another;

3 (26) "User," any person who has an account with a custodian;

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

6 Section 2. That the code be amended by adding a NEW SECTION to read:

7 The provisions of this Act apply to:

8 (1) Any fiduciary acting under a will or power of attorney executed before, on, or after
9 July 1, 2017;

10 (2) Any personal representative acting for a decedent who died before, on, or after
11 July 1, 2017;

12 (3) Any conservatorship proceeding commenced before, on, or after July 1, 2017; and

13 (4) A trustee acting under a trust created before, on, or after July 1, 2017.

14 Section 3. That the code be amended by adding a NEW SECTION to read:

15 This Act applies to a custodian if the user resides in this state or resided in this state at the
16 time of the user's death. This Act does not apply to any digital asset of an employer used by an
17 employee in the ordinary course of the employer's business.

18 Section 4. That the code be amended by adding a NEW SECTION to read:

19 Any user may utilize an online tool to direct a custodian to disclose or not to disclose to a
20 designated recipient some or all of the user's digital assets, including the content of electronic
21 communications. If the online tool allows the user to modify or delete a direction at all times,
22 a direction regarding disclosure using an online tool overrides a contrary direction by the user
23 in a will, trust, power of attorney, or other record.

24 If a user has not utilized an online tool to give direction under this section, or if the

1 custodian has not provided an online tool, the user may allow for or prohibit in a will, trust,
2 power of attorney, or any other record, disclosure to a fiduciary of some or all of the user's
3 digital assets, including the content of electronic communications sent or received by the user.

4 A user's direction under this section overrides a contrary provision in any terms-of-service
5 agreement that does not require the user to act affirmatively and distinctly from the user's assent
6 to the terms of service agreement.

7 Section 5. That the code be amended by adding a NEW SECTION to read:

8 This Act does not change or impair the right of any custodian or user under a
9 terms-of-service agreement to access and use digital assets of the user.

10 This Act does not give a fiduciary or designated recipient any new or expanded rights other
11 than those held by the user for whom, or for whose estate, the fiduciary or designated recipient
12 acts or represents.

13 A fiduciary's or designated recipient's access to digital assets may be modified or eliminated
14 by a user, by federal law, or by a terms-of-service agreement if the user has not provided
15 direction under section 4 of this Act.

16 Section 6. That the code be amended by adding a NEW SECTION to read:

17 If a custodian discloses digital assets of a user under this Act, the custodian may, at the
18 custodian's sole discretion:

- 19 (1) Grant a fiduciary or designated recipient full access to the user's account;
- 20 (2) Grant a fiduciary or designated recipient partial access to the user's account sufficient
21 to perform any task with which the fiduciary or designated recipient is charged; or
- 22 (3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that,
23 on the date the custodian received the request for disclosure, the user could have
24 accessed if the user were alive and had full capacity and access to the account.

1 A custodian may assess a reasonable administrative charge for the cost of disclosing digital
2 assets under this Act.

3 A custodian need not disclose under this Act a digital asset deleted by a user.

4 If a user directs or a fiduciary requests a custodian to disclose under this Act some, but not
5 all, of the user's digital assets, the custodian need not disclose the assets if segregation of the
6 assets would impose an undue burden on the custodian. If the custodian believes the direction
7 or request imposes an undue burden, the custodian or fiduciary may seek an order from the court
8 to disclose: a subset limited by date of the user's digital assets; all of the user's digital assets to
9 the fiduciary or designated recipient; none of the user's digital assets; or all of the user's digital
10 assets to the court for review in camera.

11 Section 7. That the code be amended by adding a NEW SECTION to read:

12 If a deceased user consented to or a court directs disclosure of contents of electronic
13 communications of the user, the custodian shall disclose to the personal representative of the
14 estate of the user the content of an electronic communication sent or received by the user if the
15 representative gives the custodian:

- 16 (1) A written request for disclosure in physical or electronic form;
- 17 (2) A certified copy of the death certificate of the user;
- 18 (3) A certified copy of the letter of appointment of the representative or a small estate
19 affidavit or court order;
- 20 (4) A copy of the user's will, trust, power of attorney, or other record that provides
21 evidence of the user's consent to disclosure of the content of electronic
22 communications, unless the user provided direction by utilizing an online tool; and
- 23 (5) If requested by the custodian:
 - 24 (a) A number, username, address, or other unique subscriber or account identifier

1 assigned by the custodian to identify the user's account;

2 (b) Evidence linking the account to the user; or

3 (c) A finding by the court that:

