

**PROPOSED AMENDMENTS TO
SENATE BILL 369**

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
3 13”.

4 In line 9, delete “(B)” and insert “(b)”.

5 Delete lines 16 and 17 and insert:

6 “(5) ‘Content of an electronic communication’ means information con-
7 cerning the substance or meaning of an electronic communication that:

8 “(a) Has been sent or received by an account holder;

9 “(b) Is held in electronic storage by a custodian that is an electronic
10 communication service or is carried or maintained by a custodian that is a
11 remote computing service; and

12 “(c) Is not readily available to the public.”

13 On page 2, line 28, delete “3.” and insert “2.” and delete “7 (2)” and insert
14 “11 (2)”.

15 In line 31, delete “sent or received by the decedent if the”.

16 In line 32, delete “electronic communication service or remote computing
17 service” and insert “if the custodian”.

18 In line 36, delete “4.” and insert “3.” and delete “7 (2)” and insert “11
19 (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
22 computing service” and insert “if the custodian”.

1 In line 44, delete “5.” and insert “4.”.

2 In line 45, delete “7 (2)” and insert “11 (2)”.

3 On page 3, delete line 2.

4 In line 3, delete “puting service” and insert “if the custodian”.

5 In line 9, delete “6.” and insert “5.” and delete “7 (2)” and insert “11
6 (2)”.

7 In line 15, delete “sent or received by the original or any”.

8 Delete line 16.

9 In line 17, delete “vice” and insert “if the custodian”.

10 Delete lines 22 through 45 and delete pages 4 and 5 and insert:

11 **“SECTION 6. (1) Subject to section 11 (2) of this 2015 Act and unless**
12 **otherwise provided by the court, the will of a decedent, the power of**
13 **attorney of a principal or the record of intention created by an ac-**
14 **count holder pursuant to section 8 of this 2015 Act, a personal repre-**
15 **sentative of the decedent, a conservator and an agent under a power**
16 **of attorney have a right to the catalog of electronic communications**
17 **sent or received by the decedent, protected person or principal.**

18 **“(2) A custodian shall comply with a fiduciary’s request for the**
19 **catalog of electronic communications to the extent permitted by cop-**
20 **yright law not later than 60 days after receipt of the request if the**
21 **fiduciary complies with the following:**

22 **“(a) If a request under this section is made by a personal repre-**
23 **sentative, the request must be accompanied by a certified copy of the**
24 **letter of appointment of the representative, or a small estate affidavit**
25 **filed under ORS 114.515 or other court order.**

26 **“(b) If a request under this section is made by a conservator, the**
27 **request must be accompanied by a certified copy of the letters of**
28 **conservatorship issued by the court under ORS 125.405.**

29 **“(c) If a request under this section is made by an agent under a**
30 **power of attorney, the request must be accompanied by a copy of the**

1 power of attorney that authorizes the agent to exercise authority over
2 the catalog of electronic communications and a certification by the
3 agent, under penalty of perjury, that the power of attorney is in effect.

4 “(3) A custodian may not unduly restrict the manner in which a
5 catalog of electronic communications is provided to a fiduciary. The
6 custodian must reasonably provide access to the catalog of electronic
7 communications and provide a printed copy of the catalog upon re-
8 quest.

9 “(4) If the custodian fails to comply with the request upon the
10 fiduciary’s compliance with subsection (2) of this section, the fiduciary
11 may apply to the court for an order directing compliance under section
12 10 of this 2015 Act. The application must show that the catalog of
13 electronic communications is necessary for the administration of the
14 estate, conservatorship or execution of the duties and powers under a
15 power of attorney.

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

22 “(2) A custodian shall comply with a trustee’s request for access to
23 the catalog of electronic communications if the request is accompa-
24 nied by:

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

26 “(b) A certification of trust under ORS 130.860 that authorizes the
27 trustee to exercise authority over the catalog of electronic communi-
28 cations, is signed or otherwise authenticated by the trustee, states
29 that the trust has not been revoked, modified or amended in a manner
30 that would cause the representations contained in the certification of

1 trust to be incorrect and contains the following information:

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

4 “(B) The identity of the settlor;

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

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

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

10 “(F) Whether a cotrustee has authority to sign or otherwise
11 authenticate, and whether all or fewer than all cotrustees are required
12 to exercise powers of the trustee.

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

17 “(4) A custodian that receives a certification of trust under ORS
18 130.860 may require the trustee to provide copies of excerpts from the
19 original trust instrument and later amendments that designate the
20 trustee and confer on the trustee the right to access the catalog of
21 electronic communications sent or received by the settlor.

22 “(5) A custodian that acts in reliance on a certification of trust
23 under ORS 130.860 without knowledge that the representations con-
24 tained in it are incorrect is not liable to any person for so acting and
25 may assume without inquiry the existence of facts stated in the cer-
26 tification.

