

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

02/01/17
ORIGINAL DATE 02/09/17
LAST UPDATED 03/13/17 **HB** _____

SPONSOR Wirth

SHORT TITLE Uniform Fiduciary Access to Digital Assets **SB** 60/aSJC/aHBIC

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal to None	Minimal to None	Minimal to None	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Taxation and Revenue Department (TRD)
 Department of Information Technology (DoIT)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of HBIC Amendment

House Business and Industry Committee amendment to Senate Judiciary Committee amendment to Senate Bill 60 strikes the SJC amendment, and strikes “good will” and inserts “with reasonable care” when describing the acts or omission by a custodian and its officers, employees and agents, which would make them immune from liability.

Synopsis of SJC Amendment

Senate Judiciary Committee amendment to Senate Bill 60 removes subsection F of Section 16 of the original bill which would have made a custodian and its officers, employees and agents immune from liability for an act or omission done in good faith in compliance with the Revised Uniform Fiduciary Access to Digital Assets Act.

Synopsis of Bill

Senate Bill 60 creates a new section to the Uniform Probate Code relating to fiduciaries and enacting the Revised Uniform Fiduciary Access to Digital Assets Act. SB60 addresses technological and electronic changes in society which have created a unique asset that is not currently addressed by property law, digital assets. A significant percentage of the population has at least some property and communications stored as data on a computer server and accessed via the internet. SB60 defines digital assets as “an electronic record in which an individual has a right or interest”. Access to digital assets varies and is usually controlled by a private service provider or company. A custodian is defined as “a person that carries, maintains, processes, receives or stores a digital asset of a user”. Problems arise when the owner of the digital asset dies or loses the ability to manage a digital asset. This uniform law seeks to merge deficiencies in property law and the probate code that does not specifically address the unique issues associated with digital assets.

SB60 highlights the fiduciary’s role in gaining access to digital assets. A fiduciary is a person or entity with the legal authority to manage another’s property, and the duty to act in that person’s best interest. Section 3 of SB60 delineates that this legislation applies to:

1. a fiduciary acting under a will or power of attorney;
2. a personal representative appointed for a decedent;
3. a conservator appointed for a protected person; and
4. a trustee appointed under a trust.

User direction for disclosure of digital assets

This legislation does not eliminate or restrict a person from making plans regarding the management and disposition of digital assets but rather is triggered when there are no instructions in place or where there are conflicting instructions when the owner of the digital asset dies or loses the ability to manage a digital asset. Section 4 of SB60 outlines the following provisions:

- A. A users may use an online tool to direct the custodian to disclose or not disclose some or all of the user’s digital assets. If the custodian’s online tool allows the user to modify directions at all times, this modification would override any contrary directions previously direct in a will, trust, power of attorney or other record.
- B. If the custodian does not provide an online tool, or if the user neglects to use the online tool, the user may give directions allowing or prohibiting disclosure of the user’s digital assets in a will, trust, power of attorney, or other record disclosure.
- C. A user’s direction under Subsection A or B overrides any provision in a terms-of-service agreement.

Digital assets and a fiduciary

Section 6 of SB60 allows full access, partial access, or a copy of the user’s digital asset to be disclosed by the custodian to a fiduciary. This section clearly states that the custodian is under no duty to disclose any digital asset deleted by a user. If only partial disclosure of a digital asset is granted by the user or is requested by a fiduciary, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. In a case of partial disclosure of digital assets, a custodian may seek a court order to clarify the extent of the release of these digital assets to the fiduciary. This section also allows the custodian to assess a reasonable administrative charge for actions taken under this new act.

Electronic communications of a deceased user

Section 7 of SB60 focuses on the contents of electronic communications of a deceased user. SB 60 indicates that the contents of electronic communications shall only be disclosed if the deceased user consented to the disclosure or the court directs the custodian to disclose this information. A personal representative of an estate must provide the custodian: a written request to disclose the contents of the electronic communication, a certified copy of the death certificate of the user, a certified copy of the letters of administration or letters testamentary of the personal representative or an affidavit of small estate and a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure.

