



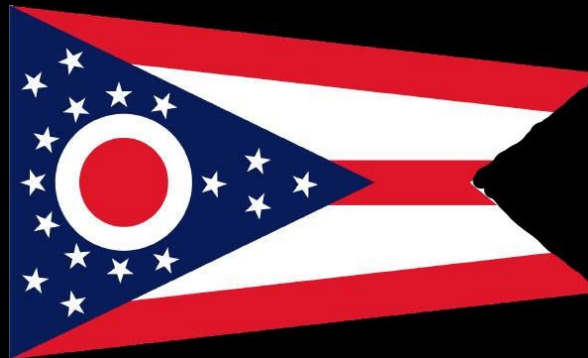
ESTATE PLANNING IN THE DIGITAL AGE

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What is a Digital Asset?

"Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

- Ohio Revised Code 2137.01 (I)



What is a Digital Asset?

“Digital assets” means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.”

- Oregon State Bar, Digital Assets Legislative Proposal (5/9/2012)

What is a Digital Asset?

Six broad categories

- 1) Password protected electronic communications
- 2) Remote-stored information (“the cloud”)
- 3) Online investment and financial accounts (E*Trade, etc.)
- 4) Business enterprises conducted mostly (or entirely) online (web hosts, digital storefronts, bloggers, photographers, etc.)
- 5) Stored value accounts / virtual currency
- 6) Purely sentimental assets (online photo and video, social media, genealogy trackers)

What is a Digital Asset?

- Financially valuable:
 - Virtual currencies (Bitcoin)
 - Domain names
 - Business web sites
 - Revenue-generating or copyright-protected digital works (music, writings, photos & videos)
 - Accounts with stored value (PayPal, ApplePay, etc.)



What is a Digital Asset?



- Sentimentally valuable:
 - Digital photos, videos, music, publications, and apps
 - Email accounts (Gmail, Yahoo!, Hotmail, etc.)
 - Social media accounts (Facebook, Instagram, LinkedIn, etc.)
 - Personal websites, blogs

***Can't I just make a list of all accounts
and passwords for my family?***



A screenshot of a login window titled "Please Login". The window has a blue header bar with a question mark icon, a maximize icon, and a close icon (X). Below the header, there are two input fields: "Username:" with the text "Username" inside, and "Password:" with six black dots representing a masked password. Below the password field is a checkbox labeled "Remember Password".

Making a list of usernames and passwords is not a bad idea, BUT....

Can't I just make a list of all accounts and passwords for my family?

- Your loved ones will likely not be legally permitted to access your assets and accounts under most Terms of Service Agreements
- In fact, federal and/or state law may view your family member as a hacker!





- Federal Law

- **Federal Computer Fraud and Abuse Act:** sets up criminal sanctions against those who “intentionally access a computer without authorization or exceed authorized use and thereby obtains . . . information from any protected computer.” 8 U.S.C. § 1030 (2012).
- Intended to combat hackers, fraudsters, etc. and may not be likely to be used against family members or executors



- Federal Law continued

- **Stored Communications Act:** prohibits electronic service providers from knowingly divulging contents of electronic communications stored by or maintained on its service. 18 U.S.C. § 2702(a).
- The SCA also makes it a crime for individuals to intentionally access electronic communications without proper authorization and imposes imprisonment and fines as penalties. 18 U.S.C. § 2701(a) and (b)(2).
- The SCA does allow disclosure with the lawful consent of the originator or an addressee or intended recipient of such communications, however the language does not specifically allow for consent given by a fiduciary or assignee. *Id.* at (b)(3).



- State Law

- All fifty states criminalize unauthorized access to computers, systems, and networks
- Ohio Revised Code §2913.04: No person, in any manner . . . shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service or other person authorized to give consent.

So What Happens to Digital Assets After Death?





What Happens to Digital Assets After Death?

