

SENATE BILL No. 248

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-5; IC 35-52-24-30.5.

Synopsis: Biometric identifiers. Provides that a person shall not enroll a biometric identifier of an individual in a data base unless the person first: (1) provides notice to the individual from whom the biometric identifier was captured; (2) obtains the consent of the individual; or (3) provides a mechanism that can be used to prevent the subsequent use of biometric identifiers for a commercial purpose following enrollment in the data base. Provides that a person who enrolls the biometric identifier of an individual in a data base as permitted under these provisions may not sell, lease, or otherwise disclose the biometric identifier to another person for a commercial purpose unless the disclosure is made for certain specified purposes. Imposes certain duties on a person that knowingly possesses a biometric identifier that has been enrolled in a data base. Provides that a person that violates these provisions commits a deceptive act that is actionable under the deceptive consumer sales act. Provides that a person who: (1) knowingly and intentionally; and (2) with the intent to defraud or cause harm to another person, or to wrongfully obtain anything of value; violates these provisions, commits a Level 6 felony. Provides that the offense is a Level 5 felony if: (1) the offense involves the biometric identifiers of more than 100 individuals; or (2) the fair market value of the fraud or harm caused by the offense is at least \$50,000.

Effective: July 1, 2018.

Koch

January 3, 2018, read first time and referred to Committee on Corrections and Criminal Law.



Second Regular Session 120th General Assembly (2018)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2017 Regular Session of the General Assembly.

SENATE BILL No. 248

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 24-5-0.5-3, AS AMENDED BY P.L.170-2017,
- 2 SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 3 JULY 1, 2018]: Sec. 3. (a) A supplier may not commit an unfair,
- 4 abusive, or deceptive act, omission, or practice in connection with a
- 5 consumer transaction. Such an act, omission, or practice by a supplier
- 6 is a violation of this chapter whether it occurs before, during, or after
- 7 the transaction. An act, omission, or practice prohibited by this section
- 8 includes both implicit and explicit misrepresentations.
- 9 (b) Without limiting the scope of subsection (a), the following acts,
- 10 and the following representations as to the subject matter of a
- 11 consumer transaction, made orally, in writing, or by electronic
- 12 communication, by a supplier, are deceptive acts:
- 13 (1) That such subject of a consumer transaction has sponsorship,
- 14 approval, performance, characteristics, accessories, uses, or
- 15 benefits it does not have which the supplier knows or should
- 16 reasonably know it does not have.
- 17 (2) That such subject of a consumer transaction is of a particular



1 standard, quality, grade, style, or model, if it is not and if the
2 supplier knows or should reasonably know that it is not.

3 (3) That such subject of a consumer transaction is new or unused,
4 if it is not and if the supplier knows or should reasonably know
5 that it is not.

6 (4) That such subject of a consumer transaction will be supplied
7 to the public in greater quantity than the supplier intends or
8 reasonably expects.

9 (5) That replacement or repair constituting the subject of a
10 consumer transaction is needed, if it is not and if the supplier
11 knows or should reasonably know that it is not.

12 (6) That a specific price advantage exists as to such subject of a
13 consumer transaction, if it does not and if the supplier knows or
14 should reasonably know that it does not.

15 (7) That the supplier has a sponsorship, approval, or affiliation in
16 such consumer transaction the supplier does not have, and which
17 the supplier knows or should reasonably know that the supplier
18 does not have.

19 (8) That such consumer transaction involves or does not involve
20 a warranty, a disclaimer of warranties, or other rights, remedies,
21 or obligations, if the representation is false and if the supplier
22 knows or should reasonably know that the representation is false.

23 (9) That the consumer will receive a rebate, discount, or other
24 benefit as an inducement for entering into a sale or lease in return
25 for giving the supplier the names of prospective consumers or
26 otherwise helping the supplier to enter into other consumer
27 transactions, if earning the benefit, rebate, or discount is
28 contingent upon the occurrence of an event subsequent to the time
29 the consumer agrees to the purchase or lease.

30 (10) That the supplier is able to deliver or complete the subject of
31 the consumer transaction within a stated period of time, when the
32 supplier knows or should reasonably know the supplier could not.
33 If no time period has been stated by the supplier, there is a
34 presumption that the supplier has represented that the supplier
35 will deliver or complete the subject of the consumer transaction
36 within a reasonable time, according to the course of dealing or the
37 usage of the trade.

