

**WRITTEN TESTIMONY OF REPRESENTATIVE SHARON TREAT  
JUDICIARY COMMITTEE REVIEW  
OF P.L. 2009, c. 230**

**October 8, 2009  
Joint Standing Committee on Judiciary**

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Chairman Bliss, Chairman Priest, and members of the Joint Standing Committee on Judiciary. I am Sharon Treat, State Representative for District 79, and I live in Hallowell. I co-sponsored Senator Schneider's legislation, LD 1183, "AN ACT TO PREVENT PREDATORY MARKETING PRACTICES AGAINST MINORS REGARDING DATA CONCERNING HEALTH CARE ISSUES" which was enacted, after amendment in committee, as PL 2009, Chapter 230.

**Your task should be a narrow one.** Chapter 230 was duly enacted with the unanimous support of the Business Research & Economic Development Committee and of this Legislature, on the basis of information presented to the Legislature establishing a compelling state interest – protection of the health and welfare of minors. A strong case was made at the April 2009 hearing, and subsequent committee work sessions, that the unfettered collection of personal information from minors – personal information which is not generally public – for use in marketing health products including drugs, is not in the best interest of this vulnerable population. Indeed, such data collection and marketing activities could place children and teens at risk.

No testimony opposing the legislation was presented at the public hearing. Nor was any evidence or argument provided then, or in work session or floor debate, that the legislation was unnecessary; or that the concern was misplaced that such data collection and use, without parental permission, poses risks to the health or safety of children.

It should be clear that the intent of the sponsors, myself included, was to address the collection from minors of personal data through online interactions and mobile applications, where that information was collected for use in health-related marketing. There was no intent to prevent the publication of lists of honor students, nor to interfere with medical providers' communications with patients. Your task, then, is to look at how Chapter 230 carries out this narrow protective goal and to review whether the scope of the bill is sufficiently targeted to the problem at hand, within the context of the First Amendment's protections of speech. The goal should be to fix any drafting errors, not throw out the law.

Others will lay out for you the applicable legal standard, the relevant case law, and several years' experience implementing the data collection provisions of COPPA, the federal Children's Online Privacy Protection Act, which have been upheld by the courts and upon which Chapter 230 is modeled.

The focus of my testimony is on the State's compelling interest in protecting minors from data collection activities used to market pharmaceuticals and other health products, where that marketing makes use of personal, private information. In particular, my testimony will focus on why the State's

interest is no less compelling with respect to teens than it is to children under age 13, since similar protections are already in the law and already upheld by the courts for younger children.

***Understanding the context of the Legislature's decision to enact Chapter 230.*** Misleading marketing of potentially dangerous drugs is a big problem. Just last month the U.S. Department of Justice announced the largest drug marketing fraud settlement in history, requiring Pfizer to pay \$2.3 billion for marketing the drug Bextra for unapproved uses – including in Maine. DOJ release: <http://www.hhs.gov/news/press/2009pres/09/20090902a.html>

While the Pfizer settlement is just the latest in a long line of cases involving marketing abuses, it would be incorrect to conclude that that the federal government has a handle on the problem, particularly as it relates to online and social media. In fact, the federal Food and Drug Administration (FDA) has been so delinquent in regulating social marketing that even drug industry bloggers began calling on the agency to do something: <http://www.disruptivewomen.net/2009/09/24/fda-gets-social-considers-regulating-social-media-for-drugs-and-devices/>. The FDA has finally opened a docket on the issue [<http://edocket.access.gpo.gov/2009/E9-22618.htm>] and is holding a public hearing November 12–13, 2009; written and electronic comments will be accepted until February 28, 2010. A short perusal of the FDA federal register notice or the excerpts here: <http://www.npr.org/blogs/health/2009/09/fda.html> will give you some of the flavor of the concerns about web-based, mobile and social media direct-to-consumer marketing and its potential to mislead and confuse and poorly communicate information about risks and side effects.

