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53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

DISCUSSION DRAFT

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO FIDUCIARIES; ENACTING THE REVISED UNIFORM FIDUCIARY
ACCESS TO DIGITAL ASSETS ACT; MAKING CONFORMING TECHNICAL
AMENDMENTS TO THE UNIFORM PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1
through 18 of this act may be cited as the "Revised Uniform
Fiduciary Access to Digital Assets Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Revised Uniform Fiduciary Access to Digital Assets Act:

A. "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;

B. "agent" means an attorney-in-fact granted

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1 authority under a durable or nondurable power of attorney;

2 C. "carries" means engages in the transmission of
3 an electronic communication;

4 D. "catalogue of electronic communications" means
5 information that identifies each person with which a user has
6 had an electronic communication the time and date of the
7 communication and the electronic address of the person;

8 E. "conservator" means a person appointed by a
9 court to manage the estate of a living individual. The term
10 includes a limited conservator;

11 F. "content of an electronic communication" means
12 information concerning the substance or meaning of the
13 communication that:

14 (1) has been sent or received by a user;

15 (2) is in electronic storage by a custodian
16 providing an electronic-communication service to the public or
17 is carried or maintained by a custodian providing a remote-
18 computing service to the public; and

19 (3) is not readily accessible to the public;

20 G. "court" means the district court;

21 H. "custodian" means a person that carries,
22 maintains, processes, receives or stores a digital asset of a
23 user;

24 I. "designated recipient" means a person chosen by
25 a user using an online tool to administer digital assets of the

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1 user;

2 J. "digital asset" means an electronic record in
3 which an individual has a right or interest. The term does not
4 include an underlying asset or liability unless the asset or
5 liability is itself an electronic record;

6 K. "electronic" means relating to technology having
7 electrical, digital, magnetic, wireless, optical,
8 electromagnetic or similar capabilities;

9 L. "electronic communication" has the meaning set
10 forth in 18 U.S.C. Section 2510(12), as amended;

11 M. "electronic-communication service" means a
12 custodian that provides to a user the ability to send or
13 receive an electronic communication;

14 N. "fiduciary" means an original, additional or
15 successor personal representative, conservator, agent or
16 trustee;

17 O. "information" means data, text, images, videos,
18 sounds, codes, computer programs, software, databases or the
19 like;

20 P. "online tool" means an electronic service
21 provided by a custodian that allows the user, in an agreement
22 distinct from the terms-of-service agreement between the
23 custodian and user, to provide directions for disclosure or
24 nondisclosure of digital assets to a third person;

25 Q. "person" means an individual, estate,

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1 partnership, association, trust, business or nonprofit entity,
2 public corporation, government or governmental subdivision,
3 agency or instrumentality or other legal or commercial entity;

4 R. "personal representative" means an executor,
5 administrator, special administrator or person that performs
6 substantially the same function under law of this state other
7 than the Revised Uniform Fiduciary Access to Digital Assets
8 Act;

9 S. "power of attorney" means a record that grants
10 an agent authority to act in the place of a principal;

11 T. "principal" means an individual who grants
12 authority to an agent in a power of attorney;

13 U. "protected person" means an individual for whom
14 a conservator has been appointed. The term includes an
15 individual for whom an application for the appointment of a
16 conservator is pending;

17 V. "record" means information that is inscribed on
18 a tangible medium or that is stored in an electronic or other
19 medium and is retrievable in perceivable form;

20 W. "remote-computing service" means a custodian
21 that provides to a user computer-processing services or the
22 storage of digital assets by means of an electronic
23 communications system, as defined in 18 U.S.C. Section
24 2510(14), as amended;

25 X. "terms-of-service agreement" means an agreement

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1 that controls the relationship between a user and a custodian;

2 Y. "trustee" means a fiduciary with legal title to
3 property under an agreement or declaration that creates a
4 beneficial interest in another. The term includes a successor
5 trustee;

6 Z. "user" means a person that has an account with a
7 custodian; and

8 AA. "will" includes a codicil, testamentary
9 instrument that only appoints an executor and instrument that
10 revokes or revises a testamentary instrument.