38 (11) That the consumer will be able to purchase the subject of the
39 consumer transaction as advertised by the supplier, if the supplier
40 does not intend to sell it.

41 (12) That the replacement or repair constituting the subject of a
42 consumer transaction can be made by the supplier for the estimate



the supplier gives a customer for the replacement or repair, if the specified work is completed and:

(A) the cost exceeds the estimate by an amount equal to or greater than ten percent (10%) of the estimate;

(B) the supplier did not obtain written permission from the customer to authorize the supplier to complete the work even if the cost would exceed the amounts specified in clause (A);

(C) the total cost for services and parts for a single transaction is more than seven hundred fifty dollars (\$750); and

(D) the supplier knew or reasonably should have known that the cost would exceed the estimate in the amounts specified in clause (A).

(13) That the replacement or repair constituting the subject of a consumer transaction is needed, and that the supplier disposes of the part repaired or replaced earlier than seventy-two (72) hours after both:

(A) the customer has been notified that the work has been completed; and

(B) the part repaired or replaced has been made available for examination upon the request of the customer.

(14) Engaging in the replacement or repair of the subject of a consumer transaction if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized.

(15) The act of misrepresenting the geographic location of the supplier by listing an alternate business name or an assumed business name (as described in IC 23-0.5-3-4) in a local telephone directory if:

(A) the name misrepresents the supplier's geographic location;

(B) the listing fails to identify the locality and state of the supplier's business;

(C) calls to the local telephone number are routinely forwarded or otherwise transferred to a supplier's business location that is outside the calling area covered by the local telephone directory; and

(D) the supplier's business location is located in a county that is not contiguous to a county in the calling area covered by the local telephone directory.

(16) The act of listing an alternate business name or assumed business name (as described in IC 23-0.5-3-4) in a directory assistance data base if:

(A) the name misrepresents the supplier's geographic location;



- 1 (B) calls to the local telephone number are routinely forwarded
2 or otherwise transferred to a supplier's business location that
3 is outside the local calling area; and
4 (C) the supplier's business location is located in a county that
5 is not contiguous to a county in the local calling area.
- 6 (17) The violation by a supplier of IC 24-3-4 concerning
7 cigarettes for import or export.
- 8 (18) The act of a supplier in knowingly selling or reselling a
9 product to a consumer if the product has been recalled, whether
10 by the order of a court or a regulatory body, or voluntarily by the
11 manufacturer, distributor, or retailer, unless the product has been
12 repaired or modified to correct the defect that was the subject of
13 the recall.
- 14 (19) The violation by a supplier of 47 U.S.C. 227, including any
15 rules or regulations issued under 47 U.S.C. 227.
- 16 (20) The violation by a supplier of the federal Fair Debt
17 Collection Practices Act (15 U.S.C. 1692 et seq.), including any
18 rules or regulations issued under the federal Fair Debt Collection
19 Practices Act (15 U.S.C. 1692 et seq.).
- 20 (21) A violation of IC 24-5-7 (concerning health spa services), as
21 set forth in IC 24-5-7-17.
- 22 (22) A violation of IC 24-5-8 (concerning business opportunity
23 transactions), as set forth in IC 24-5-8-20.
- 24 (23) A violation of IC 24-5-10 (concerning home consumer
25 transactions), as set forth in IC 24-5-10-18.
- 26 (24) A violation of IC 24-5-11 (concerning real property
27 improvement contracts), as set forth in IC 24-5-11-14.
- 28 (25) A violation of IC 24-5-12 (concerning telephone
29 solicitations), as set forth in IC 24-5-12-23.
- 30 (26) A violation of IC 24-5-13.5 (concerning buyback motor
31 vehicles), as set forth in IC 24-5-13.5-14.
- 32 (27) A violation of IC 24-5-14 (concerning automatic
33 dialing-announcing devices), as set forth in IC 24-5-14-13.
- 34 (28) A violation of IC 24-5-15 (concerning credit services
35 organizations), as set forth in IC 24-5-15-11.
- 36 (29) A violation of IC 24-5-16 (concerning unlawful motor
37 vehicle subleasing), as set forth in IC 24-5-16-18.
- 38 (30) A violation of IC 24-5-17 (concerning environmental
39 marketing claims), as set forth in IC 24-5-17-14.
- 40 (31) A violation of IC 24-5-19 (concerning deceptive commercial
41 solicitation), as set forth in IC 24-5-19-11.
- 42 (32) A violation of IC 24-5-21 (concerning prescription drug



discount cards), as set forth in IC 24-5-21-7.

