

## SENATE AMENDMENTS TO SENATE BILL 369

By COMMITTEE ON JUDICIARY

April 30

- 1 On page 1 of the printed bill, delete lines 4 and 5.
- 2 In line 6, delete “2.” and insert “1.” and delete “2 to 11” and insert “1 to 13”.
- 3 In line 9, delete “(B)” and insert “(b)”.
- 4 Delete lines 12 through 14 and insert:
- 5 “(3) ‘Catalog of electronic communications’ means information that identifies each person with
- 6 which an account holder has had an electronic communication, the time and date of the electronic
- 7 communication and the subject line of the electronic communication.”.
- 8 Delete lines 16 and 17 and insert:
- 9 “(5) ‘Content of an electronic communication’ means information concerning the substance or
- 10 meaning of an electronic communication that:
- 11 “(a) Has been sent or received by an account holder;
- 12 “(b) Is held in electronic storage by a custodian that is an electronic communication service or
- 13 is carried or maintained by a custodian that is a remote computing service; and
- 14 “(c) Is not readily available to the public.”.
- 15 On page 2, line 28, delete “3.” and insert “2.” and delete “7 (2)” and insert “11 (2)”.
- 16 In line 31, delete “sent or received by the decedent if the”.
- 17 In line 32, delete “electronic communication service or remote computing service” and insert
- 18 “if the custodian”.
- 19 In line 36, delete “4.” and insert “3.” and delete “7 (2)” and insert “11 (2)”.
- 20 In line 38, delete “sent or received by the protected person”.
- 21 In line 39, delete “if the electronic communication service or remote computing service” and
- 22 insert “if the custodian”.
- 23 In line 44, delete “5.” and insert “4.”.
- 24 In line 45, delete “7 (2)” and insert “11 (2)”.
- 25 On page 3, delete line 2.
- 26 In line 3, delete “puting service” and insert “if the custodian”.
- 27 In line 9, delete “6.” and insert “5.” and delete “7 (2)” and insert “11 (2)”.
- 28 In line 15, delete “sent or received by the original or any”.
- 29 Delete line 16.
- 30 In line 17, delete “vice” and insert “if the custodian”.
- 31 Delete lines 22 through 45 and delete pages 4 and 5 and insert:
- 32 **“SECTION 6. (1) Subject to section 11 (2) of this 2015 Act and unless otherwise provided**
- 33 **by the court, the will of a decedent, the power of attorney of a principal or the record of**
- 34 **intention created by an account holder pursuant to section 8 of this 2015 Act, a personal**
- 35 **representative of the decedent, a conservator and an agent under a power of attorney have**

1 a right to the catalog of electronic communications sent or received by the decedent, pro-  
2 tected person or principal.

3 “(2) A custodian shall comply with a fiduciary’s request for the catalog of electronic  
4 communications to the extent permitted by copyright law not later than 60 days after receipt  
5 of the request if the fiduciary complies with the following:

6 “(a) If a request under this section is made by a personal representative, the request  
7 must be accompanied by a certified copy of the letter of appointment of the representative,  
8 or a small estate affidavit filed under ORS 114.515 or other court order.

9 “(b) If a request under this section is made by a conservator, the request must be ac-  
10 companied by a certified copy of the letters of conservatorship issued by the court under  
11 ORS 125.405.

12 “(c) If a request under this section is made by an agent under a power of attorney, the  
13 request must be accompanied by a copy of the power of attorney that authorizes the agent  
14 to exercise authority over the catalog of electronic communications and a certification by  
15 the agent, under penalty of perjury, that the power of attorney is in effect.

16 “(3) A custodian may not unduly restrict the manner in which a catalog of electronic  
17 communications is provided to a fiduciary. The custodian must reasonably provide access  
18 to the catalog of electronic communications and provide a printed copy of the catalog upon  
19 request.

20 “(4) If the custodian fails to comply with the request upon the fiduciary’s compliance  
21 with subsection (2) of this section, the fiduciary may apply to the court for an order directing  
22 compliance under section 10 of this 2015 Act. The application must show that the catalog of  
23 electronic communications is necessary for the administration of the estate, conservatorship  
24 or execution of the duties and powers under a power of attorney.