***Regulation is lacking.*** Direct-to-consumer advertising for prescription drugs has been permitted by the FDA since 1997, and ***there are still no specific rules for marketing to kids and teens.***<sup>1</sup> The only law that regulates online marketing to children is COPPA, the Children's Online Privacy Protection Act, which requires parental permission before any commercial entity can collect personal information from a child under 13. But there's no law that governs marketing to teens. ***The FDA's new focus in its social media docket does not even mention children and teens, even though they are the heaviest users of this media and the among the least equipped to evaluate the information thus promulgated.***

***Direct to consumer marketing of pharmaceuticals is big business, and kids are the next frontier.*** According to a 2006 article in the Journal of Health Economics, drug companies spend 20-30% of their total budgets on marketing, often double what they spend on research and development. Since 1997, when the FDA relaxed its restrictions on direct-to-consumer (DTC) advertising, DTC has skyrocketed. In 1996, DTC advertising was a \$220 million market. By 2000, DTC ads had shot up to \$1.8 billion. Currently, the estimated annual cost of pharmaceutical ads, just on television and in popular media, is \$2.5 billion, *a figure that does not include internet ads, social networking or text messaging.*

***Marketing aimed at teens can be devastatingly effective, especially if targeted on the basis of personal, private information such as Chapter 230 addresses.*** Drugs have serious side effects, and the risks of taking these drugs are often poorly communicated in DTC advertising, a problem that is magnified in online marketing. Marketing to kids and teens exacerbates the problem that already

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<sup>1</sup> Robert Temple, director of the Office of Medical Policy at the FDA's Center for Drug Evaluation and Research, quoted in the Washington Post, "What teens are Hearing about Drugs," By Francesca Lunzer Kritz, 9/8/08

exists with deceptive advertising, by targeting vulnerable children who have even less capacity to seek out or evaluate such information. Further, it raises serious questions of privacy as information is collected from children and used to target marketing campaigns.

Children are vulnerable to marketing that targets their feelings about body image and social position. As the pending FDA hearing attests, the latest trends in marketing drugs – and not just to teens – are ads and affinity groups on social networking sites like Facebook and My Space, text messaging and mobile communications. This trend is especially likely to be effective with teens. A recent study found that 1 in 3 teens browses the web on a phone, and ads are now appearing on mobile phones. Teens are a prime market, and they share personal information with impunity, not realizing potential consequences. This same study trumpets: “Great news for mobile advertising – 6 in 10 teens willing to provide personal information.” See Attachment #2, “A generation unplugged,” September 12, 2008, Harris Interactive posted here (scroll down): <http://www.maine.gov/legis/opla/LD1183RepTreatAttachment.pdf>.

Chapter 230 appropriately addresses this very concern - minors sending personal information to drug and health products companies or their affiliates who then use the information to micro-target their solicitations. Such solicitations can be extremely innovative and effective. According to the Los Angeles Times, Nintendo has a marketing campaign involving the mobile-phone marketing firm Hyperfactory which published a brain teaser relating to it in game magazines. Users sent a text message to get the answer, and they received a message back with a link to sign up for alerts about the game and download free wallpaper and mobile games. When Kiwibox.com, an online teen magazine, launches a service to send teens text messages with horoscopes and celebrity alerts this year, they'll include a short advertisement at the end sponsored by different brands such as Sparq Inc., a company that designs workout training programs for aspiring athletes, and Paramount Pictures.<sup>2</sup>

It's one thing to promote a magazine or game. But there is quite another level of concern on the part of parents, doctors and legislators, when these same tactics are used to market powerful pharmaceuticals to kids. The use of this media for marketing drugs to children is not mere speculation. Drug companies are actively courting minors through a variety of advertising media. Here's what a 2008 article in the Washington Post reported:

*“Tazorac, an acne drug made by Allergan, is the subject of a back-to-school ad campaign featuring situations such as high school graduation and the prom in which teens might feel particularly self-conscious about their acne. Incentives to register on the site and learn more about the drug (teens 13 to 18 need a parent's permission) include a \$5 Starbucks card and a chance at winning a Nintendo Wii console, a video camcorder or a laptop computer.”<sup>3</sup>*