4 (i) The user had a specific account with the custodian, identifiable by the
5 information specified in this subdivision;

6 (ii) Disclosure of the content of electronic communications of the user
7 would not violate 18 U.S.C. Section 2701 et seq., 47 U.S.C. Section
8 222, or other applicable law;

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

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

13 Section 8. That the code be amended by adding a NEW SECTION to read:

14 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a
15 custodian shall disclose to the personal representative of the estate of a deceased user a
16 catalogue of electronic communications sent or received by the user and digital assets, other
17 than the content of electronic communications, of the user, if the representative gives the
18 custodian:

19 (1) A written request for disclosure in physical or electronic form;

20 (2) A certified copy of the death certificate of the user;

21 (3) A certified copy of the letter of appointment of the representative or a small estate
22 affidavit or court order; and

23 (4) If requested by the custodian:

24 (a) A number, username, address, or other unique subscriber or account identifier

- 1 assigned by the custodian to identify the user's account;
- 2 (b) Evidence linking the account to the user;
- 3 (c) An affidavit stating that disclosure of the user's digital assets is reasonably
- 4 necessary for administration of the estate; or
- 5 (d) A finding by the court that the user had a specific account with the custodian,
- 6 identifiable by the information specified in subsection (a) or that disclosure of
- 7 the user's digital assets is reasonably necessary for administration of the estate.

8 Section 9. That the code be amended by adding a NEW SECTION to read:

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

- 13 (1) A written request for disclosure in physical or electronic form;
- 14 (2) An original or copy of the power of attorney expressly granting the agent authority
- 15 over the content of electronic communications of the principal;
- 16 (3) A certification by the agent, under penalty of perjury, that the power of attorney is in
- 17 effect; and
- 18 (4) If requested by the custodian:
 - 19 (a) A number, username, address, or other unique subscriber or account identifier
 - 20 assigned by the custodian to identify the principal's account; or
 - 21 (b) Evidence linking the account to the principal.

22 Section 10. That the code be amended by adding a NEW SECTION to read:

23 Unless otherwise ordered by the court, directed by the principal, or provided by a power of
24 attorney, a custodian shall disclose to an agent with specific authority over digital assets or

1 general authority to act on behalf of a principal a catalogue of electronic communications sent
2 or received by the principal and digital assets, other than the content of electronic
3 communications, of the principal if the agent gives the custodian:

- 4 (1) A written request for disclosure in physical or electronic form;
- 5 (2) An original or copy of the power of attorney that gives the agent specific authority
6 over digital assets or general authority to act on behalf of the principal;
- 7 (3) A certification by the agent, under penalty of perjury, that the power of attorney is in
8 effect; and
- 9 (4) If requested by the custodian:
 - 10 (a) A number, username, address, or other unique subscriber or account identifier
11 assigned by the custodian to identify the principal's account; or
 - 12 (b) Evidence linking the account to the principal;

13 Section 11. That the code be amended by adding a NEW SECTION to read:

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

18 Section 12. That the code be amended by adding a NEW SECTION to read:

19 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a
20 custodian shall disclose to a trustee that is not an original user of an account the content of an
21 electronic communication sent or received by an original or successor user and carried,
22 maintained, processed, received, or stored by the custodian in the account of the trust if the
23 trustee gives the custodian:

- 24 (1) A written request for disclosure in physical or electronic form;

1 (2) A certified copy of the trust instrument or a certification of the trust pursuant to
2 § 55-4-51 that includes consent to disclosure of the content of electronic
3 communications to the trustee;

4 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the
5 trustee is a currently acting trustee of the trust; and

6 (4) If requested by the custodian:

7 (a) A number, username, address, or other unique subscriber or account identifier
8 assigned by the custodian to identify the trust's account; or

9 (b) Evidence linking the account to the trust;

10 Section 13. That the code be amended by adding a NEW SECTION to read:

11 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a
12 custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of
13 electronic communications sent or received by an original or successor user and stored, carried,
14 or maintained by the custodian in an account of the trust and any digital assets, other than the
15 content of electronic communications, in which the trust has a right or interest if the trustee
16 gives the custodian:

17 (1) A written request for disclosure in physical or electronic form;

18 (2) A certified copy of the trust instrument or a certification of the trust pursuant to
19 § 55-4-51;

20 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the
21 trustee is a currently acting trustee of the trust; and

22 (4) If requested by the custodian:

23 (a) A number, username, address, or other unique subscriber or account identifier
24 assigned by the custodian to identify the trust's account; or

1 (b) Evidence linking the account to the trust;

2 Section 14. That the code be amended by adding a NEW SECTION to read:

3 After an opportunity for a hearing under chapter 29A-5, a court may grant a conservator
4 access to the digital assets of a protected person. Unless otherwise ordered by the court or
5 directed by the user, a custodian shall disclose to a conservator the catalogue of electronic
6 communications sent or received by a protected person and any digital assets, other than the
7 content of electronic communications, in which the protected person has a right or interest if the
8 conservator gives the custodian:

9 (1) A written request for disclosure in physical or electronic form;

10 (2) A certified copy of the court order that gives the conservator authority over the digital
11 assets of the protected person; and

12 (3) If requested by the custodian:

13 (a) A number, username, address, or other unique subscriber or account identifier
14 assigned by the custodian to identify the account of the protected person; or

15 (b) Evidence linking the account to the protected person;

16 Section 15. That the code be amended by adding a NEW SECTION to read:

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

22 Section 16. That the code be amended by adding a NEW SECTION to read:

23 The legal duties imposed on a fiduciary charged with managing tangible property apply to
24 the management of digital assets, including: the duty of care, the duty of loyalty, and the duty

1 of confidentiality.

2 Section 17. That the code be amended by adding a NEW SECTION to read:

3 A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

4 (1) Is subject to the applicable terms of service except as otherwise provided in section
5 4 of this Act;

6 (2) Is subject to other applicable law, including copyright law;

7 (3) Is limited by the scope of the fiduciary's duties, if a fiduciary; and

8 (4) May not be used to impersonate the user.

9 Section 18. That the code be amended by adding a NEW SECTION to read:

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

14 Section 19. That the code be amended by adding a NEW SECTION to read:

15 A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the
16 property of the decedent, protected person, principal, or settlor for the purpose of any computer
17 fraud or unauthorized computer access law.

18 Section 20. That the code be amended by adding a NEW SECTION to read:

19 A fiduciary with authority over the tangible, personal property of a decedent, protected
20 person, principal, or settlor has the right to access the property and any digital asset stored in it,
21 and is an authorized user for the purpose of any computer fraud or unauthorized computer
22 access law.

23 Section 21. That the code be amended by adding a NEW SECTION to read:

24 A custodian may disclose information in an account to a fiduciary of the user when the

1 information is required to terminate an account used to access digital assets licensed to the user.

2 Section 22. That the code be amended by adding a NEW SECTION to read:

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

5 (1) If the user is deceased, a certified copy of the death certificate of the user;

6 (2) A certified copy of the letter of appointment of the representative or a small estate
7 affidavit, court order, power of attorney, or trust giving the fiduciary authority over
8 the account; and

9 (3) If requested by the custodian, a number, username, address, or other unique
10 subscriber or account identifier assigned by the custodian to identify the user's
11 account; evidence linking the account to the user; or a finding by the court that the
12 user had a specific account with the custodian, identifiable by the information
13 specified in this subdivision.

14 Section 23. That the code be amended by adding a NEW SECTION to read:

15 A custodian shall comply with a request under this Act from a fiduciary or designated
16 recipient to disclose digital assets or terminate an account not later than sixty days after receipt
17 of information required under this Act. A fiduciary or designated recipient may apply to a court
18 for an order directing compliance if the custodian fails to comply with the fiduciary's request
19 within sixty days. An order under this section directing compliance must contain a finding that
20 compliance is not in violation of 18 U.S.C. Section 2702.

21 Section 24. That the code be amended by adding a NEW SECTION to read:

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

24 Section 25. That the code be amended by adding a NEW SECTION to read:

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

4 Section 26. That the code be amended by adding a NEW SECTION to read:

5 This Act does not limit a custodian's ability to obtain or require a fiduciary or designated
6 recipient requesting disclosure or termination under this Act to obtain a court order that specifies
7 that an account belongs to the protected person or principal, specifies that there is sufficient
8 consent from the protected person or principal to support the requested disclosure, and contains
9 a finding required by law other than this Act.

10 Section 27. That the code be amended by adding a NEW SECTION to read:

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

13 Section 28. That § 59-3-11 be amended to read:

14 59-3-11. An authority expressed in general terms, however broad, does not authorize an
15 agent to do any act ~~which~~ that a trustee is forbidden to do by the law on trusts or that an agent
16 is forbidden to do by the law on fiduciary access to digital assets.