VIRGINIA UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Effective July 1, 2017, Virginia will repeal the Privacy Expectation Afterlife and Choices Act and adopt the more robust and encompassing Uniform Fiduciary Access to Digital Assets Act ("Act"). The Act modernizes fiduciary law in the age of the internet, working in conjunction with Virginia's existing laws on probate, guardianship and conservatorship, trusts, and powers of attorney. It does not change banking, contract, criminal, or other laws applicable to fiduciaries, but fills in the blanks for access to digital assets. Some digital assets have real, tangible value and present unique privacy concerns. Often, terms of service agreements govern digital assets rather than state law, creating problems when a user passes away or loses the ability to manage his or her assets.

Under the Act, a "digital asset" is an electronic record a user owns or has a right or interest in and a "custodian" is an individual or company who processes, receives, or stores the digital asset for the user. The definition of "digital asset" does not include an underlying asset unless the asset is itself an electronic record. For example, an online bank account is a digital asset, but the funds in the account are not. Conversely, bitcoins are digital assets.

The Act addresses access to digital assets for four types of fiduciaries: personal representatives of deceased persons' estates, guardians and conservators of protected persons' estates, agents under powers of attorney, and trustees.

The Act provides legal authority for fiduciaries to manage digital assets in accordance with the user's estate plan while protecting the user's private communications from unintended disclosure. The user can specify whether the custodian should preserve, distribute or destroy his or her digital assets. How the user indicates his or her directions for digitals assets depends on whether the custodian provides an online tool for access to the assets.

- If the custodian provides an online tool (separate from the general terms of service) that allows the user to grant another person access to the user's digital assets or direct the custodian to delete the user's digital assets, the Act makes the user's online instructions via the online tool legally enforceable.

- If the custodian does not provide an online tool or if the user declines to use the tool, the user may give legally enforceable directions for the preservation, distribution or destruction of digital assets in a will, trust, power of attorney or other record.

- If the user has not provided any direction, either through an online tool or the user's estate plan, the custodian's terms of service for the user's account determine whether the fiduciary may access the digital assets.

When disclosing the user's digital assets, the custodian has the discretion to grant the fiduciary full or partial access to the user's account, as long as the access allows the fiduciary to perform his or her required tasks. The custodian may also provide the fiduciary with a copy of the digital assets the user could have accessed had he or she been alive or had full capacity to access the account at that time. The Act contemplates that custodians have different business models and methods for disclosure. It allows custodians to assess reasonable administrative charges for disclosure, recognizing that such requests may be outside of the custodian's ordinary course of business. If a

user deletes an asset, the custodian does not need to disclose the deleted asset to the fiduciary, even if the custodian can recover it. Under the Act, deletion of an asset is an indication that the user did not intend for the fiduciary to have access to the asset. If a custodian receives an unduly burdensome request, it may decline to disclose the digital assets. Both the fiduciary and custodian can seek guidance from a court maintaining jurisdiction over the assets.

Pursuant to the Act, the custodian must respond to the fiduciary's request for access to the digital assets within sixty days of receiving proper proof of the fiduciary's authority to access the assets. Depending on the fiduciary's role, proper proof may be in the form of a certified letter of appointment, court order, power of attorney expressly granting the requisite authority, or a certified copy of the trust instrument. Custodians of digital assets that comply with a fiduciary's request for access are immune from liability under laws that prohibit unauthorized access if the fiduciary provides proper proof under the Act.

It is important to remember that just because a fiduciary has access to digital assets does not necessarily mean the fiduciary owns the assets or may engage in transactions with the assets. The Act is an overlay statute, and the fiduciary's authority to engage in transactions involving the underlying assets continues to be governed by existing laws that specify the fiduciary's rights and obligations to marshal, protect and distribute assets of a decedent or protected person. For example, under other applicable laws, a fiduciary may have certain legal rights to a user's bank account. The Act affects the fiduciary's access to electronic records for the bank account. It does not affect the fiduciary's authority under other laws to engage in transactions involving the funds in the account, even though the fiduciary may make such transactions electronically.

For more information about the Uniform Fiduciary Access to Digital Assets Act, contact Mel Tull, VBA General Counsel, at mtull@vabankers.org or (804) 819-4710. This article has been prepared for informational purposes only and is not legal advice.