25 “SECTION 7. (1) Subject to section 11 (2) of this 2015 Act and unless otherwise provided  
26 by the court, the settlor in the terms of a trust or the settlor in a record of intention created  
27 by the settlor as an account holder pursuant to section 8 of this 2015 Act, a trustee has a  
28 right to access the catalog of electronic communications sent or received by the settlor as  
29 an account holder.

30 “(2) A custodian shall comply with a trustee’s request for access to the catalog of elec-  
31 tronic communications if the request is accompanied by:

32 “(a) A certified copy of the trust instrument; or

33 “(b) A certification of trust under ORS 130.860 that authorizes the trustee to exercise  
34 authority over the catalog of electronic communications, is signed or otherwise  
35 authenticated by the trustee, states that the trust has not been revoked, modified or  
36 amended in a manner that would cause the representations contained in the certification of  
37 trust to be incorrect and contains the following information:

38 “(A) That the trust exists and the date the trust instrument was executed;

39 “(B) The identity of the settlor;

40 “(C) The identity and address of the trustee;

41 “(D) That there is nothing inconsistent in the trust with respect to the trustee’s powers  
42 over the catalog of electronic communications;

43 “(E) Whether the trust is revocable and the identity of any person holding a power to  
44 revoke the trust; and

45 “(F) Whether a cotrustee has authority to sign or otherwise authenticate, and whether

1 all or fewer than all cotrustees are required to exercise powers of the trustee.

2 “(3) A custodian shall comply with a request made under this section not later than 60  
3 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for  
4 an order directing compliance under section 10 of this 2015 Act.

5 “(4) A custodian that receives a certification of trust under ORS 130.860 may require the  
6 trustee to provide copies of excerpts from the original trust instrument and later amend-  
7 ments that designate the trustee and confer on the trustee the right to access the catalog  
8 of electronic communications sent or received by the settlor.

9 “(5) A custodian that acts in reliance on a certification of trust under ORS 130.860 with-  
10 out knowledge that the representations contained in it are incorrect is not liable to any  
11 person for so acting and may assume without inquiry the existence of facts stated in the  
12 certification.

13 “SECTION 8. (1)(a) At the time an account holder enters into a terms of service agree-  
14 ment with a custodian, the custodian shall offer to the account holder an affirmative means  
15 of creating a record of intention that indicates how the account holder intends that the  
16 digital assets, content of electronic communications and catalog of electronic communi-  
17 cations of the account holder may be treated by the custodian after a set period of inactivity  
18 or upon receipt of a request for disclosure. The record of intention is not a part of the terms  
19 of service agreement.

20 “(b) A custodian shall make an offer as described in paragraph (a) of this subsection to  
21 any existing account holder with a current terms of service agreement with the custodian  
22 within six months after the effective date of this 2015 Act.

23 “(2) The offer to create a record of intention under subsection (1) of this section must  
24 be made conspicuously at the time an account holder enters into a terms of service agree-  
25 ment with a custodian. The account holder must affirmatively indicate whether or not the  
26 account holder desires to create a record of intention.

27 “(3) The offer to create a record of intention must include a nonexclusive list of options  
28 that may be individually selected by the account holder, including but not limited to options  
29 for disclosure that specify to whom disclosure may be made, the circumstances under which  
30 disclosure may be made and what portions of the digital assets, content of electronic com-  
31 munications or catalog of electronic communications may be disclosed.

32 “(4) The custodian shall comply with the record of intention pursuant to its terms and  
33 is authorized to disclose the digital assets, content of electronic communications and catalog  
34 of electronic communications of the account holder as provided in the record of intention.  
35 The custodian shall not be liable in any civil or criminal action for compliance in good faith  
36 with the provisions of a record of intention made under this section.