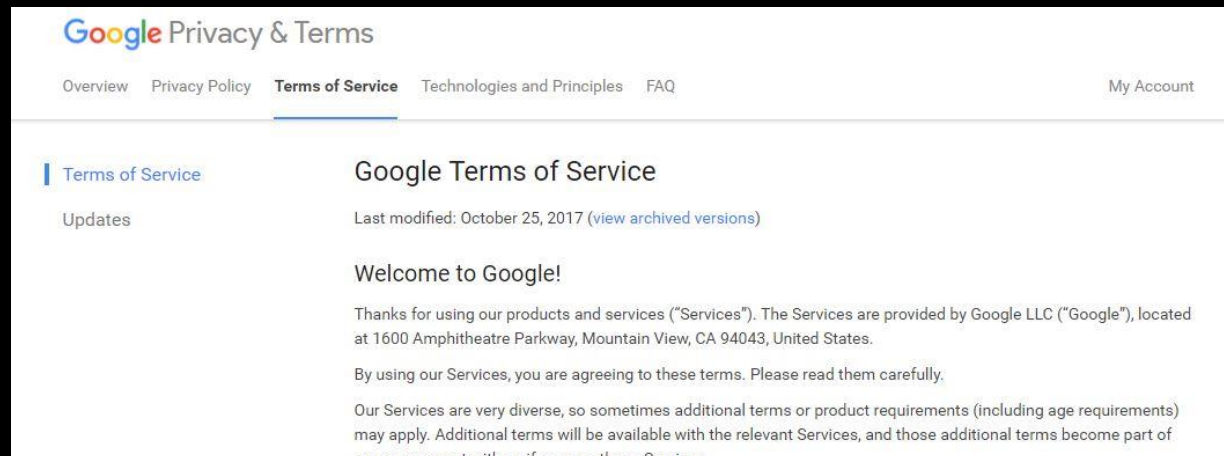
It depends.....

What Happens to Digital Assets After Death?

- It depends.....
 - What do the Terms of Service provide?
 - What does federal law provide?
 - What does state law provide?
 - Was there a digital asset estate plan?

What Happens to Digital Assets After Death?

- Terms of Service Agreements
 - Many electronic accounts are governed by restrictive (and non-negotiable) “Terms of Service” agreements between the user and the custodian.



What Happens to Digital Assets After Death?

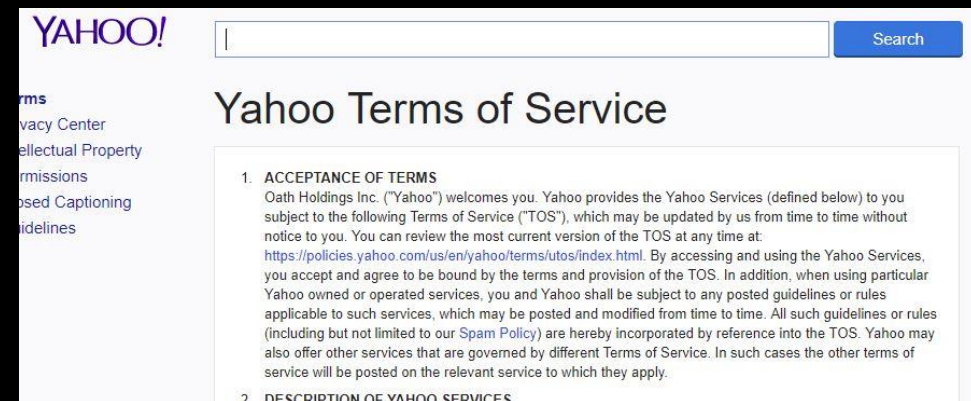
- Terms of Service Agreements
 - **Google:** We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review.
 - Note: Google does have an “Inactive Account Manager” option which allows users to authorize a third party to access their account data

What Happens to Digital Assets After Death?

- Terms of Service Agreements
 - **Facebook:** a user may “not share your password..., let anyone else access your account, or do anything else that might jeopardize the security of your account...If you violate the letter or spirit of this Statement..., [Facebook] can stop providing all or part of Facebook to you.”
 - A Facebook user can now choose one of three options for handling their account after death: default to the existing rules that will memorialize an account; delete the account at death; or designate a legacy contact (who must be a Facebook user) to manage the user’s account.

What Happens to Digital Assets After Death?

- Terms of Service Agreements
 - **Yahoo!:** “[y]ou agree that your Yahoo! Account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”



The screenshot shows the Yahoo! website's Terms of Service page. At the top left is the "YAHOO!" logo. To its right is a search bar with a "Search" button. Below the logo is a vertical list of links: "Terms", "Privacy Center", "Intellectual Property", "Permissions", "Closed Captioning", and "Guidelines". The main heading is "Yahoo Terms of Service". The first section is titled "1. ACCEPTANCE OF TERMS" and contains the following text: "Oath Holdings Inc. ("Yahoo") welcomes you. Yahoo provides the Yahoo Services (defined below) to you subject to the following Terms of Service ("TOS"), which may be updated by us from time to time without notice to you. You can review the most current version of the TOS at any time at: <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.html>. By accessing and using the Yahoo Services, you accept and agree to be bound by the terms and provision of the TOS. In addition, when using particular Yahoo owned or operated services, you and Yahoo shall be subject to any posted guidelines or rules applicable to such services, which may be posted and modified from time to time. All such guidelines or rules (including but not limited to our Spam Policy) are hereby incorporated by reference into the TOS. Yahoo may also offer other services that are governed by different Terms of Service. In such cases the other terms of service will be posted on the relevant service to which they apply." The second section is titled "2. DESCRIPTION OF YAHOO SERVICES".

