

**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 12 through 14 and insert:

6 “(3) ‘Catalog of electronic communications’ means information that iden-
7 tifies each person with which an account holder has had an electronic com-
8 munication, the time and date of the electronic communication and the
9 subject line of the electronic communication.”.

10 Delete lines 16 and 17 and insert:

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

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

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

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

18 On page 2, line 28, delete “3.” and insert “2.” and delete “7 (2)” and insert
19 “11 (2)”.

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

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

1 In line 36, delete “4.” and insert “3.” and delete “7 (2)” and insert “11
2 (2)”.

3 In line 38, delete “sent or received by the protected person”.

4 In line 39, delete “if the electronic communication service or remote
5 computing service” and insert “if the custodian”.

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

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

8 On page 3, delete line 2.

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

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

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

13 Delete line 16.

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

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

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

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

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

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

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

9 **“(3) A custodian may not unduly restrict the manner in which a**
10 **catalog of electronic communications is provided to a fiduciary. The**
11 **custodian must reasonably provide access to the catalog of electronic**
12 **communications and provide a printed copy of the catalog upon re-**
13 **quest.**

14 **“(4) If the custodian fails to comply with the request upon the**
15 **fiduciary’s compliance with subsection (2) of this section, the fiduciary**
16 **may apply to the court for an order directing compliance under section**
17 **10 of this 2015 Act. The application must show that the catalog of**
18 **electronic communications is necessary for the administration of the**
19 **estate, conservatorship or execution of the duties and powers under a**
20 **power of attorney.**

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

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

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

1 **“(b) A certification of trust under ORS 130.860 that authorizes the**
2 **trustee to exercise authority over the catalog of electronic communi-**
3 **cations, is signed or otherwise authenticated by the trustee, states**
4 **that the trust has not been revoked, modified or amended in a manner**
5 **that would cause the representations contained in the certification of**
6 **trust to be incorrect and contains the following information:**

7 **“(A) That the trust exists and the date the trust instrument was**
8 **executed;**

9 **“(B) The identity of the settlor;**

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

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

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

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

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

22 **“(4) A custodian that receives a certification of trust under ORS**
23 **130.860 may require the trustee to provide copies of excerpts from the**
24 **original trust instrument and later amendments that designate the**
25 **trustee and confer on the trustee the right to access the catalog of**
26 **electronic communications sent or received by the settlor.**

27 **“(5) A custodian that acts in reliance on a certification of trust**
28 **under ORS 130.860 without knowledge that the representations con-**
29 **tained in it are incorrect is not liable to any person for so acting and**
30 **may assume without inquiry the existence of facts stated in the cer-**

1 **tification.**

2 **“SECTION 8. (1)(a) At the time an account holder enters into a**
3 **terms of service agreement with a custodian, the custodian shall offer**
4 **to the account holder an affirmative means of creating a record of**
5 **intention that indicates how the account holder intends that the dig-**
6 **ital assets, content of electronic communications and catalog of elec-**
7 **tronic communications of the account holder may be treated by the**
8 **custodian after a set period of inactivity or upon receipt of a request**
9 **for disclosure. The record of intention is not a part of the terms of**
10 **service agreement.**

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

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

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

27 **“(4) The custodian shall comply with the record of intention pur-**
28 **suant to its terms and is authorized to disclose the digital assets,**
29 **content of electronic communications and catalog of electronic com-**
30 **munications of the account holder as provided in the record of inten-**

1 tion. The custodian shall not be liable in any civil or criminal action
2 for compliance in good faith with the provisions of a record of inten-
3 tion made under this section.

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

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

11 **“(A) Deceased;**

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

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

14 **“(D) A settlor of a trust.**

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

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

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

21 **“(e) A declaration that disclosure is not in violation of 18 U.S.C.**
22 **2701 et seq.**

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

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

30 **“(h) A statement that the request is not in conflict with, as appli-**

1 **cable:**

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

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

4 **“(C) The settlor’s trust;**

5 **“(D) Any order of the court pertaining to the digital asset or con-**
6 **tent of an electronic communication of the account holder; or**

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

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

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

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

18 **“(c) If made by an agent under a power of attorney, the request**
19 **must be accompanied by a copy of the power of attorney that author-**
20 **izes the agent to exercise authority over the digital asset or content**
21 **of an electronic communication and a certification by the agent, under**
22 **penalty of perjury, that the power of attorney is in effect.**

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

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

25 **“(B) A certification of trust under ORS 130.860 that authorizes the**
26 **trustee to exercise authority over the digital asset or content of an**
27 **electronic communication, is signed or otherwise authenticated by a**
28 **trustee, states that the trust has not been revoked, modified or**
29 **amended in a manner that would cause the representations contained**
30 **in the certification of trust to be incorrect and that contains the in-**

1 formation described in section 7 (2)(b)(A) to (F) of this 2015 Act.

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

5 **“SECTION 10. (1) Upon the refusal or failure of a custodian to dis-**
6 **close a digital asset, the content of an electronic communication or a**
7 **catalog of electronic communications under sections 1 to 13 of this 2015**
8 **Act, a fiduciary may petition the court for the right to access a digital**
9 **asset, the content of an electronic communication or a catalog of**
10 **electronic communications of an account holder who is a decedent,**
11 **protected person, principal or settlor as provided in this section. The**
12 **petition must be narrowly tailored and specify with particularity:**

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

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

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

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

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

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

29 “(d) With respect to a trust, to persons entitled to notice of a judi-
30 cial proceeding under ORS 130.035 in the manner prescribed in that

1 section.

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

5 “(4) A custodian shall comply with an order of the court entered
6 under this section authorizing disclosure of a digital asset, some or
7 all of the content of an electronic communication or a catalog of
8 electronic communications within 30 days of receipt of a copy of the
9 order. A custodian shall not be liable in any civil or criminal action
10 for compliance in good faith with a court order under this section.

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

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

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

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

26 “(2) Unless an account holder, after the effective date of this 2015
27 Act, creates a record of intention under section 8 of this 2015 Act or
28 agrees to a provision in a terms of service agreement that limits a
29 fiduciary’s access to a digital asset, the content of an electronic com-
30 munication, or a catalog of electronic communications, of the account

1 holder by an affirmative act separate from the account holder’s assent
2 to other provisions of the terms of service agreement:

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

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

12 “(3) A choice of law provision in a terms of service agreement is
13 unenforceable against a fiduciary to the extent that the provision
14 designates law that enforces a limitation described in subsection (2)
15 of this section on a fiduciary’s right to access a digital asset, the
16 content of an electronic communication or a catalog of electronic
17 communications.

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

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

27 “SECTION 13. Sections 1 to 13 of this 2015 Act modify, limit or su-
28 persede the Electronic Signatures in Global and National Commerce
29 Act, 15 U.S.C. 7001 et seq., but do not modify, limit or supersede 15
30 U.S.C. 7001(c) or authorize electronic delivery of any of the notices

1 **described in 15 U.S.C. 7003(b).**

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

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

5 **“(2) A personal representative acting for a decedent who died be-**
6 **fore, on or after the effective date of this 2015 Act;**

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

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

12