(33) A violation of IC 24-5-23.5-7 (concerning real estate appraisals), as set forth in IC 24-5-23.5-9.

(34) A violation of IC 24-5-26 (concerning identity theft), as set forth in IC 24-5-26-3.

(35) A violation of IC 24-5.5 (concerning mortgage rescue fraud), as set forth in IC 24-5.5-6-1.

(36) A violation of IC 24-8 (concerning promotional gifts and contests), as set forth in IC 24-8-6-3.

(37) A violation of IC 21-18.5-6 (concerning representations made by a postsecondary credit bearing proprietary educational institution), as set forth in IC 21-18.5-6-22.5.

(38) A violation of IC 24-5-27 (concerning the commercial use of biometric identifiers), as set forth in IC 24-5-27-11.

(c) Any representations on or within a product or its packaging or in advertising or promotional materials which would constitute a deceptive act shall be the deceptive act both of the supplier who places such representation thereon or therein, or who authored such materials, and such other suppliers who shall state orally or in writing that such representation is true if such other supplier shall know or have reason to know that such representation was false.

(d) If a supplier shows by a preponderance of the evidence that an act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, such act shall not be deceptive within the meaning of this chapter.

(e) It shall be a defense to any action brought under this chapter that the representation constituting an alleged deceptive act was one made in good faith by the supplier without knowledge of its falsity and in reliance upon the oral or written representations of the manufacturer, the person from whom the supplier acquired the product, any testing organization, or any other person provided that the source thereof is disclosed to the consumer.

(f) For purposes of subsection (b)(12), a supplier that provides estimates before performing repair or replacement work for a customer shall give the customer a written estimate itemizing as closely as possible the price for labor and parts necessary for the specific job before commencing the work.

(g) For purposes of subsection (b)(15) and (b)(16), a telephone company or other provider of a telephone directory or directory assistance service or its officer or agent is immune from liability for publishing the listing of an alternate business name or assumed business name of a supplier in its directory or directory assistance data



base unless the telephone company or other provider of a telephone directory or directory assistance service is the same person as the supplier who has committed the deceptive act.

(h) For purposes of subsection (b)(18), it is an affirmative defense to any action brought under this chapter that the product has been altered by a person other than the defendant to render the product completely incapable of serving its original purpose.

SECTION 2. IC 24-5-27 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2018]:

Chapter 27. Enrollment and Use of Biometric Identifiers

Sec. 1. This chapter does not apply to the following:

- (1) A financial institution, or an affiliate of a financial institution, that is subject to Title V of the Gramm-Leach-Bliley Act of 1999 (15 U.S.C. 6801 et seq.) and to regulations promulgated under that act.
- (2) Activities subject to the federal Health Insurance Portability and Accountability Act (HIPAA) (P.L. 104-191) and to regulations promulgated under that act.

Sec. 2. (a) As used in this chapter, "biometric identifier" means data that:

- (1) is generated by the automatic measurement of a biological characteristic of an individual, including an individual's:
 - (A) fingerprint;
 - (B) voice print;
 - (C) retina or iris; or
 - (D) other unique biological patterns or characteristics; and
- (2) is used to identify the individual.

(b) The term does not include:

- (1) a physical or digital photograph;
- (2) a video or audio recording or data generated from a video or audio recording; or
- (3) information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act (HIPAA) (P.L. 104-191).

Sec. 3. As used in this chapter, "biometric system" means an automated identification system capable of:

- (1) capturing, processing, and storing a biometric identifier;
- (2) comparing the biometric identifier to one (1) or more references; and
- (3) matching the biometric identifier to a specific individual.



1 **Sec. 4.** As used in this chapter, "capture" means the process of
 2 collecting a biometric identifier from an individual.

3 **Sec. 5. (a)** As used in this chapter, "commercial purpose" means
 4 a purpose in furtherance of the sale or disclosure of a biometric
 5 identifier by a person to a third party for the purpose of marketing
 6 goods and services if those goods and services are unrelated to the
 7 initial transaction in which the person selling or disclosing the
 8 biometric identifier to the third party first gained possession of the
 9 biometric identifier.

10 **(b)** The term does not include a security or law enforcement
 11 purpose.

