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HOUSE BILL NO. 1608

Offered January 11, 2017

Prefiled January 3, 2017

A *BILL to amend and reenact § 64.2-1622 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 1 of Title 64.2 an article numbered 3.1, consisting of sections numbered 64.2-116 through 64.2-132; and to repeal Article 3 (§§ 64.2-109 through 64.2-115) of Chapter 1 of Title 64.2 of the Code of Virginia, relating to creation of the Uniform Fiduciary Access to Digital Assets Act.*

Patron—Leftwich

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-1622 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 1 of Title 64.2 an article numbered 3.1, consisting of sections numbered 64.2-116 through 64.2-132, as follows:

Article 3.1.

Uniform Fiduciary Access to Digital Assets Act.

§ 64.2-116. Definitions.

As used in this article, unless the context requires otherwise:

"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.

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. "Agent" includes an original agent, a coagent, a successor agent, and a person to which an agent's authority is delegated.

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

"Catalog 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.

"Conservator" means a person appointed by a court to manage the estate of a living individual.

"Conservator" includes a limited conservator.

"Content of an electronic communication" means information concerning the substance or meaning of the communication that (i) has been sent or received by a user; (ii) 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 (iii) is not readily accessible to the public.

"Court" means the circuit court for the county or city having jurisdiction over the fiduciary in matters relating to the content of this article.

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

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

"Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Electronic communication" has the same meaning as the definition provided in 18 U.S.C. § 2510(12).

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

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

"Guardian" means a person appointed by a court to manage the person of a living individual adult pursuant to Chapter 20 (§ 64.2-2000 et seq.) or a person appointed by a court to manage the estate of a minor pursuant to Chapter 17 (§ 64.2-1700 et seq.). "Guardian" includes a limited guardian.

"Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or something that is substantially similar.

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

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

64 *"Personal representative" means an executor, administrator, curator, designated successor or*
65 *successor under the Virginia Small Estate Act (§ 64.2-600 et seq.), or person that performs*
66 *substantially the same function under the laws of the Commonwealth other than this article.*

67 *"Power of attorney" means a record that grants an agent authority to act in the place of a principal.*

68 *"Principal" means an individual who grants authority to an agent in a power of attorney.*

69 *"Protected person" means an individual for whom a conservator or guardian has been appointed.*

70 *"Protected person" includes an individual for whom an application for the appointment of a conservator*
71 *or guardian is pending.*

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

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

77 *"Terms-of-service agreement" means an agreement that controls the relationship between a user and*
78 *a custodian.*

79 *"Trustee" means a fiduciary with legal title to property under an agreement or declaration that*
80 *creates a beneficial interest in another. "Trustee" includes a successor trustee.*

81 *"User" means a person that has an account with a custodian.*

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

84 **§ 64.2-117. Applicability.**

85 *A. This article applies to:*

86 *1. A fiduciary acting under a will or power of attorney executed before, on, or after July 1, 2017;*

87 *2. A personal representative acting for a decedent who died before, on, or after July 1, 2017;*

88 *3. A conservatorship proceeding commenced before, on, or after July 1, 2017;*

89 *4. A guardianship proceeding commenced before, on, or after July 1, 2017; and*

90 *5. A trustee acting under a trust created before, on, or after July 1, 2017.*

91 *B. This article applies to a custodian if the user resides in the Commonwealth or resided in the*
92 *Commonwealth at the time of the user's death.*

93 *C. This article does not apply to a digital asset of an employer used by an employee in the ordinary*
94 *course of the employer's business.*

95 **§ 64.2-118. User direction for disclosure of digital assets.**

96 *A. A user may use an online tool to direct the custodian to disclose to a designated recipient or not*
97 *to disclose some or all of the user's digital assets, including the content of electronic communications. If*
98 *the online tool allows the user to modify or delete a direction at all times, a direction regarding*
99 *disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of*
100 *attorney, or other record.*

101 *B. If a user has not used an online tool to give direction under subsection A or if the custodian has*
102 *not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other*
103 *record disclosure to a fiduciary of some or all of the user's digital assets, including the content of*
104 *electronic communications sent or received by the user.*

105 *C. A user's direction under subsection A or B overrides a contrary provision in a terms-of-service*
106 *agreement that does not require the user to act affirmatively and distinctly from the user's assent to the*
107 *terms of service.*

108 **§ 64.2-119. Terms-of-service agreement.**

109 *A. This article does not change or impair a right of a custodian or a user under a terms-of-service*
110 *agreement to access and use digital assets of the user.*

111 *B. This article does not give a fiduciary or a designated recipient any new or expanded rights other*
112 *than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or*
113 *represents.*

114 *C. A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a*
115 *user, by federal law, or by a terms-of-service agreement if the user has not provided direction under*
116 *§ 64.2-118.*

117 **§ 64.2-120. Procedure for disclosing digital assets.**

118 *A. When disclosing digital assets of a user under this article, the custodian may, at its sole*
119 *discretion:*

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

121 2. Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform
122 the tasks with which the fiduciary or designated recipient is charged; or

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

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

128 C. A custodian need not disclose under this article a digital asset deleted by a user.

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

133 1. A subset limited by date of the user's digital assets;

134 2. All of the user's digital assets to the fiduciary or designated recipient;

135 3. None of the user's digital assets; or

136 4. All of the user's digital assets to the court for review in camera.

