

SENATE No. 974

The Commonwealth of Massachusetts

PRESENTED BY:

Barry R. Finegold

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to fiduciary access to digital assets.

PETITION OF:

NAME:

Barry R. Finegold

DISTRICT/ADDRESS:

Second Essex and Middlesex

SENATE No. 974

By Mr. Finegold, a petition (accompanied by bill, Senate, No. 974) of Barry R. Finegold for legislation relative to uniform fiduciary access to digital assets. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 1033 OF 2021-2022.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

An Act relative to fiduciary access to digital assets.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 201F the
2 following chapter:-

3 CHAPTER 201G. Massachusetts Fiduciary Access to Digital Assets Act

4 Section 1. Definitions

5 As used in this chapter, the following words shall have the following meanings, unless
6 the context clearly requires otherwise:

7 “Account”, an arrangement under a terms-of-service agreement in which a custodian
8 carries, maintains, processes, receives or stores a digital asset of the user or provides goods or
9 services to the user.

10 “Agent”, an attorney-in-fact granted authority under a durable or nondurable power of
11 attorney.

12 “Carries”, engages in the transmission of an electronic communication.

13 “Catalogue of electronic communications”, information that identifies each person with
14 which a user has had an electronic communication, the time and date of the communication and
15 the electronic address of such person.

16 “Conservator”, a person appointed by a court to manage the estate of a protected person
17 and includes a limited conservator, temporary conservator, special conservator and those
18 individuals specifically authorized under section 5-408 of chapter 190B.

19 “Content of an electronic communication”, information concerning the substance or
20 meaning of the communication which:

21 (i) has been sent or received by a user;

22 (ii) is in electronic storage by a custodian providing an electronic-communication service
23 to the public or is carried or maintained by a custodian providing a remote-computing service to
24 the public; and

25 (iii) is not readily accessible to the public.

26 “Court”, the probate and family court department of the trial court.

27 “Custodian”, a person that carries, maintains, processes, receives or stores a digital asset
28 of a user.

29 “Designated recipient”, a person chosen by a user using an online tool to administer
30 digital assets of the user.

31 “Digital asset”, an electronic record in which an individual has a right or interest;
32 provided, however, that “digital asset” shall not include an underlying asset or liability unless the
33 asset or liability is itself an electronic record.

34 “Electronic”, relating to technology having electrical, digital, magnetic, wireless, optical,
35 electromagnetic or similar capabilities.

36 “Electronic communication”, as set forth in 18 U.S.C. section 2510(12), as amended.

37 “Electronic-communication service”, a custodian that provides to a user the ability to
38 send or receive an electronic communication.

39 “Fiduciary”, an original, additional or successor personal representative, conservator,
40 agent or trustee.

41 “Information”, data, text, images, videos, sounds, codes, computer programs, software,
42 databases or the like.

43 “Higher education institution”, a public or private institution of higher education,
44 including, but not limited to, a college, community college, junior college, graduate school or
45 university.

46 “Higher education institutional account”, an account of which the custodian is: (i) a
47 higher education institution; or (ii) a custodian acting on behalf of a higher education institution.

48 “Online tool”, an electronic service provided by a custodian that allows the user, in an
49 agreement distinct from the terms-of-service agreement between the custodian and user, to
50 provide directions for disclosure or nondisclosure of digital assets to a third person.

51 “Person”, an individual, estate, business or nonprofit entity, public corporation,
52 government or governmental subdivision, agency or instrumentality or other legal entity.

53 “Personal representative”, an executor, administrator, special administrator or person that
54 performs substantially the same function under law of this commonwealth other than this
55 chapter.

56 “Power of attorney”, a record that grants an agent authority to act in the place of a
57 principal.

58 “Principal”, an individual who grants authority to an agent in a power of attorney.

59 “Protected person”, an individual for whom a conservator has been appointed; provided,
60 however, that “protected person” shall include an individual for whom a petition for the
61 appointment of a conservator is pending.

62 “Record”, information that is inscribed on a tangible medium or that is stored in an
63 electronic or other medium and is retrievable in perceivable form.

64 “Remote-computing service”, a custodian that provides to a user computer-processing
65 services or the storage of digital assets by means of an electronic communications system, as
66 defined in 18 U.S.C. section 2510(14), as amended.

67 “Terms-of-service agreement”, an agreement that controls the relationship between a user
68 and a custodian.

69 “Trustee”, a fiduciary with legal title to property under an agreement or declaration that
70 creates a beneficial interest in another; provided, however, that "trustee" shall include an
71 original, additional or successor trustee, whether or not appointed or confirmed by the court.

72 “User”, a person that has an account with a custodian.

