

LFC Requester:	Eric Chenier
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date January 12, 2015
Bill No: SB59-305

Sponsor: Sen. Peter Wirth **Agency Code:** Attorney General's Office
Short The Uniform Fiduciary Access **Person Writing** Roscoe A. Woods, AAG
Title: To Digital Assets Act **Phone:** 505.827.7411 **Email** rwoods@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

SB 59 would provide precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries’ ability to access the electronic records of a decedent, protected person, principal, or a trust.

Effective January 1, 2016 SB 59 would enable an identified fiduciary (personal representative, agent, conservator or trustee) the ability to access the content of an electronic communication or digital asset of a decedent, principal, protected person, or trust as permitted to disclose under the Federal Electronic Communications Act of 1986, as amended, 18 U.S.C. Section 2702(b), including the right to access the property and digital asset stored in it.

Said fiduciary’s authority is subject to and limited to the terms of the service agreement, applicable law, law of the State of New Mexico, and/or governing instrument i.e., will, trust, etc.

SB 59 would ensure that account-holders retain control of their digital property and can plan for its ultimate disposition after their death. Unless the account-holder instructs otherwise, legally appointed fiduciaries will have the same access to digital assets as they have always had to tangible assets, and the same duty to comply with the account-holder’s instructions.

FISCAL IMPLICATIONS

None for the AGO

SIGNIFICANT ISSUES

SB 59 would remove barriers to a fiduciary’s access to electronic records and leaves unaffected other laws, such as fiduciary, probate, trust, banking, investment securities, and agency law.

PERFORMANCE IMPLICATIONS

On its face, SB 59 may work in conjunction with a state’s existing laws on probate,

guardianship, trusts, and powers of attorney—it would extend the fiduciary’s existing authority over a person’s tangible assets to include the person’s digital assets.

ADMINISTRATIVE IMPLICATIONS

None for AGO.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

None noted.

TECHNICAL ISSUES

Digital assets may have real value, both monetary and sentimental. However, Internet service agreements, passwords that can be reset only through the account holder’s email, and federal and state privacy laws that do not contemplate the account holder’s death or incapacity may prevent fiduciaries from gaining access to these valuable assets.

The intent is to make digital assets more accessible for the fiduciary subject to the provisions of the service agreement between the account holder and the service provider, i.e., Xfinity, Dish or Comcast, etc. See Section 8, paragraph A (1). Thus, if the terms of the service agreement are not content-preservation-friendly, then nothing is accomplished by the adoption of SB 59. Therefore, perhaps express language need be interjected that would enable the fiduciary to retain any and all digital assets owned by the decedent, to wit:

“A fiduciary with authority over digital assets or digital accounts of an account holder under the Act shall have the same access as the account holder, and is deemed to (i) have the lawful consent of the account holder and (ii) be an authorized agent or user under all applicable state and federal law and regulations and any end user license agreement.”

Elizabeth Glenn 1/12/15 4:03 PM
Comment: I read this provision of the law a little differently. I think it is intended to allow the fiduciary the same access that the account holder has under the service agreement. So maybe all we need to say is that this might be ambiguous.
Elizabeth Glenn 1/12/15 4:03 PM
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OTHER SUBSTANTIVE ISSUES

There may be provisions in SB 59 that conflict with, *inter alia*, anti-hacking and computer laws. As such, perhaps a general rule of severability would be applicable.

Severability Clause—If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

Elizabeth Glenn 1/12/15 3:57 PM
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ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo—no clear guidance for the courts and internet service providers nor the ability to access electronic records of a decedent protected person, principal, or a trust.

AMENDMENTS

None.