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TO: Joint Standing Committee on Judiciary, Maine Legislature
The Honorable Lawrence Bliss, Senate Chair
The Honorable Charles Priest, House Chair

FR: Suzanne D. Goucher, President & CEO

DT: October 8, 2009

RE: PL 2009, Ch. 230 (LD 1183), An Act to Prevent Predatory Marketing Practices against Minors

We appreciate the Committee's consideration of the above-referenced matter, and we thank you for the opportunity to offer our thoughts on it.

The original version of LD 1183 defined as "predatory" the marketing of any product or service to a minor using any health-related information. Had it passed in this form, it could have resulted in a cause of action if, for example, absent the requisite parental consent, a 17-year-old answered a completely anonymous survey on a website about health and exercise habits, and was then presented with a web page showing some exercise suggestions and a coupon for \$5 off a pair of brand-name running shoes. This unfortunate effort to lump together the good, the bad and the ugly by essentially banning even the most benign marketing communications was only exacerbated by the amended version of the bill, which was extended to encompass various items of "personal information" as well as health-related information.

Other commenters, and the plaintiffs in the federal suit, have written at length about the constitutional infirmities of this law. We will simply note that, in our view, it fails the fourth "Central Hudson"¹ test, which questions whether a law or regulation restricting lawful commercial speech is more extensive than necessary to advance the government's asserted interest. While this law is no doubt well-intentioned, the government's interest in protecting young people from messages that some think they should not receive might be better served by strengthening the federal Children's Online Privacy Protection Act (COPPA). Furthermore, by banning marketing communications based on personal or health-related information, *regardless of the source of the communication*, PL 2009 Ch. 230 sets up the State of Maine as the information police for communications originating anywhere around the world – an untenable position at best.

With specific regard to the impact of the law on Maine's radio and television stations, most stations generally require people to certify that they are 18 years of age or older before entering contests, signing up for station e-newsletters, and the like. However, it would be difficult for stations to "ensure that a parent of a minor receives notice of the collection of personal information, use and disclosure practices and authorizes the collection, use and disclosure" of personal information if, for example, a minor were to self-certify as being over 18, or to certify on behalf of a parent, without the parent's knowledge, that the collection of personal information was authorized. This law places an impossibly burdensome requirement on stations to verify parental authorization when they have no practical means of doing so.

We appreciate the Committee's willingness to wrestle with the difficult issues this law presents, and thank you again for allowing us to comment.

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¹ *Central Hudson Gas & Electric v. Public Service Commission of NY*, 447 U.S. 557 (1980)