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January 28, 2013

Delegate David Albo, Chairman
Courts of Justice Committee
Virginia Legislature
Richmond, Virginia

RE: Opposition to HB 1584, Digital accounts and assets; enables a fiduciary to gain access.

Dear Chairman Albo and members of the Committee:

On behalf of our member companies and their Virginia users, we urge that you not support HB 1584 in its current form and at the present time.

HB 1584 attempts to give parents access to the online accounts of their deceased teenage child.

Unfortunately, the bill creates false expectations of actually delivering this access for parents.

That's because the Electronic Communications Privacy Act (ECPA)¹ preempts HB 1584.

As the committee knows, ECPA prevents online services from sharing the contents of communications unless they have consent from the subscriber or sender.² But HB 1584 is not likely to meet the consent requirements of ECPA. This puts online businesses in the tough spot of needing to disregard a state law in the face of a contradictory federal law.

Beyond preemption by ECPA, there are many other key questions that must be considered when legislating in this area. For example:

- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by a seventeen year-old?
- Should online services be required to retain emails and documents for a minimum period -- despite the subscriber's express wishes to delete their account upon death?
- When must estate representatives obtain probate court orders to force online services to retain or divulge documents and communications?

Along with these questions, HB 1584 discourages online services from developing new ways for Virginians to express their preferences for afterlife account access. Worst of all, HB 1584 could lead

¹ 18 USC § 2702(a)-(b).

² *Id.* § 2702(a)-(b) "A person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage ... [without] the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."

Virginians to not express their preferences – incorrectly thinking that HB 1584 controls the access to their account.

Fortunately, the Uniform Law Commission (ULC) is drafting model state rules to solve these questions.³ The ULC is attempting to fulfill ECPA's consent requirement in granting access by a personal representative. To date the ULC has drafted 18 pages and hopes to finish the model rules this year. NetChoice is participating in this process and will be at the drafting meeting next month.

We therefore urge that you not support HB 1584 in its current form and at the present time. In addition to the present ULC project discussed above, there will undoubtedly be additional court decisions and discussions of federal privacy laws that will impact this issue.

Nonetheless, we think it is important that individuals and online services consider this question and we appreciate Delegate Bulova alerting people to this issue.

Sincerely,



Steve DelBianco
Executive Director, NetChoice

cc: Members of the Committee

NetChoice is a trade association of e-Commerce businesses who share the goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org

³ Uniform Law Commission, *Fiduciary Access to Digital Assets Act* (Jan. 18, 2013), available at <http://bit.ly/ulcdraft1-18-13>.