73 “Will” shall include, but not be limited to, a codicil, testamentary instrument that only
74 appoints a personal representative or an instrument that revokes or revises a testamentary
75 instrument.

76 Section 2. Scope and Applicability

77 (a) This chapter shall apply to:

78 (i) a fiduciary acting under a will or power of attorney executed before, on or after the
79 effective date of this chapter;

80 (ii) a personal representative acting for a decedent who died before, on or after the
81 effective date of this chapter;

82 (iii) a conservatorship proceeding commenced before, on or after the effective date of this
83 chapter; or

84 (iv) a trustee acting under a trust created before, on or after the effective date of this
85 chapter.

86 (b) This chapter shall apply to a custodian if the user resides in this commonwealth or
87 resided in this commonwealth at the time of the user’s death.

88 (c) This chapter shall not apply to a digital asset of an employer used by an employee in
89 the ordinary course of the employer's business; provided, however, that for the purposes of this
90 chapter, an individual enrolled at a higher education institution shall not be considered an
91 employee of the higher education institution with regard to any electronic communications or
92 digital assets produced in the ordinary course of the individual's course of study.

93 Section 3. User Direction for Disclosure of Digital Assets

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

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

103 (c) A user's direction under subsection (a) or (b) of this section overrides a contrary
104 provision in a terms-of-service agreement that does not require the user to act affirmatively and
105 distinctly from the user's assent to the terms of service.

106 Section 4. Terms-of-Service Agreement

107 (a) This chapter does not change or impair a right of a custodian or a user under a terms-
108 of-service agreement to access and use the digital assets of the user.

109 (b) This chapter does not give a fiduciary any new or expanded rights other than those
110 held by the user for whom, or for whose estate, the fiduciary acts or represents.

111 (c) A fiduciary's access to digital assets may be modified or eliminated by a user by
112 federal law or by a terms-of-service agreement if the user has not provided direction under
113 section 3 of this chapter.

114 (d) Notwithstanding anything in this section to the contrary, if a user's account is a higher
115 education institutional account, a user's assent to a terms-of-service agreement shall not be
116 construed to constitute the user's direction to prohibit the disclosure of the user's digital assets to
117 a fiduciary upon or after the user's death.

118 Section 5. Procedure for Disclosing Digital Assets

119 (a) When disclosing the digital assets of a user under this chapter, the custodian may at its
120 sole discretion:

121 (i) grant a fiduciary or designated recipient full access to the user's account;

122 (ii) grant a fiduciary or designated recipient partial access to the user's account sufficient
123 to perform the tasks with which the fiduciary or designated recipient is charged; or

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

127 (b) A custodian may assess a reasonable administrative charge for the cost of disclosing
128 digital assets under this chapter.

129 (c) A custodian shall not be required to disclose under this chapter a digital asset deleted
130 by a user.

131 (d) If a user directs or a fiduciary requests a custodian to disclose under this chapter
132 some, but not all, of the user's digital assets, the custodian shall not be required to disclose the
133 assets if segregation of the assets would impose an undue burden on the custodian. If the
134 custodian believes the direction or request imposes an undue burden, the custodian or fiduciary
135 may seek an order from the court to disclose:

136 (i) a subset limited by date of the user's digital assets;

137 (ii) all of the user's digital assets to the fiduciary or designated recipient;

138 (iii) none of the user's digital assets; or

139 (iv) all of the user's digital assets to the court for review in camera.

140 Section 6. Disclosure of Electronic Communications of Deceased User

141 (a) If a deceased user consented or a court directs disclosure of the contents of electronic
142 communications of the user, the custodian shall disclose to the personal representative of the
143 estate of the user the content of an electronic communication sent or received by the user if the
144 representative gives to the custodian:

145 (i) a written request for disclosure in physical or electronic form;

146 (ii) a certified copy of the death certificate of the user;

147 (iii) an attested copy of the letter of appointment of the representative or a small-estate
148 affidavit or court order;

149 (iv) unless the deceased user provided direction using an online tool, a copy of the user's
150 will, trust or other record evidencing the user's consent to disclosure of the content of electronic
151 communications; and

152 (v) if requested by the custodian:

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

155 (2) evidence linking the account to the user; or

156 (3) a finding by the court that:

157 (A) the user had a specific account with the custodian, identifiable by the information
158 specified in paragraph (1);

159 (B) disclosure of the content of electronic communications of the user would not violate
160 18 U.S.C. section 2701 et seq., as amended, 47 U.S.C. section 222, as amended, or other
161 applicable law;

162 (C) unless the user provided direction using an online tool, the user consented to
163 disclosure of the content of electronic communications; or

164 (D) disclosure of the content of electronic communications of the user is reasonably
165 necessary for administration of the estate.