37 “SECTION 9. (1) If an account holder has not created a record of intention under section  
38 8 of this 2015 Act, or if the record of intention created by an account holder is ambiguous  
39 or incomplete, a fiduciary may submit to a custodian a notarized form signed by the fiduciary  
40 requesting disclosure of a digital asset or the content of an electronic communication. The  
41 form must contain the following:

42 “(a) Information that the account holder is, as applicable:

43 “(A) Deceased;

44 “(B) A protected person subject to a conservatorship;

45 “(C) A principal under a power of attorney; or

1           **“(D) A settlor of a trust.**

2           **“(b) Information that the account holder is a person or fiduciary that has entered into**  
3 **a terms of service agreement with the custodian.**

4           **“(c) Information that identifies the account as belonging to the account holder with**  
5 **specificity.**

6           **“(d) A statement that there are no other existing account holders of the account holder’s**  
7 **account.**

8           **“(e) A declaration that disclosure is not in violation of 18 U.S.C. 2701 et seq.**

9           **“(f) A description of the digital asset or content of an electronic communication sought**  
10 **to be disclosed.**

11           **“(g) A statement setting forth the purpose for the disclosure, how information obtained**  
12 **from the disclosure will be used and that the disclosure is for the purpose of administering**  
13 **a trust estate or the estate of a decedent or protected person, or to execute the duties and**  
14 **functions under a power of attorney.**

15           **“(h) A statement that the request is not in conflict with, as applicable:**

16           **“(A) The deceased account holder’s will;**

17           **“(B) The terms of the principal’s power of attorney;**

18           **“(C) The settlor’s trust;**

19           **“(D) Any order of the court pertaining to the digital asset or content of an electronic**  
20 **communication of the account holder; or**

21           **“(E) A record of intention created by the account holder under section 8 of this 2015 Act.**

22           **“(2) A request made under, and the form described in, subsection (1) of this section must**  
23 **be accompanied by the following:**

24           **“(a) If made by a personal representative, the request must be accompanied by a certified**  
25 **copy of the letter of appointment of the representative, or a small estate affidavit filed under**  
26 **ORS 114.515 or other court order.**

27           **“(b) If made by a conservator, the request must be accompanied by a certified copy of**  
28 **the court order that gives the conservator authority over the digital asset or content of an**  
29 **electronic communication.**

30           **“(c) If made by an agent under a power of attorney, the request must be accompanied**  
31 **by a copy of the power of attorney that authorizes the agent to exercise authority over the**  
32 **digital asset or content of an electronic communication and a certification by the agent,**  
33 **under penalty of perjury, that the power of attorney is in effect.**

34           **“(d) If made by a trustee, the request must be accompanied by:**

35           **“(A) A certified copy of the trust instrument; or**

36           **“(B) A certification of trust under ORS 130.860 that authorizes the trustee to exercise**  
37 **authority over the digital asset or content of an electronic communication, is signed or**  
38 **otherwise authenticated by a trustee, states that the trust has not been revoked, modified**  
39 **or amended in a manner that would cause the representations contained in the certification**  
40 **of trust to be incorrect and that contains the information described in section 7 (2)(b)(A) to**  
41 **(F) of this 2015 Act.**

42           **“(3) If a custodian denies a fiduciary’s request for disclosure under this section, the**  
43 **custodian shall provide an explanation, in writing, to the fiduciary of the reasons for the**  
44 **denial.**

45           **“SECTION 10. (1) Upon the refusal or failure of a custodian to disclose a digital asset,**

1 the content of an electronic communication or a catalog of electronic communications under  
2 sections 1 to 13 of this 2015 Act, a fiduciary may petition the court for the right to access  
3 a digital asset, the content of an electronic communication or a catalog of electronic com-  
4 munications of an account holder who is a decedent, protected person, principal or settlor  
5 as provided in this section. The petition must be narrowly tailored and specify with  
6 particularity:

7 “(a) The nature and extent of the digital asset, content of an electronic communication  
8 or catalog of electronic communications to be disclosed; and

9 “(b) The purpose for which the digital asset, content of an electronic communication or  
10 catalog of electronic communications is sought and its relationship to the administration of  
11 the estate, conservatorship or trust, or to the execution of the duties and powers under a  
12 power of attorney.