Standardizing Digital Assets Rights

- Proposed Model Legislation
 - **Uniform Fiduciary Access to Digital Assets Act**
 - National Conference of Commissioners on Uniform State Laws
 - UFADAA designed to “vest fiduciaries with the authority to access, control, or copy digital assets and accounts”



Standardizing Digital Assets Rights

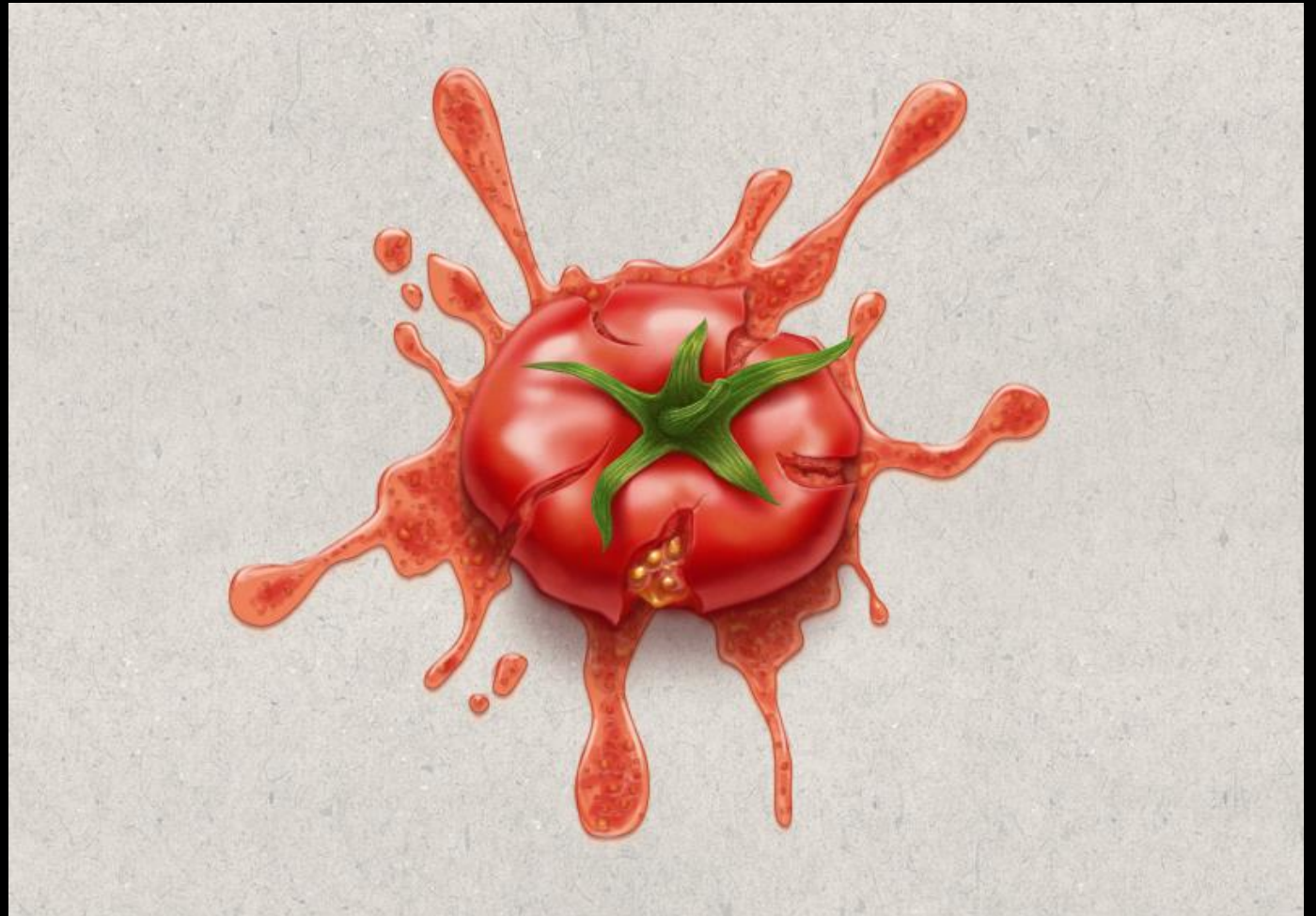
- **UFADAA!!**

- Approved by uniform commission on July 16, 2014
- UFADAA designed to “vest fiduciaries with the authority to access, control, or copy digital assets and accounts”
- Delaware quickly enacted
- Introduced in half of the state legislatures by the end of 2015
- But then.....