137 **§ 64.2-121. Disclosure of content of electronic communications of deceased user.**

138 If a deceased user consented to or a court directs disclosure of the contents of electronic
139 communications of the user, the custodian shall disclose to the personal representative of the estate of
140 the user the content of electronic communications sent or received by the user if the representative gives
141 the custodian:

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

143 2. A certified copy of the death certificate of the user;

144 3. A certified copy of the letter of appointment of the representative or a small-estate affidavit or
145 court order;

146 4. Unless the user provided direction using an online tool, a copy of the user's will, trust, power of
147 attorney, or other record evidencing the user's consent to disclosure of the content of electronic
148 communications; and

149 5. If requested by the custodian:

150 a. A number, username, address, or other unique subscriber or account identifier assigned by the
151 custodian to identify the user's account;

152 b. Evidence linking the account to the user; or

153 c. A finding by the court that (i) the user had a specific account with the custodian, identifiable by
154 the information specified in subdivision a; (ii) disclosure of the content of electronic communications of
155 the user would not violate 18 U.S.C. § 2701 et seq., 47 U.S.C. § 222, or other applicable law; (iii)
156 unless the user provided direction using an online tool, the user consented to disclosure of the content
157 of electronic communications; or (iv) disclosure of the content of electronic communications of the user
158 is reasonably necessary for administration of the estate.

159 **§ 64.2-122. Disclosure of other digital assets of deceased user.**

160 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian
161 shall disclose to the personal representative of the estate of a deceased user a catalog of electronic
162 communications sent or received by the user and digital assets, other than the content of electronic
163 communications, of the user, if the representative gives the custodian:

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

165 2. A certified copy of the death certificate of the user;

166 3. A certified copy of the letter of appointment of the representative or a small-estate affidavit or
167 court order; and

168 4. If requested by the custodian:

169 a. A number, username, address, or other unique subscriber or account identifier assigned by the
170 custodian to identify the user's account;

171 b. Evidence linking the account to the user;

172 c. An affidavit stating that disclosure of the user's digital assets is reasonably necessary for
173 administration of the estate; or

174 d. A finding by the court that (i) the user had a specific account with the custodian, identifiable by
175 the information specified in subdivision a or (ii) disclosure of the user's digital assets is reasonably
176 necessary for administration of the estate.

177 **§ 64.2-123. Disclosure of content of electronic communications of principal.**

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

- 182 1. A written request for disclosure in physical or electronic form;
 183 2. An original or copy of the power of attorney expressly granting the agent authority over the
 184 content of electronic communications of the principal;
 185 3. A certification by the agent that the power of attorney is in effect; and
 186 4. If requested by the custodian:

- 187 a. A number, username, address, or other unique subscriber or account identifier assigned by the
 188 custodian to identify the principal's account; or
 189 b. Evidence linking the account to the principal.

190 **§ 64.2-124. Disclosure of other digital assets of principal.**

191 Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney,
 192 a custodian shall disclose to an agent with specific authority over digital assets or general authority to
 193 act on behalf of a principal a catalog of electronic communications sent or received by the principal
 194 and digital assets, other than the content of electronic communications, of the principal if the agent
 195 gives the custodian:

- 196 1. A written request for disclosure in physical or electronic form;
 197 2. An original or copy of the power of attorney that gives the agent specific authority over digital
 198 assets or general authority to act on behalf of the principal;
 199 3. A certification by the agent that the power of attorney is in effect; and
 200 4. If requested by the custodian:

- 201 a. A number, username, address, or other unique subscriber or account identifier assigned by the
 202 custodian to identify the principal's account; or
 203 b. Evidence linking the account to the principal.

204 **§ 64.2-125. Disclosure of digital assets held in trust when trustee is original user.**

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

208 **§ 64.2-126. Disclosure of contents of electronic communications held in trust when trustee is not
 209 original user.**

210 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall
 211 disclose to a trustee that is not an original user of an account the content of electronic communications
 212 sent or received by an original or successor user and carried, maintained, processed, received, or stored
 213 by the custodian in the account of the trust if the trustee gives the custodian:

- 214 1. A written request for disclosure in physical or electronic form;
 215 2. A certified copy of the trust instrument, or a certification of the trust under § 64.2-804 that
 216 includes consent to disclosure of the content of electronic communications to the trustee;
 217 3. A certification by the trustee that the trust exists and the trustee is a currently acting trustee of the
 218 trust; and

- 219 4. If requested by the custodian:
 220 a. A number, username, address, or other unique subscriber or account identifier assigned by the
 221 custodian to identify the trust's account; or
 222 b. Evidence linking the account to the trust.

