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October 8, 2009

Senator Lawrence Bliss
Representative Charles Priest
Co Chairs, Joint Standing Committee on Judiciary
Maine Legislature
3 State House Station
Augusta, Maine 04333

Re: Comments re Judiciary Committee Review of PL 2009 c. 230

Dear Senator Bliss and Representative Priest:

Our law firm was counsel to the plaintiffs in *Maine Independent College Association v. Mills*. We are filing these comments on behalf of a broad coalition of companies and trade associations to explain the extent of the legal problems with each of the restrictions in P.L. 2009, chapter 230 ("L.D. 1183").

These problems are so extensive that in order to fix them, the legislature should focus on protecting minors by prohibiting deceptive or coercive behaviors, instead of making incremental changes to the fatally flawed, existing law.

Constitutional Concerns With the Statute As a Whole

- It is important to start from the recognition that Judge Woodcock's order in the *Maine Independent College Association v. Mills* case found that the plaintiffs had established a likelihood of success on the merits of their challenge with regard to *all* of the three prohibitions in current law – chapter 230, §§ 9552(1) & (2) and 9553. Thus, for example, simply eliminating § 9552(2) (the data transfer prohibition) and 9553 (the marketing and recommending a course of conduct prohibition), will not fix the constitutional problems with the statute.

- It is equally important to recognize that because General Mills did not contest the statute's First Amendment problems with regard to all of the prohibitions the plaintiffs challenged, the Court had no reason to consider the plaintiffs' Dormant Commerce Clause and Children's Online Privacy Protection Act (COPPA) preemption arguments. These, as we will explain, are very strong and would apply to all three prohibitions in the bill.

- LD 1183 regulates so far beyond coercive or deceptive marketing to minors that it: (1) imposes extensive restrictions on a large swath of both non-commercial speech and commercial speech that violate the First Amendment; (2) impermissibly regulates interstate commerce in a way that would compel advertisers and website operators across the nation to comply with Maine's regulatory regime; and (3) conflicts with and would be preempted by COPPA.

- Furthermore, the statute would impose significant costs and create chilling effects on constitutionally protected activities by effectively requiring individuals and entities to avoid dealing with minors under threat of expensive class action lawsuits.

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§ 9551(1) Definition of Health-Related Information

- The bill will not be constitutional if limited to "health-related information" because the definition of that term is highly overbroad.
    - First of all, this definition includes information that does not even identify an individual (such as anonymous health survey data or data that has been de-identified in accordance with clinical drug trial protocols or HIPAA), and therefore raises minimal privacy concerns, if any.
    - Second, the definition covers collection of a huge range of information "relating to health, nutrition, drug or medication use, physical or bodily condition." Thus, it could prohibit, for example: (1) a supermarket from allowing a minor to use a family discount supermarket loyalty card; (2) a pharmacy from collecting information about non-prescription drug use to offer coupons to purchase those drugs at a discount; (3) a college athletic program from collecting information about athletes' physical condition to offer them scholarships to induce them to enroll at the college; or (4) an Internet company from recommending books to a minor about a medical condition about which the minor was seeking additional information.
    - Third, this definition is dramatically broader than the use of drug prescription data for "detailing" (a form of marketing deemed to constitute economic activity, not speech, because it was deemed to serve only to raise prescription drug prices), which was at issue in the *IMS Health v. Ayotte* case that Associate Professor Flynn was involved in.

§ 9552(1) Collection of Information

- By requiring verifiable parental consent for the collection of health-related or personal information for marketing purposes, § 9552(1) would deprive minors of a host of beneficial information that goes to the heart of First Amendment protections. This is because "[v]erifiable parental consent" is a term of art lifted from COPPA, 15 U.S.C. § 6501. The term has been defined very narrowly by the Federal Trade Commission to require a parental consent form or a parent's credit card number for verification that the parent is consenting. In practice, this has been extremely difficult and expensive to obtain, and most Internet sites potentially subject to COPPA do everything they can not to target children under the age of 13 so that they are not subject to this requirement.

- As result of this huge obstacle to obtaining verifiable parental consent, most high school students would be largely cut off from subscribing to newspapers and receiving information about vocational schools, college counseling services, and college test preparation services that merely required them to provide a name and address to business entities advertising such services, much less the ability to sign up to receive information about their favorite sports team or band. Similarly, even if the law is limited to health-related information, minors would be prohibited from providing information to ad-supported eHealth websites, ad-supported illness support groups, or family planning services without verifiable parental consent.

- By restricting the provision of information by minors to these sorts of services, the state would severely restrict **non-commercial speech** by minors, because signing up to receive information in no way

"proposes a commercial transaction." *See, e.g., Trustees of the State Univ. of N.Y v. Fox*, 492 U.S. 469, 473-74 (1989).