Note that in this case, the website **already** requires parental permission from teenagers not covered by COPPA – a provision of Chapter 230 that the businesses challenging the law's constitutionality have claimed to be burdensome or technically impossible to comply with. Their arguments simply don't

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<sup>2</sup> “Advertisers in touch with teens' cellphones,” By Alana Semuels, LA Times, May 23, 2008

<sup>3</sup> Washington Post, “What Teens are Hearing about Drugs,” By Francesca Lunzer Kritz, 9/8/08

hold water; the technology is well established and the parental consent isn't restricting effective speech.

The examples of teen marketing in the Washington Post article underscore the serious risk to teens. The article continues: "Ads meant to get a teen's attention typically feature cool clothes, hip music and other teen draws. Bayer Healthcare Pharmaceuticals, the maker of Yaz, a birth control pill, hired the Veronicas, a group popular with teen girls, to record a song for one of the drug's commercials. The Web site of Galderma, the maker of Differin, another acne drug, offers teens a quiz called "The Truth About Zits."

The mention of Yaz should set off alarm bells. Yaz and Yasmin are birth control drugs that are currently the subject of over 300 lawsuits alleging that women suffered serious and potentially life-threatening injuries after use. Most of the complaints allege Bayer failed to adequately warn about these risks. <http://www.aboutlawsuits.com/yasmin-and-yaz-birth-control-lawsuits-mount-5062/> Just this week, a Yaz / Yasmin lawsuit was filed in the U.S. District Court for the Eastern District of Pennsylvania accusing Bayer of unlawfully promoting Yaz to mislead investors about the value of the company, concealing the drug's increased risks of blood clots, strokes, heart attacks, gallbladder disease, pulmonary embolisms and deep vein thrombosis (DVT). <http://www.aboutlawsuits.com/yasmin-and-yaz-problems-were-concealed-6339/>

Its hard enough for adults – whether patients, physicians, or investors - to evaluate these risks, especially in the face of an industry track record of repeated marketing abuses. Add targeted marketing to kids through social media and online and mobile platforms, using kids' personal information about where they live, their social security numbers, their weight and height, their favorite color – and you have a potent recipe for harm.

Drug advertising targeted at teens was first noted in 2000, when the New York Times reported that both Roche Laboratories and Galderma Laboratories were running ad campaigns aimed at teenagers to make them aware of prescription medications to treat that most common but angst-laden adolescent condition: acne. According to the article, the companies were running their campaigns on family and youth-oriented programming on national cable television including spots on the Nickelodeon Channel, spending more than \$8 million on television advertising in just 11 months.<sup>4</sup> As the Times article notes, "(y)oung people are the natural target because 85 percent will get acne."

Yet acne drugs can be dangerous. Children should not be exposed unnecessarily to serious risk of harm. Companies should not use children's personal information to market directly to them and encourage the use of drugs that may be unnecessary or contraindicated. Accutane is a commonly prescribed but powerful acne drug. Its side effects include depression and birth defects, and it has been linked to youth suicides. The company marketing Accutane has been the subject of FDA warning letters for misleading advertising that minimized side effects. (See Attachment #1 posted here: <http://www.maine.gov/legis/opla/LD1183RepTreatAttachment.pdf>.) Such a drug should not be marketed directly to teenagers using personal data collected from them – unless a parent allows it.