223 **§ 64.2-127. Disclosure of other digital assets held in trust when trustee is not original user.**

224 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall
 225 disclose, to a trustee that is not an original user of an account, a catalog of electronic communications
 226 sent or received by an original or successor user and stored, carried, or maintained by the custodian in
 227 an account of the trust and any digital assets, other than the content of electronic communications, in
 228 which the trust has a right or interest if the trustee gives the custodian:

- 229 1. A written request for disclosure in physical or electronic form;
 230 2. A certified copy of the trust instrument or a certification of the trust under § 64.2-804;
 231 3. A certification by the trustee that the trust exists and the trustee is a currently acting trustee of the
 232 trust; and
 233 4. If requested by the custodian:

- 234 a. A number, username, address, or other unique subscriber or account identifier assigned by the
 235 custodian to identify the trust's account; or
 236 b. Evidence linking the account to the trust.

237 **§ 64.2-128. Disclosure of digital assets to conservator or guardian of protected person.**

238 A. After an opportunity for a hearing under Chapter 20 (§ 64.2-2000 et seq.), the court may grant a
 239 conservator or guardian access to the digital assets of a protected person.

240 B. Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a
 241 conservator or guardian the catalog of electronic communications sent or received by a protected
 242 person and any digital assets, other than the content of electronic communications, in which the
 243 protected person has a right or interest if the conservator or guardian gives the custodian:

- 244 1. A written request for disclosure in physical or electronic form;
- 245 2. A certified copy of the court order that gives the conservator or guardian authority over the
- 246 digital assets of the protected person; and
- 247 3. If requested by the custodian:
- 248 a. A number, username, address, or other unique subscriber or account identifier assigned by the
- 249 custodian to identify the account of the protected person; or
- 250 b. Evidence linking the account to the protected person.
- 251 C. A conservator with general authority to manage the assets of a protected person or a guardian
- 252 with specific authority granted by the court may request a custodian of the digital assets of the
- 253 protected person to suspend or terminate an account of the protected person for good cause. A request
- 254 made under this section shall be accompanied by a certified copy of the court order giving the
- 255 conservator or guardian authority over the protected person's property.
- 256 **§ 64.2-129. Fiduciary duty and authority.**
- 257 A. The legal duties imposed on a fiduciary charged with managing tangible property apply to the
- 258 management of digital assets, including:
- 259 1. The duty of care;
- 260 2. The duty of loyalty; and
- 261 3. The duty of confidentiality.
- 262 B. A fiduciary's or designated recipient's authority with respect to a digital asset of a user:
- 263 1. Except as otherwise provided in § 64.2-118, is subject to the applicable terms-of-service
- 264 agreement;
- 265 2. Is subject to other applicable law, including copyright law;
- 266 3. In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
- 267 4. May not be used to impersonate the user.
- 268 C. A fiduciary with authority over the property of a decedent, protected person, principal, or settlor
- 269 has the right to access any digital asset in which the decedent, protected person, principal, or settlor
- 270 had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.
- 271 D. A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property
- 272 of the decedent, protected person, principal, or settlor for the purpose of applicable computer-fraud and
- 273 unauthorized computer-access laws, including Article 7.1 (§ 18.2-152.1 et seq.) of Chapter 5 of Title
- 274 18.2.
- 275 E. A fiduciary with authority over the tangible personal property of a decedent, protected person,
- 276 principal, or settlor:
- 277 1. Has the right to access the property and any digital asset stored in it; and
- 278 2. Is an authorized user for the purposes of computer-fraud and unauthorized computer-access laws,
- 279 including Article 7.1 (§ 18.2-152.1 et seq.) of Chapter 5 of Title 18.2.
- 280 F. A custodian may disclose information in an account to a fiduciary of the user when the
- 281 information is required to terminate an account used to access digital assets licensed to the user.
- 282 G. A fiduciary of a user may request a custodian to terminate the user's account. A request for
- 283 termination shall be in writing, in either physical or electronic form, and accompanied by:
- 284 1. If the user is deceased, a certified copy of the death certificate of the user;
- 285 2. A certified copy of the letter of appointment of the representative or a small-estate affidavit or
- 286 court order, court order, power of attorney, or trust giving the fiduciary authority over the account; and
- 287 3. If requested by the custodian:
- 288 a. A number, username, address, or other unique subscriber or account identifier assigned by the
- 289 custodian to identify the user's account;
- 290 b. Evidence linking the account to the user; or
- 291 c. A finding by the court that the user had a specific account with the custodian, identifiable by the
- 292 information specified in subdivision a.
- 293 **§ 64.2-130. Custodian compliance and immunity.**
- 294 A. Not later than 60 days after receipt of the information required under §§ 64.2-121 through
- 295 64.2-129, a custodian shall comply with a request under this article from a fiduciary or designated
- 296 recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary
- 297 or designated recipient may apply to the court for an order directing compliance.
- 298 B. An order under subsection A directing compliance shall contain a finding that compliance is not
- 299 in violation of 18 U.S.C. § 2702.
- 300 C. A custodian may notify the user that a request for disclosure or to terminate an account was
- 301 made under this article.
- 302 D. A custodian may deny a request under this article from a fiduciary or designated recipient for
- 303 disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to
- 304 the account following the receipt of the fiduciary's request.