166 (b) Notwithstanding anything in this section to the contrary, unless the deceased user
167 prohibited disclosure of digital assets or a court directs otherwise, the custodian shall disclose to

168 the personal representative of the estate of the user the content of an electronic communication
169 sent or received by the user if:

170 (i) the user's account was a higher education institutional account;

171 (ii) the user was 25 years of age or younger at the time of their death; and

172 (iii) the representative gives to the custodian each of the records required pursuant to
173 clauses (i) through (iii) of subsection (a) and requested pursuant to clause (v) of subsection (a);
174 provided, however, that the representative shall not be required to give a record of the user's
175 consent to disclosure if such record does not exist.

176 (c) Unless the deceased user prohibited disclosure of digital assets or a court directs
177 otherwise, a custodian shall disclose to the personal representative of the estate of a deceased
178 user a catalogue of electronic communications sent or received by the user and digital assets,
179 other than the content of electronic communications, of the user; provided, however, that the
180 representative shall give to the custodian:

181 (1) each of the records required pursuant to clauses (i) through (iii) of subsection (a); and

182 (2) if requested by the custodian:

183 (A) a number, username, address or other unique subscriber or account identifier assigned
184 by the custodian to identify the user's account;

185 (B) evidence linking the account to the user;

186 (C) a finding by the court that the user had a specific account with the custodian,
187 identifiable by the information specified in subparagraph (A); or

188 (D) an affidavit or a finding by the court stating that disclosure of the user's digital assets
189 is reasonably necessary for administration of the estate.

190 Section 7. Disclosure of Digital Assets of Principal

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

196 (i) a written request for disclosure in physical or electronic form;

197 (ii) an original or a copy of the power of attorney that gives the agent specific authority
198 over digital assets or general authority to act on behalf of the principal;

199 (iii) a certification by the agent, under penalty of perjury, that the power of attorney is in
200 effect; and

201 (iv) if requested by the custodian:

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

204 (2) evidence linking the account to the principal.

205 (b) To the extent a power of attorney expressly grants an agent authority over the content
206 of electronic communications sent or received by the principal and unless directed otherwise by

207 the principal or the court, a custodian shall disclose to the agent the content if the agent gives to
208 the custodian:

209 (i) each of the records required pursuant to clauses (i) and (iii) of subsection (a) and
210 requested pursuant to clause (iv) of subsection (a); and

211 (ii) an original or a copy of the power of attorney expressly granting the agent authority
212 over the content of electronic communications of the principal.

213 Section 8. Disclosure of Digital Assets Held in Trust

214 (a) Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose
215 to a trustee that is an original user of an account any digital asset of the account held in trust,
216 including a catalogue of electronic communications of the trustee and the content of electronic
217 communications.

218 (b) Unless otherwise ordered by the court, directed by the user or provided in a trust, a
219 custodian shall disclose to a trustee that is not an original user of an account the content of an
220 electronic communication sent or received by an original or successor user and carried,
221 maintained, processed, received or stored by the custodian in the account of the trust if the
222 trustee gives to the custodian:

223 (i) a written request for disclosure in physical or electronic form;

224 (ii) a certified copy of the trust instrument or a certification of the trust under chapter
225 203E; provided, however, that such copy shall include the original user's consent to disclosure of
226 the content of electronic communications to the trustee, unless the original user's account was a

227 higher education institutional account and the original user was 25 years of age or younger at the
228 time of their death;

229 (iii) a certification by the trustee, under penalty of perjury, that the trust exists and the
230 trustee is a currently acting trustee of the trust; and

231 (iv) if requested by the custodian:

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

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

235 (c) Unless otherwise ordered by the court, directed by the user or provided in a trust, a
236 custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of
237 electronic communications sent or received by an original or successor user and stored, carried
238 or maintained by the custodian in an account of the trust and any digital assets, other than the
239 content of electronic communications, in which the trust has a right or interest if the trustee gives
240 to the custodian: (1) each of the records required pursuant to clause (i) and (iii) of subsection (b)
241 and requested pursuant to clause (iv) of subsection (b); and (2) a certified copy of the trust
242 instrument or a certification of the trust under chapter 203E.

243 Section 9. Disclosure of Digital Assets to Conservator of Protected Person

244 (a) After an opportunity for a hearing under chapter 190B, the court may grant a
245 conservator access to the digital assets of a protected person.

