DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0159/P1dn
MDK:sac:rs

September 28, 2012

Sen. Erpenbach:

As you requested, this preliminary draft is based on an Indiana law (Ind. Code s. 24–5–14–5 and related definitions). Please note the following about this draft:

1. I made minor changes to the language and structure of the Indiana law. In particular, the Indiana law creates an exception for certain messages from school districts. See Ind. Code s. 24–5–14–5 (a) (1). I expanded the exception to include messages from school boards, as well as the governing bodies of private schools and charter school operators. As a result, the exception applies to both public and private schools. Is that okay?

2. The definition of "subscriber" in proposed s. 100.522 (1) (c) 1. refers to a "telephone company" and "telephone service," but, like the Indiana law, the draft does not define those terms. I think those terms would be broadly interpreted to apply to both landline and wireless service. If you want to revise the draft to clarify this issue, please let me know.

3. Proposed s. 100.522 (2) (a) 1., like the Indiana law, refers to who "knowingly or voluntarily" authorizes receipt of a message. I recommend changing the language to "knowingly and voluntarily" or eliminating the reference to "or voluntarily." Please let me know what you think.

4. Proposed s. 100.522 (2) (b) 2. creates an exception for messages to subscribers with whom a caller has a current business or personal relationship. Note that, if necessary, DATCP may promulgate rules interpreting what constitutes such a relationship. See s. 227.11 (2) (a) (intro.), which grants any state agency the power to promulgate rules interpreting provisions in statutes that the agency administers.

5. Proposed s. 100.522 (3), (4), and (5), which deal with territorial application, enforcement, and a penalty, are based on s. 100.52 (7), (9), and (10), which pertain to the state's do–not–call list.

6. Under current law, s. 100.52 (4) (a) 1. prohibits persons who make commercial telephone solicitations from using electronically prerecorded messages without the recipient's consent. That provision is no longer necessary, as this draft prohibits anybody, including a commercial or political solicitor, from using automatic

dialing–announcing devices unless an exemption applies. That is why the draft repeals s. 100.52 (4) (a) 1.

7. I delayed the effective date by approximately 3 months to give people time to change their business practices to comply with the law. Is that okay?

8. The Indiana Supreme Court has held that the Indiana law does not violate the free speech clause of the Indiana constitution because the law does not impose a substantial obstacle to the right to engage in free speech. See *State of Indiana v. Economic Freedom Fund*, 959 N.E.2d 794, 806 (Ind. 2011). In that decision, the Indiana Supreme Court also noted that the Indiana law would likely withstand a challenge that it violates the 1st Amendment of the U.S. Constitution. According to the Indiana Supreme Court, the appropriate test for such a challenge is whether the law is narrowly tailored to serve a significant governmental interest while leaving open ample alternative channels for communication of information. That test was appropriate because the law is content neutral (i.e. the law applies to all autodialed calls regardless of content) and because the law restricts speech through private channels to reach private residences. 959 N.E.2d at 802. The Indiana Supreme Court found that the law would likely pass that test. However, note that a different state or federal court might reach a different result.

9. The Indiana law has also been challenged in federal court. In fact, the Indiana Supreme Court itself noted that a federal district court had found that a federal law preempted the state law, but that that finding did not affect the Indiana Supreme Court's decision. 959 N.E.2d at 800, n. 3, citing *Patriotic Veterans, Inc. v. Indiana ex rel. Zoeller*, 821 F. Supp.2d 1074 (S.D. Ind. 2011). In the *Patriotic Veterans* case, a federal district court held that the Federal Telephone Consumer Protection Act (FTCPA), 47 USC 227, preempted the state law. The plaintiffs in that federal case also argued that the state law violated the 1st Amendment of the United States Constitution. However, because the federal district court found preemption, the federal district court determined that it was not necessary or appropriate to address the 1st Amendment argument. Note that the federal district court's decision has been appealed to the 7th Circuit, which has not yet taken any action. Also note that other federal courts have held that the FTCPA does ***not*** preempt statutes in other states. See, e.g., *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (upholding a state law similar to the Indiana law) and *Palmer v. Sprint Nextel Corp.*, 674 F. Supp.2d 1224 (W.D. Wash. 2009) (upholding a state law prohibiting the use of automatic dialing and announcing devices in commercial telephone solicitations).

Please let me know whether you have any questions or redraft instructions.

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