12 **Sec. 6.** As used in this chapter, "enroll", with respect to a
 13 biometric identifier of an individual, means to:

- 14 (1) capture the biometric identifier from the individual;
- 15 (2) convert the biometric identifier into a reference template
 16 that cannot be reconstructed into the original image captured;
- 17 and
- 18 (3) store the reference template in a data base that matches
 19 the biometric identifier to the individual from whom the
 20 biometric identifier was captured.

21 **Sec. 7.** As used in this chapter, "security purpose" means any
 22 purpose in furtherance of:

- 23 (1) preventing shoplifting, fraud, or any other
 24 misappropriation or theft of a thing of value, including
 25 tangible and intangible goods and services;
- 26 (2) protecting the security or integrity of software, accounts,
 27 applications, or online services; or
- 28 (3) protecting any person.

29 **Sec. 8. (a)** Subject to subsection (c), a person shall not enroll a
 30 biometric identifier in a data base unless the person first:

- 31 (1) subject to subsection (b), provides notice to the individual
 32 from whom the biometric identifier was captured;
- 33 (2) obtains the consent of the individual from whom the
 34 biometric identifier was captured; or
- 35 (3) provides a mechanism that can be used to prevent the
 36 subsequent use of biometric identifiers for a commercial
 37 purpose following the enrollment of the biometric identifiers
 38 in the data base.

39 **(b)** To satisfy subsection (a)(1), notice must be given through a
 40 procedure reasonably designed to be readily available to affected
 41 individuals.

42 **(c)** A person that enrolls the biometric identifier of an individual



1 in a data base as permitted under subsection (a) may not sell, lease,
 2 or otherwise disclose the biometric identifier to another person for
 3 a commercial purpose unless the sale, lease, or disclosure is:

- 4 (1) necessary to provide a product or service subscribed to,
 5 requested by, or expressly authorized by the individual;
 6 (2) necessary to effect, administer, enforce, or complete a
 7 financial transaction that the individual requested, initiated,
 8 or authorized, if the third party to whom the biometric
 9 identifier is disclosed:

10 (A) maintains the confidentiality of the biometric
 11 identifier; and

12 (B) does not further disclose the biometric identifier;
 13 except as otherwise permitted under this subsection;

14 (3) required or expressly authorized by a court order or by a
 15 federal or state statute;

16 (4) made to a third party that contractually promises that the
 17 biometric identifier will not be further:

18 (A) disclosed; or

19 (B) enrolled in a data base for a commercial purpose in
 20 violation of subsection (a); or

21 (5) made to prepare for litigation or to respond to, or
 22 participate in, a judicial process.

23 **Sec. 9. A person that knowingly possesses a biometric identifier**
 24 **that has been enrolled in a data base:**

25 (1) shall take reasonable care to guard against unauthorized
 26 access to, or acquisition of, the biometric identifier; and

27 (2) may not retain the biometric identifier for any period
 28 longer than is reasonably necessary to:

29 (A) comply with:

30 (i) a court order;

31 (ii) a statute; or

32 (iii) a public records retention schedule specified under
 33 federal, state, or local law;

34 (B) protect against or prevent actual or potential fraud,
 35 criminal activity, claims, security threats, or liability; or

36 (C) provide the services for which the biometric identifier
 37 was enrolled in the data base.

38 **Sec. 10. This chapter does not expand or limit the authority of**
 39 **a law enforcement officer acting within the scope of the law**
 40 **enforcement officer's authority, including the authority of a law**
 41 **enforcement officer in executing lawful searches and seizures.**

42 **Sec. 11. A person that violates this chapter commits a deceptive**



act that is:

- (1) actionable under IC 24-5-0.5; and
- (2) subject to the remedies and penalties set forth in IC 24-5-0.5.

Sec. 12. (a) Except as provided in subsection (b), a person who:

- (1) knowingly and intentionally; and
- (2) with the intent to:
 - (A) defraud or cause harm to another person; or
 - (B) wrongfully obtain anything of value;

violates this chapter, commits a Level 6 felony.

(b) The offense set forth in subsection (a) is a Level 5 felony if:

- (1) the offense involves the biometric identifiers of more than one hundred (100) individuals; or
- (2) the fair market value of the fraud or harm caused by the offense is at least fifty thousand dollars (\$50,000).

(c) It is not a defense in a prosecution under subsection (a) or (b) that:

- (1) no person was harmed or defrauded; or
- (2) nothing of value was wrongfully obtained.

SECTION 3. IC 35-52-24-30.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2018]: **Sec. 30.5. IC 24-5-27-12 defines a crime concerning the commercial use of biometric identifiers.**