Standardizing Digital Assets Rights

**UFADAA
SQUASHED!!**



Standardizing Digital Assets Rights

- **UFADAA SQUASHED!!**
 - Big Tech (Facebook, Google) and its lobbyists successfully derailed UFADAA
 - Thought powers it gave fiduciaries were too broad
 - Too burdensome to determine who should and should not be granted access



Standardizing Digital Assets Rights

- **PEAC Act?**

- Big Tech proposes their own model law, the **Privacy Expectation Afterlife and Choices (PEAC) Act**
- Only addressed executors (not POAs, etc)
- Court order required for access



Standardizing Digital Assets Rights

- **PEAC Act?**

- Went nowhere



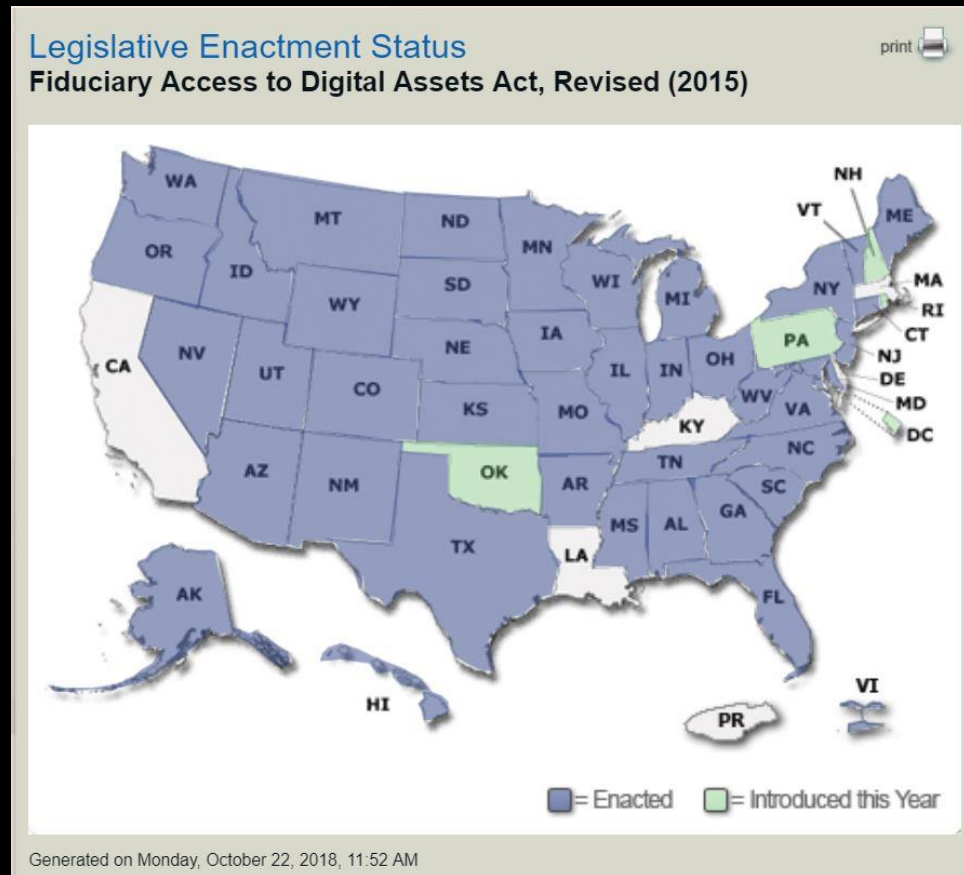
Standardizing Digital Assets Rights

- **Compromise**
- REVISED Uniform Fiduciary Access to Digital Assets Act
- RUFADAA!!
- Introduced July 15, 2015
- Widespread support – AARP, National Academy of Elder Law Attorneys, plus big tech companies