11 SECTION 3. [NEW MATERIAL] APPLICABILITY.--

12 A. The Revised Uniform Fiduciary Access to Digital
13 Assets Act applies to:

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

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

18 (3) a conservatorship proceeding commenced
19 before, on or after July 1, 2017; and

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

22 B. The Revised Uniform Fiduciary Access to Digital
23 Assets Act applies to a custodian if the user resides in this
24 state or resided in this state at the time of the user's death.

25 C. The Revised Uniform Fiduciary Access to Digital

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1 Assets Act does not apply to a digital asset of an employer
2 used by an employee in the ordinary course of the employer's
3 business.

4 SECTION 4. [NEW MATERIAL] USER DIRECTION FOR DISCLOSURE
5 OF DIGITAL ASSETS.--

6 A. A user may use an online tool to direct the
7 custodian to disclose to a designated recipient or not to
8 disclose some or all of the user's digital assets, including
9 the content of electronic communications. If the online tool
10 allows the user to modify or delete a direction at all times, a
11 direction regarding disclosure using an online tool overrides a
12 contrary direction by the user in a will, trust, power of
13 attorney or other record.

14 B. If a user has not used an online tool to give
15 direction under Subsection A of this section or if the
16 custodian has not provided an online tool, the user may allow
17 or prohibit in a will, trust, power of attorney or other record
18 disclosure to a fiduciary of some or all of the user's digital
19 assets, including the content of electronic communications sent
20 or received by the user.

21 C. A user's direction under Subsection A or B of
22 this section overrides a contrary provision in a terms-of-
23 service agreement that does not require the user to act
24 affirmatively and distinctly from the user's assent to the
25 terms of service.

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1 SECTION 5. ~~[NEW MATERIAL]~~ TERMS-OF-SERVICE AGREEMENT.--

2 A. The Revised Uniform Fiduciary Access to Digital
3 Assets Act does not change or impair a right of a custodian or
4 a user under a terms-of-service agreement to access and use
5 digital assets of the user.

6 B. The Revised Uniform Fiduciary Access to Digital
7 Assets Act does not give a fiduciary or designated recipient
8 any new or expanded rights other than those held by the user
9 for whom, or for whose estate, the fiduciary or designated
10 recipient acts or represents.

11 C. A fiduciary's or designated recipient's access
12 to digital assets may be modified or eliminated by a user, by
13 federal law or by a terms-of-service agreement if the user has
14 not provided direction under Section 4 of the Revised Uniform
15 Fiduciary Access to Digital Assets Act.

16 SECTION 6. ~~[NEW MATERIAL]~~ PROCEDURE FOR DISCLOSING
17 DIGITAL ASSETS.--

18 A. When disclosing digital assets of a user under
19 the Revised Uniform Fiduciary Access to Digital Assets Act, the
20 custodian may at its sole discretion:

21 (1) grant a fiduciary or designated recipient
22 full access to the user's account;

23 (2) grant a fiduciary or designated recipient
24 partial access to the user's account sufficient to perform the
25 tasks with which the fiduciary or designated recipient is

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1 charged; or

2 (3) provide a fiduciary or designated
3 recipient a copy in a record of any digital asset that, on the
4 date the custodian received the request for disclosure, the
5 user could have accessed if the user were alive and had full
6 capacity and access to the account.

7 B. A custodian may assess a reasonable
8 administrative charge for the cost of disclosing digital assets
9 under the Revised Uniform Fiduciary Access to Digital Assets
10 Act.

11 C. A custodian need not disclose under the Revised
12 Uniform Fiduciary Access to Digital Assets Act a digital asset
13 deleted by a user.