Digital assets of a deceased user

Section 8 of SB60 focuses on the disclosure of a catalogue of electronic communications to the personal representative of the estate of a deceased user. A catalogue of electronic communications is defined as "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". SB60 is intended to provide the personal representative of an estate with an additional tool to identify any unknown or undisclosed assets of a decedent while keeping the integrity of the decedent's privacy intact. In other words, the custodian need only disclose a list of the electronic communications of a decedent rather than disclosing the contents of the actual message. This section mirrors the requirements of Section 7 by requiring the personal representative to provide a list of documents to the custodian before the catalogue of electronic communications can be provided.

Disclosure involving a principal and agent

Section 9 of SB60 deals with disclosure of the content of electronic communications to a person with power of attorney. This section of SB60 focuses on a person that is still alive but has granted disclosure of the contents of electronic communications in a power of attorney to another person. The person with power of attorney shall give the custodian: a written request to disclose the contents of electronic communications sent or received by the principal and a copy of the power of attorney expressly granting the agent authority to access the contents of the electronic communications. If the power of attorney or order of the court does not grant specific authority to gain access to the content of electronic communications, Section 10 of SB 60 allows the custodian to disclose a catalogue of electronic communications rather than the contents.

Trust assets

With regard to trusts and digital assets, if the trustee is the original user, Section 11 of SB60 allows the trustee to disclose to the trustee any digital asset of the account held in trust, including both a catalogue and the contents of electronic communications. If the trustee is not an original user, then Sections 12 only allows the custodian to disclose the contents of electronic communications if the trust instrument includes consent to disclosure of this information. Otherwise, Section 13 provides that a trustee that is not an original user is entitled to access of a catalogue of electronic communications sent by the original user or successor.

Conservator of a protected person

Section 14 of SB60 governs conservators appointed for a protected person. This section allows the court to grant a conservator access to the digital assets of a protected person after an opportunity for hearing. The custodian shall then disclose to the conservator a catalogue of electronic communications sent or received by the protected person and any digital assets. Again, the privacy of the protected person appears to be safeguarded by this process since a conservator

only needs access to a list of the electronic communications to identify unknown or undisclosed assets rather than access to the contents of such messages. This section gives a conservator authority to suspend or terminate an account of the protected person for good cause. Any such request by the conservator must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

Fiduciary duty

Section 15 defines the fiduciary duty and authority imposed on a fiduciary charged with managing digital assets, to include the duty of care, duty of loyalty and duty of confidentiality.

FISCAL IMPLICATIONS

Agencies report minimal to no fiscal impact from this bill.

SIGNIFICANT ISSUES

According to the Administrative Office of the Courts (AOC), the most significant issue identified with adopting this uniform law is balancing the privacy interest of the user with the need of the fiduciary to gain access to enough information to be able to identify digital assets. Certain provisions of SB60 only allow the custodian to provide a catalogue of electronic communications to the fiduciary. The fiduciary may object to not having access to the entire contents of electronic messages because it requires the fiduciary to put much more effort into determining whether any digital assets exist. It is important to continue to honor the user's privacy rights and protect the contents of electronic messages from disclosure of personal details that serve no real purpose to the fiduciary.

The Attorney General's Office (AGO) states that protections meant to ensure the security of a user's digital assets, can prohibit a fiduciary from performing their duties. Prior to the internet age, fiduciaries would access and manage property kept in hard copy form, but a great deal of the information and ability to manage the assets necessary for a fiduciary to perform their duties are now accessed electronically. The bill makes provisions for individuals and their actual or potential future fiduciaries to plan for and manage the persons' digitally accessed assets, which are currently governed by terms of service agreements rather than property law. When a person dies or becomes incapable of managing their own property, and a fiduciary is appointed, the terms of service agreements, internet permissions, passwords, etc., can be a block to the fiduciary's ability to do their job.

The Public Defender Department (PDD) provides that existing laws provide a framework for fiduciaries to manage tangible property, but do not give fiduciaries the power to manage digital property. Digital assets may include business files stored in "the cloud," electronic communications, social media accounts, electronically stored photographs, and many other types of electronic property. This creates problems when people who have digital assets die or lose the ability to manage their internet assets. The Revised Uniform Fiduciary Access to Digital Assets Act addresses that issue. The Act was developed by the Uniform Law Commission and has been enacted in 21 states, with six others considering adoption this year.