- What is more, even if statute was somehow deemed to affect only commercial speech, the Supreme Court has repeatedly struck down these sorts of commercial speech regulations that prohibit truthful, non-misleading speech because they are more extensive than necessary to achieve a substantial government interest. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) (striking down Rhode Island law prohibiting advertisements about retail prices for alcoholic beverages, noting that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes.")

- In addition, this restriction on collection of personal information from minors is **preempted by COPPA**, which is discussed below.

§ 9552(2)

- § 9552(2)'s prohibition against transfers of personal or health-related information suppresses a huge range of fully protected **non-commercial speech**, such as public record information used for child support enforcement or traffic safety.

- LD 1183 similarly violates the **First Amendment right of political association** by imposing a total ban on the transfer of names and other personally identifying information about minors for any purpose, including by political campaigns, religious groups, or community organizers working with minors on their causes.

- Narrowing this restriction to provision of information for marketing purposes would not save the constitutionality of the statute as provision of this information is *not* commercial speech – it does not itself constitute advertising or otherwise propose a commercial transaction. *Trustees of the State Univ. of N.Y v. Fox*, 492 U.S. at 473-74.

- Furthermore, even supposing that it were considered commercial speech, a ban on transferring this information is in no way tailored to the purpose of this law – protecting minors from predatory deceptive marketing. Because the restriction on speech is far broader than necessary to achieve the stated interest, the law fails the commercial speech test. *See Thompson v. Western States Medical Center et al.*, 535 U.S. 357, 371 (2002) ("if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

- Moreover, prohibiting the transfer of personal information of minors for marketing purposes is preempted by COPPA, 15 U.S.C. § 6502(d). It would effectively ban the few services that do obtain parental consent under COPPA's stringent requirements because doing so requires transferring personal information of minors in the course of confirming that consent has been obtained.

§ 9553

- § 9553 too violates First Amendment protections for **non-commercial speech** by banning all use of health-related information or personal information about a minor to engage in speech that promotes a

course of action with respect to a product or service. This restriction extends far beyond marketing to cover a broad array of non-commercial statements about products or services, safe or correct use of medications, or even statements opposing use of a product. It is a clear content-based restriction on constitutionally protected speech that falls far short of the "narrow tailoring" required under the First Amendment. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 875-79 (1997).

- As with § 9552(2), use of this information for marketing purposes, even if considered commercial speech, clearly fails the narrow tailoring test for commercial speech, as all forms of marketing to minors are certainly not predatory. *See, e.g. Thompson v. Western States Medical Center et al.*, 535 U.S. at 371.

Dormant Commerce Clause

- The Commerce Clause of the U.S. Constitution provides that "Congress shall have power…[t]o regulate Commerce…among the several states."

- The Supreme Court has interpreted the Commerce Clause to prohibit states from enacting regulations that would impermissibly burden interstate commerce, since the power to regulate interstate commerce belongs exclusively to Congress under the Constitution.

- As applied to the Internet, all three provisions of LD 1183 are unconstitutional under the Dormant Commerce Clause because it would not be workable to comply with these restrictions unless entities simply stop doing business with potential Maine residents. LD 1183 also violates the Dormant Commerce Clause because it regulates commerce that occurs wholly outside of Maine and effectively compels entities outside of Maine to comply with Maine's regulatory regime.

- LD 1183 would require marketers and other First Amendment speakers around the country who do not currently screen out minors to expend significant resources to try to comply with Maine's new regulatory regime. These entities would have the extremely difficult task of obtaining verifiable parental consent for teenagers in Maine who want to provide them with contact information, removing all Maine minors from marketing or membership lists, and refraining from using information about minors for marketing or for recommending any course of action with regard to a product or service – all to the potentially significant detriment of Maine teenagers.

Children's Online Privacy Protection Act (COPPA)

- Under COPPA, states are prohibited from imposing any liability for commercial activities by website operators that is inconsistent with the treatment of those activities under COPPA.

- LD 1183 violates COPPA by imposing liability for the collection, use, and transfer of information about minors over the age of 13, who are not covered under COPPA. Moreover, LD 1883 would actually preclude website operators from complying with COPPA by prohibiting the transfer of any personal information about Maine minors, which is necessary under COPPA in order to obtain verifiable parental consent.

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- COPPA requires parental consent before personal information may be collected online from a child under the age of 13. It does not allow a private right of action and does not require parental consent for collection of health-related information that is not personally identifiable or for collection of personal information from minors who are over 12. LD 1183, therefore, is inconsistent with COPPA.

- Although we recognize the importance of shielding minors from abusive marketing practices, any such legislative efforts must not conflict with COPPA.

Thank you for your time and consideration of our comments.

Sincerely,

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