

October 8, 2009

Honorable Lawrence Bliss, Senate Chair
Honorable Charles Priest, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Dear Senator Bliss and Representative Priest:

The Direct Marketing Association is pleased to submit comments to assist the Judiciary Committee in its review of P.L. 2009, c. 230 (10 Me. Rev. Stat. §§ 9551-9554). While P.L. 2009, c. 230 was surely enacted with good intentions, we believe that the current statute is too broadly written. To highlight two areas of particular concern, the law's application to youth aged 13-17 and its expansive definition of "health-related information" will prevent young people from receiving information about relevant products and services about which they are fully capable of making sound decisions. Moreover, the law's restrictions on speech raise significant constitutional concerns.

I. The statute unnecessarily restricts sharing relevant information with youth aged 13-17.

The treatment of youth aged 13-17 in federal and state law generally reflects the fact that teenagers, while below the age of majority, are capable of rational decision-making. The federal Children's Online Privacy Protection Act ("COPPA") establishes protections for children's privacy in the context of online information collection. But by limiting the scope of COPPA to websites directed at children under the age of 13, Congress acknowledged that teenagers can make informed decisions about sharing personal information. The COPPA framework is consistent with the fact that states generally allow teenagers to take on such responsibilities such as working and driving and as a result, P.L. 2009, c. 230 is not consistent with this general recognition that young people can and do make mature choices.

P.L. 2009, c. 230 deprives Maine's teenagers of the option to provide information about themselves in exchange for communications that may be relevant or interesting to them. For example:

- A high school student will need parental approval to set up a graduation wish list at an online bookstore, and the bookstore will be prohibited from offering automated recommendations about other books that the student might enjoy.
- A 17-year-old high school senior cannot request that universities send her brochures in the mail, even with parental permission. However, the same universities can send brochures to her 18-year-old classmates.

- A Maine teenager who is a fan of a sports team would not be able to sign up to receive information from the team's fan club that included any kind of offer for souvenirs, commemorative items or other team gear.

As these examples illustrate, P.L. 2009, c. 230 can be broadly interpreted and covers a potentially long list of likely unintended applications.

P.L. 2009, c. 230's wide scope will also create heavy compliance burdens for online businesses nationwide. Whereas COPPA is limited to websites directed at children, P.L. 2009, c. 230 applies regardless of a website's target audience. Because teenagers are likely to share many interests with adults, Maine's statute affects general-audience websites ranging from music fan clubs to sports teams to clothing outlets. P.L. 2009, c. 230 effectively requires all websites to set up onerous and costly mechanisms for identifying Maine users, discerning their ages, and attempting to obtain verifiable parental consent before accepting any user information from teenagers.

II. The statute's overly broad definition of "health-related information" will have negative consequences.

Testimony in support of P.L. 2009, c. 230 before the Committee on Business, Research and Economic Development in April 2009 focused on arguments for limiting the marketing of prescription drugs to minors. Even if the statute covered only pharmaceutical marketing, we would question whether restrictions are needed given that minors, like adults, cannot obtain such drugs without a doctor's approval. However, the statute's provisions on health-related marketing go far beyond regulating prescription drug marketing.

P.L. 2009, c. 230 provides that the use of "any health-related information ... regarding a minor" for marketing purposes constitutes illegal predatory marketing. In addition to defining "health-related information" broadly, the statute prohibits the use of such information in any marketing of a product or service, including "promoting a course of action" related to a product. The law applies even if the health-related information is not individually identifiable. P.L. 2009, c. 230 thus prohibits a wide range of communications to teenagers about relevant products and services that are not associated with the same risks as prescription drugs, even when such communications are targeted based on anonymous information. For example:

- The broad phrase "physical or bodily condition" could include the fact that an individual is prone to sunburns. Companies would not be allowed to communicate specifically with youths who are vulnerable to sunburn, such as fair-skinned athletes, to receive information about sunscreen or other skin-protective products.
- In considering "physical or bodily condition" in conjunction with limits on marketing use of personal information sports camps and possibly, other forms of organized athletic activity might be constrained in their promotional efforts. Such camps or activities could not reach out to teens based on information about their athletic talents or conditioning, and may not even use an address provided by a parent to mail marketing materials directly to the teen at the parent's request.

As these examples illustrate, the current law is written so broadly that it prevents targeted communications about a host of products and services that do not present the same concerns as prescription drugs, even when health-related information is not associated with any particular individual.

We do not believe that such restrictions are beneficial on young adults' ability to request, and organizations' ability to provide, information that is likely to be relevant and interesting.

III. The statute raises serious constitutional concerns.

The overbreadth and inconsistency of P.L. 2009, c. 230 are especially problematic because the law restricts even truthful speech to minors. The law arguably constitutes a content-based restriction on speech, a type of restriction that must satisfy the strictest constitutional scrutiny. Even if the statute were treated as a restriction on commercial speech, which receives less constitutional protection than some other types of speech, the government must be able to justify the scope of its regulation. In order to limit lawful, non-misleading commercial speech, the statute must advance a substantial government interest, and must not be more restrictive than necessary to advance that interest.

As the examples above illustrate, the consequences of P.L. 2009, c. 230 are significant. The statute appears assume that any use of certain information to provide relevant marketing to individuals under 18 is harmful and predatory, an assumption that is out of step with the prevailing COPPA regime. As the Committee reviews and reconsiders P.L. 2009, c. 230, we urge you to ensure that any final measure is necessary to advance a significant governmental interest, and sweeps only as broadly as that interest requires.

Sincerely,



Ron Barnes
Vice President, State Affairs