

October 8, 2009

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

RE: Public Law 2009, Chapter 230 (LD 1183), An Act to Prevent Predatory Marketing Practices Against Minors

Dear Senator Bliss, Representative Priest and Members of the Judiciary Committee:

We write to urge you to repeal Public Law 2009, Chapter 230 (LD 1183) as overbroad and in conflict with the First Amendment and the Commerce Clause of the United States Constitution. Judge Woodcock's order in the *Maine Independent College Association v. Mills* case correctly determined that the plaintiffs had established likelihood of success on the merits of their challenge to the law. LD 1183 imposes extensive restrictions on speech that violate the First Amendment, impermissibly regulates interstate commerce in compelling advertisers, website operators, and others across the nation to comply with Maine's regulatory regime, and is preempted by the Children's Online Privacy Protection Act (COPPA).

As a Maine-based association of responsible email marketers and service providers that has worked hard to promote permission-based email marketing and authentication practices since 2003, the Email Sender and Provider Coalition (ESPC) applauds the legislature's efforts to protect children from schemes designed to induce them to provide sensitive health information for predatory marketing purposes. Nevertheless, LD 1183 reaches far beyond this laudable goal. As a result, the law violates both the First Amendment and the Commerce Clause of the United States Constitution. The Memorandum of Law submitted by DLA Piper on behalf of a coalition of companies and trade associations explains the legal analysis behind this inescapable conclusion. This letter is intended to highlight why LD 1183 is markedly overbroad (and thus unconstitutional), with particular focus on its effect on our members, who rely on email communications as a vital method of reaching and responding to consumers.

1. LD 1183 Reaches all Personal Information, Including E-Mail Addresses

Though ostensibly focused on health information, LD 1183 actually reaches much further to prohibit the knowing collection or receipt of any "personal information" for marketing purposes from a minor without first obtaining verifiable parental consent. The term "personal information" is defined broadly to mean "individually identifiable information," including an individual's first name or first initial and last name, as well as various other identifiers. While "email address" is not included in the list of enumerated identifiers, email addresses almost certainly are included in the definition of "personal information" as they are often composed of a

combination of individuals' first and last names or initials. In addition, the use of the word "including" in the definition suggests that the list is not exhaustive, and email addresses are commonly considered to be identifying information. Accordingly, LD 1183 would cut students off from subscribing to newsletters or otherwise receiving information about valuable services such as vocational schools, college counseling services, and college test preparation services that merely require minors to provide an email address to business entities advertising such services.

Minors' personal information is already protected under federal law by the COPPA. We believe that, to the extent the legislature perceives that children's health information is not adequately protected under existing law, any law it adopts to fill that perceived void should be narrowly tailored to reach minors' sensitive health information only, and should not govern email addresses and similar personal information alone.

2. LD 1183 Will Vastly Expand the Personal Information Companies Collect

Because LD 1183 as currently drafted encompasses all "personal information," it will greatly expand the information companies collect and store to ensure that they do not unwittingly collect personal information from a minor residing in Maine. Presently, most companies collect only the minimum information needed to respond to a customer's request. For example, most websites that are not aimed at children allow customers to learn more about their products or to receive discounts simply by providing an email address. This practice is consistent with the sound data collection principle of collecting "minimum necessary" personal data, reflected in data protection laws in the European Union and other countries around the globe.

If LD 1183 stands as written, companies collecting any personal information will need to add an age verification to their registration process. As a result, websites that today require customers to provide only an email address to receive substantial benefits will be forced to require customers to enter their age or other indicia that they are not minors, and may also feel that they need to collect individuals' names. Similarly, companies that currently have no need to collect geographic information may collect such information to ensure that the individual does not reside in Maine. This will hold true even for websites tailored to adult interests, and even where there is no reason to suspect the person providing information is a minor or that he or she resides in Maine. LD 1183 accordingly runs afoul of the "minimum necessary" data protection standards built into laws across the globe.

The legislature should ensure that any law it adopts does not needlessly add to the personal information companies collect. At a minimum, there should be no liability for the collection, transfer, or use of health information unless there is proof that the collection, transfer, or use was done with knowledge that the information concerned a minor.