14 D. If a user directs or a fiduciary requests a
15 custodian to disclose under the Revised Uniform Fiduciary
16 Access to Digital Assets Act some, but not all, of the user's
17 digital assets, the custodian need not disclose the assets if
18 segregation of the assets would impose an undue burden on the
19 custodian. If the custodian believes the direction or request
20 imposes an undue burden, the custodian or fiduciary may seek an
21 order from the court to disclose:

22 (1) a subset limited by date of the user's
23 digital assets;

24 (2) all of the user's digital assets to the
25 fiduciary or designated recipient;

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- 1 (3) none of the user's digital assets; or
2 (4) all of the user's digital assets to the
3 court for review in camera.

4 SECTION 7. [NEW MATERIAL] DISCLOSURE OF CONTENT OF
5 ELECTRONIC COMMUNICATIONS OF DECEASED USER.--If a deceased user
6 consented to, or a court directs, disclosure of the contents of
7 electronic communications of the user, the custodian shall
8 disclose to the personal representative of the estate of the
9 user the content of an electronic communication sent or
10 received by the user if the representative gives the custodian:

11 A. a written request for disclosure in physical or
12 electronic form;

13 B. a certified copy of the death certificate of the
14 user;

15 C. a certified copy of the letters of
16 administration or letters testamentary of the personal
17 representative or a small estate affidavit pursuant to the
18 provisions of Section 45-3-1201 NMSA 1978;

19 D. unless the user provided direction using an
20 online tool, a copy of the user's will, trust, power of
21 attorney or other record evidencing the user's consent to
22 disclosure of the content of electronic communications; and

23 E. if requested by the custodian:

24 (1) a number, username, address or other
25 unique subscriber or account identifier assigned by the

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- 1 custodian to identify the user's account;
- 2 (2) evidence linking the account to the user;
- 3 or
- 4 (3) a finding by the court that:
 - 5 (a) the user had a specific account with
 - 6 the custodian, identifiable by the information specified in
 - 7 Paragraph (1) of this subsection;
 - 8 (b) disclosure of the content of
 - 9 electronic communications of the user would not violate 18
 - 10 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section 222,
 - 11 as amended, or other applicable law;
 - 12 (c) unless the user provided direction
 - 13 using an online tool, the user consented to disclosure of the
 - 14 content of electronic communications; or
 - 15 (d) disclosure of the content of
 - 16 electronic communications of the user is reasonably necessary
 - 17 for administration of the estate.

18 **SECTION 8. [NEW MATERIAL] DISCLOSURE OF OTHER DIGITAL**
19 **ASSETS OF A DECEASED USER.--**Unless the user prohibited
20 disclosure of digital assets or the court directs otherwise, a
21 custodian shall disclose to the personal representative of the
22 estate of a deceased user a catalogue of electronic
23 communications sent or received by the user and digital assets,
24 other than the content of electronic communications, of the
25 user, if the representative gives the custodian:

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

3 B. a certified copy of the death certificate of the
4 user;

5 C. a certified copy of the letters of
6 administration or letters testamentary of the personal
7 representative or a small estate affidavit pursuant to the
8 provisions of Section 45-3-1201 NMSA 1978; and

9 D. if requested by the custodian:

10 (1) a number, username, address or other
11 unique subscriber or account identifier assigned by the
12 custodian to identify the user's account;

13 (2) evidence linking the account to the user;

14 (3) an affidavit stating that disclosure of
15 the user's digital assets is reasonably necessary for
16 administration of the estate; or

17 (4) a finding by the court that:

18 (a) the user had a specific account with
19 the custodian, identifiable by the information specified in
20 Paragraph (1) of this subsection; or

21 (b) disclosure of the user's digital
22 assets is reasonably necessary for administration of the
23 estate.