Standardizing Digital Assets Rights

- RUFADAA adopted in more than 40 states already



Standardizing Digital Assets Rights

- Revised Uniform Fiduciary Access to Digital Assets Act
 - Effective in Ohio as of April 6, 2017
 - Allows individuals to grant legal authority to others in order to gain access to digital assets and the content of electronic communications
 - Provides a framework to resolve conflicting instructions about handling digital assets across terms-of-service agreements, online tools, and/or a will, trust or power of attorney

Standardizing Digital Assets Rights

- RUFADAA continued
 - Recognizes the use of an “**online tool**” which may be offered by the custodian, where the user can direct the custodian to either disclose (or not disclose) some or all of the user’s digital assets to a fiduciary
 - Will have priority over any and all other instructions, including Terms of Service (as well as user’s own Will)
 - Google’s “Inactive Account Manager”
 - Facebook’s “Legacy Contact”

Standardizing Digital Assets Rights

- RUFADAA continued
 - If no online tool is used, permits individuals to allow (or prohibit) in a will, trust, power of attorney, or “other record,” disclosure to a fiduciary of some or all of a user’s digital assets
 - Even if not addressed in a legal document, the law provides that fiduciaries have the right to a “**catalogue**” of electronic communications sent by the user
 - Catalogue includes information including from/to whom a message was sent, the date and time of the message, and the corresponding electronic addresses
 - A legal document must specifically authorize a fiduciary to access to the **content** of electronic communications

Standardizing Digital Assets Rights

- RUFADAA continued
 - Terms of Service Agreements will control if no online tool is used and the user did not provide instructions regarding digital assets in a Will, Trust or Power of Attorney

Standardizing Digital Assets Rights

- Revised Uniform Fiduciary Access to Digital Assets Act
 - Unclear how RUFADAA will interact with federal laws
 - Defines fiduciaries as “authorized” for purposes of Stored Communications Act as well as “applicable computer fraud and unauthorized computer access laws”
 - But RUFADAA adopted at state level
 - Best solution: federal law that provides immunity for fiduciaries that access digital assets left by decedents

What is The Financial Advisor's Role in Planning for Digital Assets?



The Financial Advisor's Role in Planning for Digital Assets

- Take inventory of digital assets
- Include web URLs, usernames, and passwords
- Consider keeping usernames and passwords separate
- Specify how each should be handled in the event of death (ranging from transfer access to a loved one, to deleting account in its entirety)

JOHN DOE
DIGITAL ASSETS MEMORANDUM

In order to assist your Agent and/or Executor, please use this space to give instructions and necessary information regarding your digital assets, including usernames, passwords, PINs, etc. (or the location of such information if stored separately) and instructions on how they should be handled.

DIGITAL DEVICES (computers, tablets, smartphones, external drives, etc.):

Item	Access Information	Instructions

EMAIL ACCOUNTS:

Account	Login / Password Information	Instructions

Creating a Digital Assets Estate Plan

- Hard to keep up! The number of logins and passwords keeps growing!
- Consider password manager (1Password, Dashlane, Keeper, LastPass), provide master password to trusted loved one or advisor



Creating a Digital Assets Estate Plan

- If digital assets have significant monetary value, consider a valuation as part of the estate plan
- If digital assets are used in business operations, make sure business succession plan addresses access to such assets
- Use “online tools” such as Google’s and Facebook’s to specify your wishes and name contacts

Creating a Digital Assets Estate Plan

- Update the estate plan to consider digital assets
- Include language regarding digital assets in Wills, Trusts, and Powers of Attorney
- Consider (again!) password manager (1Password, Dashlane, LastPass)



Creating a *Digital Assets Estate Plan*

- Include digital assets provisions in your Will, Trust, and Financial Power of Attorney

account;

7.1.13. *Dealing with Digital Assets.* To continue, transfer, terminate, and otherwise have full access and control over all my digital assets in which I have a right or interest, including access to any catalogue of electronic communications sent or received and the content of such communications. My Executor will have authority to obtain access to all digital accounts and their content and to obtain all passwords and access codes and will have authority to access all tangible personal property capable of receiving, storing, processing or sending digital assets. Digital assets include, but are not limited to, all social networking (such as Facebook, LinkedIn, and Twitter), email accounts (such as Google mail), online bank, stock and financial accounts, eBay accounts, PayPal accounts, Web sites, blogs, address books, client lists, pictures, and any other information that exists in digital media;

7.1.14. *Foreclosure of Mortgages.* To foreclose, as an incident to the collection of any debt, any deed of trust or mortgage securing such debt and to bid in the mortgaged

Creating a Digital Assets Estate Plan

- Financial Power of Attorney provision:

Modernization Act of 1999, 15 U.S.C. 6801, as amended, and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 300gg, as amended. My Agent also can have access to and possession of my mail and can redirect my mail.

