

State Privacy and Security Coalition, Inc.

February 11, 2013

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee
900 Court Street, NE, S-415
Salem, OR 97301

Re: Opposition to OR SB 54 – Personal Representative Powers Bill

Dear Chair Prozanski and Members of the Committee:

Our coalition, which is comprised of 19 leading communications, technology and media companies and 5 trade associations, writes to urge that you oppose the personal representative powers bill, SB 54, as currently drafted.

We understand that the intent of the bill is to provide the personal representative of a deceased individual the power to take control of or terminate any accounts or message services that are considered digital assets, and such power can be limited by will or court order. However, this power raises some complex legal uncertainties when it comes to giving representatives access to the contents of online accounts of the deceased (as opposed to the power to terminate accounts). These uncertainties should be understood and avoided before the bill moves forward.

It is critical to understand that access to communications stored in online accounts may be treated differently than access to a deceased's papers. There is some uncertainty whether this aspect of the bill may conflict with the federal Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. 2702(b) *et seq.*, which protects the confidentiality of the contents of personal email and other stored electronic communications. ECPA requires consent of the account holder before contents of communications can be disclosed in this circumstance, and it merits careful study whether disclosure at the request of a representative is a valid basis for disclosure, as violations of ECPA are punishable with criminal penalties and lawsuits for statutory damages and attorney's fees against the disclosing service provider. This is because third parties, who for example, may have sent sensitive personal communications to the deceased could potentially complain about an executor receiving those communications. For this reason, careful examination of the "take control" phrase in the bill is appropriate.

Due to these uncertainties, the Uniform Law Commission ("ULC") has established a committee to attempt to find a solution that adequately balances the need for a fiduciary to gain access to information with the right of the decedent to keep information private. The ULC is currently studying these and other issues, with the goal of crafting a manageable and clear set of uniform rules for use in any state. Given the legal uncertainties here, it is premature for states to legislate now.

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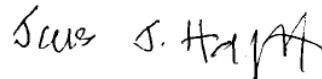
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In fact, a similar bill was proposed this year in Maryland and multiple stakeholders testified at a hearing about a month ago regarding the complexities of the issue. After considering these complexities, the committee decided to delay action until it further reviewed the issue.

For all of these reasons, we urge that you oppose SB 54, until the issue is examined more carefully and the ULC develops a consensus multi-state solution. Please feel free to contact us at the contact information below if you have any questions or would like to discuss our concerns in greater detail. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "James J. Halpert". The signature is written in a cursive style with a large, stylized "H" at the end.

James J. Halpert
General Counsel

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