305 *E. This article does not limit a custodian's ability to obtain or require a fiduciary or designated*
 306 *recipient requesting disclosure or termination under this article to obtain a court order that:*

307 *1. Specifies that an account belongs to a protected person or principal;*

308 *2. Specifies that there is sufficient consent from the protected person or principal to support the*
 309 *requested disclosure; and*

310 *3. Contains a finding required by law other than this article.*

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

313 **§ 64.2-131. Uniformity of application and construction.**

314 *In applying and construing this article, consideration shall be given to the need to promote*
 315 *uniformity of the law with respect to its subject matter among states that enact it.*

316 **§ 64.2-132. Relation to Electronic Signatures in Global and National Commerce Act.**

317 *This article modifies, limits, or supersedes the Electronic Signatures in Global and National*
 318 *Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede § 101(c) of that act,*
 319 *15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that*
 320 *act, 15 U.S.C. § 7003(b).*

321 **§ 64.2-1622. Authority that requires specific grant; grant of general authority.**

322 *A. Subject to the provisions of subsection H, an agent under a power of attorney may do the*
 323 *following on behalf of the principal or with the principal's property only if the power of attorney*
 324 *expressly grants the agent the authority and exercise of the authority is not otherwise prohibited or*
 325 *limited by another statute, agreement, or instrument to which the authority or property is subject:*

326 *1. Create, amend, revoke, or terminate an inter vivos trust;*

327 *2. Make a gift;*

328 *3. Create or change rights of survivorship;*

329 *4. Create or change a beneficiary designation;*

330 *5. Delegate authority granted under the power of attorney;*

331 *6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor*
 332 *benefit under a retirement plan; or*

333 *7. Exercise fiduciary powers that the principal has authority to delegate; or*

334 *8. Have authority over the content of an electronic communication of the principal as provided by*
 335 *§ 64.2-123.*

336 *B. Notwithstanding a grant of authority to do an act described in subsection A or H, unless the*
 337 *power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the*
 338 *principal may not exercise authority under a power of attorney to create in the agent, or in an individual*
 339 *to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by*
 340 *gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.*

341 *C. Subject to subsections A, B, D, and E, if a power of attorney grants to an agent authority to do*
 342 *all acts that a principal could do, the agent has the general authority described in § 64.2-124 and*
 343 *§§ 64.2-1625 through 64.2-1637.*

344 *D. Unless the power of attorney otherwise provides and subject to subsection H, a grant of authority*
 345 *to make a gift is subject to § 64.2-1638.*

346 *E. Subject to subsections A, B, and D, if the subjects over which authority is granted in a power of*
 347 *attorney are similar or overlap, the broadest authority controls.*

348 *F. Authority granted in a power of attorney is exercisable with respect to property that the principal*
 349 *has when the power of attorney is executed or acquires later, whether or not the property is located in*
 350 *the Commonwealth and whether or not the authority is exercised or the power of attorney is executed in*
 351 *the Commonwealth.*

352 *G. An act performed by an agent pursuant to a power of attorney has the same effect and inures to*
 353 *the benefit of and binds the principal and the principal's successors in interest as if the principal had*
 354 *performed the act.*

355 *H. Notwithstanding the provisions of subsection A, if a power of attorney grants to an agent*
 356 *authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any*
 357 *amount of any of the principal's property to any individuals or to organizations described in §§ 170(c)*
 358 *and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both,*
 359 *in accordance with the principal's personal history of making or joining in the making of lifetime gifts.*
 360 *This subsection shall not in any way impair the right or power of any principal, by express words in the*
 361 *power of attorney, to authorize, or limit the authority of, an agent to make gifts of the principal's*
 362 *property.*

363 **2. That Article 3 (§§ 64.2-109 through 64.2-115) of Chapter 1 of Title 64.2 of the Code of Virginia**
 364 **is repealed.**