Dealing with Digital Assets. Pursuant to the general grant of authority over my digital assets granted above, my Agent possesses all powers listed under R.C. §1337.571. Additionally, my Agent may transfer, terminate, and otherwise have full access and control over all my digital assets in which I have a right or interest, including access to any catalogue of electronic communications and the content of such communications. My Agent will have authority to obtain access to all digital accounts and their content and to obtain all passwords, access codes, and answers to security questions and will have authority to access all tangible personal property capable of receiving, storing, processing or sending digital assets. Digital assets include all information that exists in digital media including, but not limited to, all social networking (such as Facebook, LinkedIn, and Twitter), email accounts (such as Google mail), online bank, stock and financial accounts, eBay accounts, PayPal accounts, Web sites, blogs, address books, client lists, and pictures.

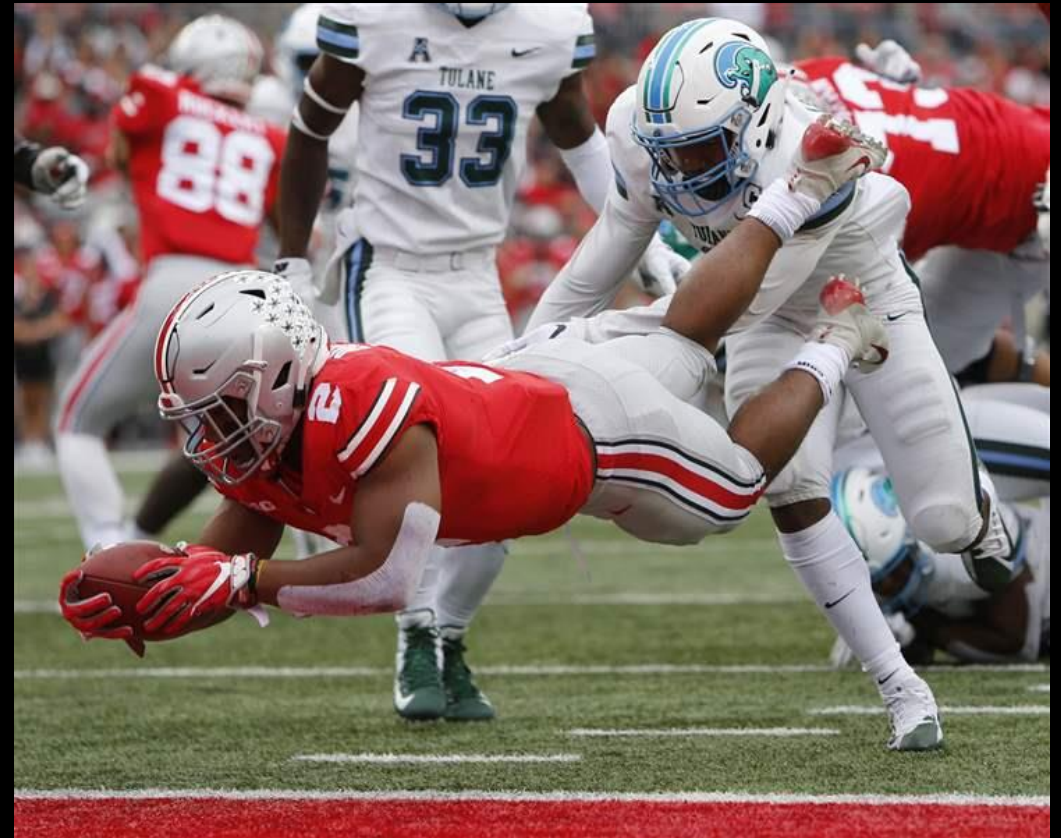
Authority over Foreign Accounts. Notwithstanding anything to the contrary, my Agent will not have any authority with respect to any foreign financial account or asset unless and until my Agent signs a writing affirmatively accepting such authority and such

Creating a Digital Assets Estate Plan

- Identify relevant individuals authorized to act
- Consider a separate “digital fiduciary”
- Consider whether user wants to keep certain matters private from their “regular” fiduciary
- Keep any “online tools” in mind

Creating a *Digital Assets Estate Plan*

- Make digital asset planning part of your client review process
- Won't happen overnight, take gradual approach
- Follow through! Don't let the plan stop short of the goal line!



Questions?

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