3. LD 1183's Definition of "Health Information" Is Overbroad

Even if LD 1183 did not impermissibly cover all "personal information," the law's prohibition on collecting, transferring, or using for marketing purposes "health information" is itself overbroad. Again, the ESPC supports the goal of prohibiting marketers from using unfair and deceptive practices to acquire and use minors' sensitive health information. But LD 1183 reaches far beyond traditional health information to include "any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or similar data." This broad definition appears to encompass facts far afield from sensitive health information, including food preferences, performance in sports contests, and purchases of over-the-counter medicines. "Information about an individual's . . . bodily condition" arguably includes eye and hair color. No valid public policy is served by cutting teens off from registering to receive information about weight loss, dietary tips, exercise, and a host of other beneficial health care products and services that are not sensitive in nature.

Any law adopted to solve the problems identified by the sponsors of LD 1183 should be more narrowly tailored. The definition of "health information" should be limited to information that relates to an individual's medical history, medical treatment, or diagnosis by a health care professional.

4. LD 1183 Prevents Use of Even De-Identified, Anonymous Health Information

LD 1183's prohibition on collecting, transferring, and using for marketing purposes "health-related information" is not limited to information that is personally identifiable. To the contrary, LD 1183 prohibits using any information that is related to nutrition or physical or bodily condition in any way, even if that information is rendered anonymous. Furthermore, the FTC has interpreted the term "collect" to mean passive receipt of information supplied voluntarily. Internet sites and services that have no interest in collecting health-related information or personal information from minors may nevertheless be unable to avoid doing so and therefore risk class action lawsuits.

To address this area of over breadth, we believe that any law adopted to protect minors' health information should be tailored to health information that identifies a unique individual and that is limited in scope as outlined above.

5. Private Right of Action

The stakes imposed by LD 1183 for companies that collect personal information are high: the law provides for a private right of action for damages, with the possibility of treble damages if deemed to be "knowing," as well as civil fines starting at \$ 10,000. This risk is magnified considerably by the ambiguity and over breadth of the law. Private citizens and courts will have considerable difficulty divining the legislature's intent in adopting the law, exposing companies to liability for engaging in behavior that the legislature may not have intended to prohibit. Our

membership is concerned that a broad-based private right of action and civil penalties could do damage to a legitimate marketing channel. Experience indicates that such provisions can be abused and that otherwise legitimate businesses are forced to spend time and resources defending frivolous lawsuits. Existing enforcement through the Attorney General and other agencies provide an ample, elaborate, and effective means of enforcement of consumer protection laws. Those agencies, moreover, have the expertise and discretion to enforce the law's requirements appropriately, and to set regulatory priorities at the state level.

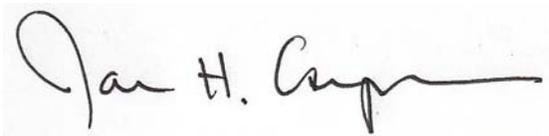
To ensure fair enforcement and mitigate against unreasonable harm to companies in defending themselves against frivolous lawsuits, any law adopted by the legislature should be enforced only by the Attorney General or other state agency as an unfair and deceptive trade practice.

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In summary, although Maine can articulate a substantial governmental interest in curbing predatory marketing using minors' sensitive health information, LD 1183 effectively prohibits all direct marketing to or about minors, even where the marketing is truthful and non-coercive, uses only an email address, and does not remotely touch upon health information. LD 1183 as written simply cannot be salvaged. We urge the committee to find LD 1183 unconstitutional and recommend its repeal as soon as possible. Any law adopted in its place should be narrowly tailored to the goal of protecting minors' sensitive health information.

We greatly appreciate the opportunity to address you regarding the laudable objective of protecting minors' sensitive health information. Thank you for considering our comments. We are always available to further elaborate on any of these points, and to assist you in your deliberations about any new legislation on this topic.

Respectfully submitted,



James H. Campbell
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Email Sender & Provider Coalition