24 SECTION 9. [NEW MATERIAL] DISCLOSURE OF CONTENT OF
25 ELECTRONIC COMMUNICATIONS OF PRINCIPAL.--To the extent a power

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1 of attorney expressly grants an agent authority over the
2 content of electronic communications sent or received by the
3 principal and unless directed otherwise by the principal or the
4 court, a custodian shall disclose to the agent the content if
5 the agent gives the custodian:

6 A. a written request for disclosure in physical or
7 electronic form;

8 B. an original or copy of the power of attorney
9 expressly granting the agent authority over the content of
10 electronic communications of the principal;

11 C. a certification by the agent, under penalty of
12 perjury, that the power of attorney is in effect; and

13 D. if requested by the custodian:

14 (1) a number, username, address or other
15 unique subscriber or account identifier assigned by the
16 custodian to identify the principal's account; or

17 (2) evidence linking the account to the
18 principal.

19 SECTION 10. [NEW MATERIAL] DISCLOSURE OF OTHER DIGITAL
20 ASSETS OF PRINCIPAL.--Unless otherwise ordered by the court,
21 directed by the principal or provided by a power of attorney, a
22 custodian shall disclose to an agent with specific authority
23 over digital assets or general authority to act on behalf of a
24 principal a catalogue of electronic communications sent or
25 received by the principal and digital assets, other than the

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1 content of electronic communications, of the principal if the
2 agent gives the custodian:

3 A. a written request for disclosure in physical or
4 electronic form;

5 B. an original or a copy of the power of attorney
6 that gives the agent specific authority over digital assets or
7 general authority to act on behalf of the principal;

8 C. a certification by the agent, under penalty of
9 perjury, that the power of attorney is in effect; and

10 D. if requested by the custodian:

11 (1) a number, username, address or other
12 unique subscriber or account identifier assigned by the
13 custodian to identify the principal's account; or

14 (2) evidence linking the account to the
15 principal.

16 SECTION 11. [NEW MATERIAL] DISCLOSURE OF DIGITAL ASSETS
17 HELD IN TRUST WHEN TRUSTEE IS AN ORIGINAL USER.--Unless
18 otherwise ordered by the court or provided in a trust, a
19 custodian shall disclose to a trustee that is an original user
20 of an account any digital asset of the account held in trust,
21 including a catalogue of electronic communications of the
22 trustee and the content of electronic communications.

23 SECTION 12. [NEW MATERIAL] DISCLOSURE OF CONTENTS OF
24 ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE IS NOT AN
25 ORIGINAL USER.--Unless otherwise ordered by the court, directed

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1 by the user or provided in a trust, a custodian shall disclose
2 to a trustee that is not an original user of an account the
3 content of an electronic communication sent or received by an
4 original or successor user and carried, maintained, processed,
5 received or stored by the custodian in the account of the trust
6 if the trustee gives the custodian:

7 A. a written request for disclosure in physical or
8 electronic form;

9 B. a certified copy of the trust instrument or a
10 certified copy of the trust instrument or a certification of
11 trust under Section 46A-10-1013 NMSA 1978 that includes consent
12 to disclosure of the content of electronic communications to
13 the trustee;

14 C. a certification by the trustee, under penalty of
15 perjury, that the trust exists and the trustee is a currently
16 acting trustee of the trust; and

17 D. if requested by the custodian:

18 (1) a number, username, address or other
19 unique subscriber or account identifier assigned by the
20 custodian to identify the trust's account; or

21 (2) evidence linking the account to the trust.

22 SECTION 13. [NEW MATERIAL] DISCLOSURE OF OTHER DIGITAL
23 ASSETS HELD IN TRUST WHEN TRUSTEE IS NOT AN ORIGINAL

24 USER.--Unless otherwise ordered by the court, directed by the
25 user or provided in a trust, a custodian shall disclose, to a

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1 trustee that is not an original user of an account, a catalogue
2 of electronic communications sent or received by an original or
3 successor user and stored, carried or maintained by the
4 custodian in an account of the trust and any digital assets,
5 other than the content of electronic communications, in which
6 the trust has a right or interest if the trustee gives the
7 custodian:

8 A. a written request for disclosure in physical or
9 electronic form;

10 B. a certified copy of the trust instrument or a
11 certified copy of the trust instrument or a certification of
12 trust under Section 46A-10-1013 NMSA 1978;

13 C. a certification by the trustee, under penalty of
14 perjury, that the trust exists and the trustee is a currently
15 acting trustee of the trust; and

16 D. if requested by the custodian:

17 (1) a number, username, address or other
18 unique subscriber or account identifier assigned by the
19 custodian to identify the trust's account; or

20 (2) evidence linking the account to the trust.

21 **SECTION 14. [NEW MATERIAL] DISCLOSURE OF DIGITAL ASSETS**
22 **TO CONSERVATOR OF A PROTECTED PERSON.--**

23 A. After an opportunity for a hearing under Chapter
24 45, Article 5 NMSA 1978, the court may grant a conservator
25 access to the digital assets of a protected person.

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1 B. Unless otherwise ordered by the court or
2 directed by the user, a custodian shall disclose to a
3 conservator the catalogue of electronic communications sent or
4 received by a protected person and any digital assets, other
5 than the content of electronic communications, in which the
6 protected person has a right or interest if the conservator
7 gives the custodian:

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

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

13 (3) if requested by the custodian:

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

17 (b) evidence linking the account to the
18 protected person.

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

1 SECTION 15. ~~[NEW MATERIAL]~~ FIDUCIARY DUTY AND

2 AUTHORITY.--

3 A. The legal duties imposed on a fiduciary charged
4 with managing tangible property apply to the management of
5 digital assets, including:

6 (1) the duty of care;

7 (2) the duty of loyalty; and

8 (3) the duty of confidentiality.

9 B. A fiduciary's or designated recipient's
10 authority with respect to a digital asset of a user:

11 (1) except as otherwise provided in Section 4
12 of the Revised Uniform Fiduciary Access to Digital Assets Act,
13 is subject to the applicable terms of service;

14 (2) is subject to other applicable law,
15 including copyright law;

16 (3) in the case of a fiduciary, is limited by
17 the scope of the fiduciary's duties; and

18 (4) may not be used to impersonate the user.

19 C. A fiduciary with authority over the property of
20 a decedent, protected person, principal or settlor has the
21 right to access any digital asset in which the decedent,
22 protected person, principal or settlor had a right or interest
23 and that is not held by a custodian or subject to a terms-of-
24 service agreement.

25 D. A fiduciary acting within the scope of the

.204346.2

1 fiduciary's duties is an authorized user of the property of the
2 decedent, protected person, principal or settlor for the
3 purpose of applicable computer-fraud and unauthorized-computer-
4 access laws, including the Computer Crimes Act.

5 E. A fiduciary with authority over the tangible,
6 personal property of a decedent, protected person, principal or
7 settlor:

8 (1) has the right to access the property and
9 any digital asset stored in it; and

10 (2) is an authorized user for the purpose of
11 computer-fraud and unauthorized-computer-access laws, including
12 those offenses enumerated in the Computer Crimes Act.

13 F. A custodian may disclose information in an
14 account to a fiduciary of the user when the information is
15 required to terminate an account used to access digital assets
16 licensed to the user.

17 G. A fiduciary of a user may request a custodian to
18 terminate the user's account. A request for termination shall
19 be in writing, in either physical or electronic form, and
20 accompanied by:

21 (1) if the user is deceased, a certified copy
22 of the death certificate of the user;

23 (2) a certified copy of the letters of
24 administration or letters testamentary of the personal
25 representative or a small estate affidavit pursuant to the

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1 provisions of Section 45-3-1201 NMSA 1978, court order, power
2 of attorney or trust giving the fiduciary authority over the
3 account; and

4 (3) if requested by the custodian:

5 (a) a number, username, address or other
6 unique subscriber or account identifier assigned by the
7 custodian to identify the user's account;

8 (b) evidence linking the account to the
9 user; or

10 (c) a finding by the court that the user
11 had a specific account with the custodian, identifiable by the
12 information specified in Subparagraph (a) of this paragraph.