13 “(2) The petitioner shall provide notice of the petition:

14 “(a) With respect to an estate of a decedent, to heirs, devisees under prior wills and  
15 persons interested in the estate of the decedent who would be required to be identified and  
16 set forth in a petition for the appointment of a personal representative under ORS 113.035;

17 “(b) With respect to a conservatorship, to persons entitled to notice under ORS 125.060;

18 “(c) With respect to a power of attorney, to the principal; and

19 “(d) With respect to a trust, to persons entitled to notice of a judicial proceeding under  
20 ORS 130.035 in the manner prescribed in that section.

21 “(3) The court shall consider, make written findings and enter an order within 30 days  
22 of the date that notice of the petition was provided under subsection (2) of this section.

23 “(4) A custodian shall comply with an order of the court entered under this section au-  
24 thorizing disclosure of a digital asset, some or all of the content of an electronic communi-  
25 cation or a catalog of electronic communications within 30 days of receipt of a copy of the  
26 order. A custodian shall not be liable in any civil or criminal action for compliance in good  
27 faith with a court order under this section.

28 “SECTION 11. (1) A fiduciary that is an account holder or has been granted access to a  
29 digital asset, the content of an electronic communication or a catalog of electronic commu-  
30 nications by court order under section 10 of this 2015 Act:

31 “(a) Subject to the terms of service agreement and copyright or other applicable law,  
32 may take any action concerning the digital asset, content of an electronic communication,  
33 or catalog of electronic communications, to the extent of the account holder’s authority and  
34 the fiduciary’s powers;

35 “(b) Has, under applicable electronic privacy laws, the lawful consent of the account  
36 holder for the custodian to grant access to the digital asset or to disclose the content of an  
37 electronic communication or catalog of electronic communications to the fiduciary; and

38 “(c) Is, under applicable computer fraud and unauthorized access laws, an authorized  
39 user.

40 “(2) Unless an account holder, after the effective date of this 2015 Act, creates a record  
41 of intention under section 8 of this 2015 Act or agrees to a provision in a terms of service  
42 agreement that limits a fiduciary’s access to a digital asset, the content of an electronic  
43 communication, or a catalog of electronic communications, of the account holder by an af-  
44 firmative act separate from the account holder’s assent to other provisions of the terms of  
45 service agreement:

1       “(a) A provision in a terms of service agreement that limits a fiduciary’s right to access  
2 a digital asset, the content of an electronic communication, or a catalog of electronic com-  
3 munications, of the account holder is void as against the strong public policy of this state;  
4 and

5       “(b) The fiduciary’s access under sections 1 to 13 of this 2015 Act to a digital asset does  
6 not violate the terms of service agreement even if the terms of service agreement requires  
7 notice of a change in the account holder’s status.

8       “(3) A choice of law provision in a terms of service agreement is unenforceable against  
9 a fiduciary to the extent that the provision designates law that enforces a limitation de-  
10 scribed in subsection (2) of this section on a fiduciary’s right to access a digital asset, the  
11 content of an electronic communication or a catalog of electronic communications.

12       “(4) If tangible personal property of a decedent, protected person, principal or settlor can  
13 receive, store, process or send a digital asset, a fiduciary with authority over the property  
14 has a right to access the property and any digital asset stored in it. The fiduciary is an  
15 authorized user for purposes of any applicable computer fraud and unauthorized access laws.

16       “SECTION 12. A custodian and the custodian’s officers, employees and agents are im-  
17 mune from liability for any act done in good faith in compliance with sections 1 to 13 of this  
18 2015 Act.

19       “SECTION 13. Sections 1 to 13 of this 2015 Act modify, limit or supersede the Electronic  
20 Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify,  
21 limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices  
22 described in 15 U.S.C. 7003(b).

23       “SECTION 14. Sections 1 to 13 of this 2015 Act apply to:

24       “(1) A fiduciary acting under a will, trust or power of attorney executed before, on or  
25 after the effective date of this 2015 Act;

26       “(2) A personal representative acting for a decedent who died before, on or after the ef-  
27 fective date of this 2015 Act;

28       “(3) A conservator appointed to act for a protected person before, on or after the effec-  
29 tive date of this 2015 Act; and

30       “(4) An existing account holder with a current terms of service agreement with a  
31 custodian on or after the effective date of this 2015 Act.”.