27 **“SECTION 8. (1)(a) At the time an account holder enters into a**
28 **terms of service agreement with a custodian, the custodian shall offer**
29 **to the account holder an affirmative means of creating a record of**
30 **intention that indicates how the account holder intends that the dig-**

1 **ital assets, content of electronic communications and catalog of elec-**
2 **tronic communications of the account holder may be treated by the**
3 **custodian after a set period of inactivity or upon receipt of a request**
4 **for disclosure. The record of intention is not a part of the terms of**
5 **service agreement.**

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

10 **“(2) The offer to create a record of intention under subsection (1)**
11 **of this section must be made conspicuously at the time an account**
12 **holder enters into a terms of service agreement with a custodian. The**
13 **account holder must affirmatively indicate whether or not the account**
14 **holder desires to create a record of intention.**

15 **“(3) The offer to create a record of intention must include a non-**
16 **exclusive list of options that may be individually selected by the ac-**
17 **count holder, including but not limited to options for disclosure that**
18 **specify to whom disclosure may be made, the circumstances under**
19 **which disclosure may be made and what portions of the digital assets,**
20 **content of electronic communications or catalog of electronic com-**
21 **munications may be disclosed.**

22 **“(4) The custodian shall comply with the record of intention pur-**
23 **suant to its terms and is authorized to disclose the digital assets,**
24 **content of electronic communications and catalog of electronic com-**
25 **munications of the account holder as provided in the record of inten-**
26 **tion. The custodian shall not be liable in any civil or criminal action**
27 **for compliance in good faith with the provisions of a record of inten-**
28 **tion made under this section.**

29 **“SECTION 9. (1) If an account holder has not created a record of**
30 **intention under section 8 of this 2015 Act, or if the record of intention**

1 created by an account holder is ambiguous or incomplete, a fiduciary
2 may submit to a custodian a notarized form signed by the fiduciary
3 requesting disclosure of a digital asset or the content of an electronic
4 communication. The form must contain the following:

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

6 “(A) Deceased;

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

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

9 “(D) A settlor of a trust.

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

12 “(c) Information that identifies the account as belonging to the
13 account holder with specificity.

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

16 “(e) A declaration that disclosure is not in violation of 18 U.S.C.
17 2701 et seq.

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

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

25 “(h) A statement that the request is not in conflict with, as appli-
26 cable:

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

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

29 “(C) The settlor’s trust;

30 “(D) Any order of the court pertaining to the digital asset or con-

1 tent of an electronic communication of the account holder; or
2 “(E) A record of intention created by the account holder under
3 section 8 of this 2015 Act.

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

6 “(a) If made by a personal representative, the request must be ac-
7 companied by a certified copy of the letter of appointment of the rep-
8 resentative, or a small estate affidavit filed under ORS 114.515 or other
9 court order.

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

13 “(c) If made by an agent under a power of attorney, the request
14 must be accompanied by a copy of the power of attorney that author-
15 izes the agent to exercise authority over the digital asset or content
16 of an electronic communication and a certification by the agent, under
17 penalty of perjury, that the power of attorney is in effect.

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

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

20 “(B) A certification of trust under ORS 130.860 that authorizes the
21 trustee to exercise authority over the digital asset or content of an
22 electronic communication, is signed or otherwise authenticated by a
23 trustee, states that the trust has not been revoked, modified or
24 amended in a manner that would cause the representations contained
25 in the certification of trust to be incorrect and that contains the in-
26 formation described in section 7 (2)(b)(A) to (F) of this 2015 Act.

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

30 **SECTION 10.** (1) Upon the refusal or failure of a custodian to dis-

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

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

11 “(b) The purpose for which the digital asset, content of an elec-
12 tronic communication or catalog of electronic communications is
13 sought and its relationship to the administration of the estate, con-
14 servatorship or trust, or to the execution of the duties and powers
15 under a power of attorney.

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

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

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

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

24 “(d) With respect to a trust, to persons entitled to notice of a judi-
25 cial proceeding under ORS 130.035 in the manner prescribed in that
26 section.

27 “(3) The court shall consider, make written findings and enter an
28 order within 30 days of the date that notice of the petition was pro-
29 vided under subsection (2) of this section.

30 “(4) A custodian shall comply with an order of the court entered

1 under this section authorizing disclosure of a digital asset, some or
2 all of the content of an electronic communication or a catalog of
3 electronic communications within 30 days of receipt of a copy of the
4 order. A custodian shall not be liable in any civil or criminal action
5 for compliance in good faith with a court order under this section.

6 **SECTION 11.** (1) A fiduciary that is an account holder or has been
7 granted access to a digital asset, the content of an electronic com-
8 munication or a catalog of electronic communications by court order
9 under section 10 of this 2015 Act:

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

15 **“(b)** Has, under applicable electronic privacy laws, the lawful con-
16 sent of the account holder for the custodian to grant access to the
17 digital asset or to disclose the content of an electronic communication
18 or catalog of electronic communications to the fiduciary; and

19 **“(c)** Is, under applicable computer fraud and unauthorized access
20 laws, an authorized user.

21 **“(2)** Unless an account holder, after the effective date of this 2015
22 Act, creates a record of intention under section 8 of this 2015 Act or
23 agrees to a provision in a terms of service agreement that limits a
24 fiduciary’s access to a digital asset, the content of an electronic com-
25 munication, or a catalog of electronic communications, of the account
26 holder by an affirmative act separate from the account holder’s assent
27 to other provisions of the terms of service agreement:

28 **“(a)** A provision in a terms of service agreement that limits a
29 fiduciary’s right to access a digital asset, the content of an electronic
30 communication, or a catalog of electronic communications, of the ac-

1 count holder is void as against the strong public policy of this state;
2 and

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

7 “(3) A choice of law provision in a terms of service agreement is
8 unenforceable against a fiduciary to the extent that the provision
9 designates law that enforces a limitation described in subsection (2)
10 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
12 communications.

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

19 “SECTION 12. A custodian and the custodian’s officers, employees
20 and agents are immune from liability for any act done in good faith
21 in compliance with sections 1 to 13 of this 2015 Act.

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

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

28 “(1) A fiduciary acting under a will, trust or power of attorney ex-
29 ecuted before, on or after the effective date of this 2015 Act;

30 “(2) A personal representative acting for a decedent who died be-

1 **fore, on or after the effective date of this 2015 Act;**

2 **“(3) A conservator appointed to act for a protected person before,**
3 **on or after the effective date of this 2015 Act; and**

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

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