13 SECTION 16. [NEW MATERIAL] CUSTODIAN COMPLIANCE AND
14 IMMUNITY.--

15 A. Not later than sixty days after receipt of the
16 information required under Sections 7 through 15 of the Revised
17 Uniform Fiduciary Access to Digital Assets Act, a custodian
18 shall comply with a request under the Revised Uniform Fiduciary
19 Access to Digital Assets Act from a fiduciary or designated
20 recipient to disclose digital assets or terminate an account.
21 If the custodian fails to comply, the fiduciary or designated
22 recipient may apply to the court for an order directing
23 compliance.

24 B. An order under Subsection A of this section
25 directing compliance shall contain a finding that compliance is

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1 not in violation of 18 U.S.C. Section 2702, as amended.

2 C. A custodian may notify the user that a request
3 for disclosure or to terminate an account was made under the
4 Revised Uniform Fiduciary Access to Digital Assets Act.

5 D. A custodian may deny a request under the Revised
6 Uniform Fiduciary Access to Digital Assets Act from a fiduciary
7 or designated recipient for disclosure of digital assets or to
8 terminate an account if the custodian is aware of any lawful
9 access to the account following the receipt of the fiduciary's
10 request.

11 E. The Revised Uniform Fiduciary Access to Digital
12 Assets Act does not limit a custodian's ability to obtain or
13 require a fiduciary or designated recipient requesting
14 disclosure or termination under the Revised Uniform Fiduciary
15 Access to Digital Assets Act to obtain a court order that:

16 (1) specifies that an account belongs to the
17 protected person or principal;

18 (2) specifies that there is sufficient consent
19 from the protected person or principal to support the requested
20 disclosure; and

21 (3) contains a finding required by law other
22 than the Revised Uniform Fiduciary Access to Digital Assets
23 Act.

24 F. A custodian and its officers, employees and
25 agents are immune from liability for an act or omission done in

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1 good faith in compliance with the Revised Uniform Fiduciary
2 Access to Digital Assets Act.

3 SECTION 17. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND
4 CONSTRUCTION.--In applying and construing the Revised Uniform
5 Fiduciary Access to Digital Assets Act, consideration shall be
6 given to the need to promote uniformity of the law with respect
7 to its subject matter among states that enact it.

8 SECTION 18. [NEW MATERIAL] RELATION TO ELECTRONIC
9 SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Revised
10 Uniform Fiduciary Access to Digital Assets Act modifies, limits
11 or supersedes the federal Electronic Signatures in Global and
12 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does
13 not modify, limit or supersede Section 101(c) of that act, 15
14 U.S.C. Section 7001(c), or authorize electronic delivery of any
15 of the notices described in Section 103(b) of that act, 15
16 U.S.C. Section 7003(b).

17 SECTION 19. Section 45-3-711 NMSA 1978 (being Laws 1975,
18 Chapter 257, Section 3-711) is amended to read:

19 "45-3-711. POWERS OF PERSONAL REPRESENTATIVES--IN
20 GENERAL.--

21 A. Until termination of [~~his~~] a personal
22 representative's appointment, a personal representative has the
23 same power over the title to property of the estate that an
24 absolute owner would have, [~~subject only to his trust to use~~
25 ~~and apply the property~~] in trust however, for the benefit of

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1 creditors whose claims have been allowed and others interested
2 in the estate. This power may be exercised without notice,
3 hearing or order of court.

4 B. A personal representative has access to and
5 authority over a digital asset of the decedent to the extent
6 provided by the Revised Uniform Fiduciary Access to Digital
7 Assets Act."

8 SECTION 20. EFFECTIVE DATE.--The effective date of the
9 provisions of this act is January 1, 2018.