246 (b) Unless otherwise ordered by the court or directed by the user, a custodian shall
247 disclose to a conservator the catalogue of electronic communications sent or received by a

248 protected person and any digital assets, other than the content of electronic communications, in
249 which the protected person has a right or interest if the conservator gives to the custodian:

250 (i) a written request for disclosure in physical or electronic form;

251 (ii) an attested copy of the court order that gives the conservator authority over the digital
252 assets of the protected person; and

253 (iii) if requested by the custodian:

254 (1) a number, username, address or other unique subscriber or account identifier assigned
255 by the custodian to identify the account of the protected person; or

256 (2) evidence linking the account to the protected person.

257 (c) A conservator with general authority to manage the assets of a protected person may
258 request a custodian of the digital assets of the protected person to suspend or terminate an
259 account of the protected person for good cause. A request made under this section shall be
260 accompanied by an attested copy of the court order giving the conservator authority over the
261 protected person's property.

262 Section 10. Fiduciary Duty and Authority

263 (a) The legal duties imposed on a fiduciary charged with managing tangible property
264 apply to the management of digital assets, including:

265 (i) the duty of care;

266 (ii) the duty of loyalty; and

267 (iii) the duty of confidentiality.

268 (b) A fiduciary's authority with respect to a digital asset of a user:

269 (i) except as otherwise provided in sections 3 or 4 of this chapter, is subject to the
270 applicable terms-of-service agreement;

271 (ii) is subject to other applicable law, including copyright law;

272 (iii) is limited by the scope of the fiduciary's duties; and

273 (iv) shall not be used to impersonate the user.

274 (c) A fiduciary with authority over the property of a decedent, protected person, principal
275 or settlor has the right to access any digital asset in which the decedent, protected person,
276 principal or settlor had a right or interest and that is not held by a custodian or subject to a terms-
277 of-service agreement.

278 (d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of
279 the property of the decedent, protected person, principal or settlor for the purpose of applicable
280 computer-fraud and unauthorized-computer-access laws, including section 120F of chapter 266.

281 (e) A fiduciary with authority over the tangible, personal property of a decedent,
282 protected person, principal or settlor:

283 (i) has the right to access the property and any digital asset stored in it; and

284 (ii) is an authorized user for the purpose of computer-fraud and unauthorized-computer-
285 access laws, including section 120F of chapter 266.

286 (f) A custodian may disclose information in an account to a fiduciary of the user when the
287 information is required to terminate an account used to access digital assets licensed to the user.

288 (g) A fiduciary of a user may request a custodian to terminate the user's account. A
289 request for termination shall be in writing, in either physical or electronic form, and accompanied
290 by:

291 (i) if the user is deceased, a certified copy of the death certificate of the user;

292 (ii) an attested copy of the letter of appointment of the representative or a small-estate
293 affidavit or court order, court order, power of attorney or trust giving the fiduciary authority over
294 the account; and

295 (iii) if requested by the custodian:

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

298 (2) evidence linking the account to the user; or

299 (3) a finding by the court that the user had a specific account with the custodian,
300 identifiable by the information specified in paragraph (1).

301 Section 16. Custodian Compliance and Immunity

302 (a) Not later than 60 days after receipt of the information required under sections 6
303 through 9 of this chapter, a custodian shall comply with a request under this chapter from a
304 fiduciary or designated recipient to disclose digital assets or terminate an account. If the

305 custodian fails to comply, the fiduciary or designated recipient may apply to the court for an
306 order directing compliance.

307 (b) An order under subsection (a) of this section directing compliance shall contain a
308 finding that compliance is not in violation of 18 U.S.C. section 2702, as amended.

309 (c) A custodian may notify the user that a request for disclosure or to terminate an
310 account was made under this chapter.

311 (d) A custodian may deny a request under this chapter from a fiduciary or designated
312 recipient for disclosure of digital assets or to terminate an account if the custodian is aware of
313 any lawful access to the account following the receipt of the fiduciary's request.

314 (e) This chapter does not limit a custodian's ability to obtain or require a fiduciary or
315 designated recipient requesting disclosure or termination under this chapter to obtain a court
316 order which:

317 (i) specifies that an account belongs to the protected person or principal;

318 (ii) specifies that there is sufficient consent from the protected person or principal to
319 support the requested disclosure; and

320 (iii) contains a finding required by law other than this chapter.

321 (f) A custodian and its officers, employees and agents are immune from liability for an
322 act or omission done in good faith in compliance with this chapter.

323 Section 17. Severability

324 If any provision of this chapter or its application to any person or circumstance is held
325 invalid, the invalidity shall not affect other provisions or applications of this chapter which can
326 be given effect without the invalid provision or application, and to this end the provisions of this
327 chapter are severable.

328 SECTION 2. Chapter 201G of the General Laws shall take effect 1 year after the passage
329 of this act.