NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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Chairman David M. Nangle
Room 146
State House
Boston, MA 02133

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RE: ***Support with amendments for H 1287, An Act relative to access to a decedent's electronic mail accounts***

Dear Chairman Nangle and Members of the Committee:

We write to support with amendments H 1287, an act relative to access to a decedent's electronic mail accounts. In doing so we ask that you remove Section 3(d) as it creates new legal problems and undermines the state uniformity created by H 1287.

We recognize the need of fiduciaries to wrap-up estates, and some of the challenges fiduciaries face when it comes to accessing electronic communications of the deceased. At the same time we need to respect the privacy expectations of the deceased, the privacy of those with whom they communicated, and federal privacy law. To that end, the H 1287 without Section 3(d) achieves the balance for all these concerns.

So long as Section 3(d) is not added, H 1287 would allow Massachusetts citizens to choose their afterlife privacy while allowing the fiduciary to wrap-up the estate and comply with federal law.

Other states are passing laws very similar to H 1287 without Section 3(d). These laws passed in Arizona, Colorado, Florida, Indiana, Illinois, Maryland, Michigan, Oregon, Tennessee, Washington, Wisconsin, and Wyoming and bills are moving in several other states.

Under H 1287 without Section 3(d):

- The privacy expectations, statements in a will, and settings chosen by users would remain after the user dies.
- Fiduciaries can see the banks, investment managers, and accountants with whom the deceased corresponded. This lets fiduciaries identify important interactions and contact those institutions as part of settling the estate.
- Fiduciaries can see the contents of communications *only* when the deceased expressly allowed it in their will, or when there is some other evidence of user consent. If the deceased allowed disclosure of these communications, then service providers must comply, subject to verification.

Some of the problems created by adding the amended Section 3(d) include:

> *Violation of federal law:* A state court cannot deem someone an "agent" under the federal stored communications act[1] — the court must actually find as a matter of fact that the

[1] 18 USC 2701, *et sec.*

accountholder authorized the agent to obtain communications. As a result, this provision fails to satisfy the requirements of federal law.

Failure to achieve true goals of H 1287: Even if a disclosure fell within the agency exception to stored communications act (which is unlikely), the exception would only apply to an electronic communications service providers (multi-party communications), not remote computing service providers (cloud storage), and only to incoming communications. As a result, Section 3(d) fails to create a pathway to access any communications or other content created or uploaded by the decedent.

Discourages services from creating afterlife choice tools: Section 3(d) only applies "If the online tool has never been utilized." In essence, only service providers that make afterlife choice tools available are implicated by Section 3(d). If passed, Section 3(d) would discourage service providers from making tools available as doing so would cause service providers to risk greater legal liability.

For all these reasons, we ask that you to pass H 1287 without Section 3(d). Thank you for considering our views. Please let us know if we can provide further information.

Sincerely,

Carl Szabo
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