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<sup>4</sup> "Teenagers Now a Target of Prescription Medicine Promotions," New York Times March 16, 2000

Since 2000 our love affair with mobile technology has transformed not only our lives but how advertisers try to reach us, with text messaging and social networking joining Internet, TV and magazine advertising aimed at kids. Here's the recent advice offered on a website devoted to marketing tactics: "If you're trying to reach teenagers online, you probably already know that social networks should be a part of your Internet campaign. ... The UC-Berkeley study that finds a completely different "class" of American teenagers on MySpace versus those on Facebook. MySpace users ... tend to be minorities and get jobs straight out of high school, while Facebookers tend to be white, go to college and come from wealthier homes, being part of a more "aspirational class." ... Danah Boyd, PhD student at UC-Berkeley and researcher on the project, commented that "MySpace has most of the kids who are socially ostracised at school because they are geeks, freaks, or queers."<sup>5</sup> See Attachment #4 (scroll down) posted here: <http://www.maine.gov/legis/opla/LD1183RepTreatAttachment.pdf>.

According to YPulse, a website claiming to be the go-to source for information about marketing to "teens, tweens and Generation Y," "teens are spending an average of 11.5 hours per week online, doing everything from instant messaging and visiting social networking sites to shopping and listening to music ... 95% of teens say[ing] they have belonged to a social networking site at some point. The average teen has signed up for over four social networking sites and currently belongs to two. Teens report learning about music, other websites, movies, TV shows, and new trends from social networking sites. Teens are receptive to advertising on these sites, where the majority of teens learn about financial services (63%) movies in theaters (59%), mobile services and accessories (58%), travel (57%) and other websites (53%) from ads on these sites." YPulse: <http://www.ypulse.com/>

***Such marketing tactics raise serious privacy issues.*** A Business Week opinion piece notes that this intersection of marketers, teens and Facebook raises privacy concerns: "With Facebook's decision to allow advertisers to display ads based on information users post on their profiles, the debate over online privacy has gained new momentum, especially since today's teenagers are living out a big chunk of their lives on social networking sites. Advertisers can now target underage consumers with relative ease, raising obvious ethical questions. But even if there were no such worries, marketers would need to be aware of pitfalls in trying to reach young consumers online."<sup>6</sup> (Attachment #5 posted here (scroll down): <http://www.maine.gov/legis/opla/LD1183RepTreatAttachment.pdf>.)

## CONCLUSION

The Legislature properly recognized, and acted to address, a compelling State interest: protecting children and teens from health marketing uses of personal data collected from them over the Internet and mobile devices without parental consent. The risk to children and teens is significant because:

- they use this media more than any other demographic group and commonly give up personal information without understanding the consequences;
- the drugs and other health products marketed to them have potent side effects including death and birth defects that minors are ill-equipped to evaluate;

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<sup>5</sup> "Marketing to Teens: Social Networking," June 25th, 2007 by Jordan McCollum

<sup>6</sup> BUSINESS WEEK, Viewpoint November 7, 2007, "Marketing to Teens Online," by Anastasia Goodstein

- teens may be even more vulnerable than younger children to the social pressures exploited by marketing focused on body image and popularity;
- the Food and Drug Administration has failed to address issues specific to marketing to children, including teens, and the data collection protections of COPPA do not protect teens;
- there is a history of marketing abuses in the health care and pharmaceutical industry including marketing for unapproved uses and failure to properly disclose side effects and risk; and
- the potential for marketing abuse is magnified in the context of social media, web marketing, and mobile communications, as the FDA is now recognizing – yet even as it moves to regulate the FDA has ignored the effect on minors.

The Legislature properly recognized that Maine needs to fill this regulatory void. We have a history of protecting kids from predatory marketing tactics by the alcohol and tobacco industries. The marketing of prescription drugs raises equally if not more serious issues with respect to health and safety threats to minors. Although it isn't always easy to balance the State's compelling interest in protecting children with our First Amendment rights, it can be done. Chapter 230 can be clarified to carry out the intent of its sponsors while protecting the health and safety of our children.

#### **APPENDIX: ADDITIONAL LINKS AND MATERIALS:**

Gardasil facebook site where you can sign up for reminders that you need three doses of the vaccine:  
<http://www.facebook.com/takeastepagainstcervicalcancer>

Using games for marketing: <http://pharmexec.findpharma.com/pharmexec/Marketing/Video-Games-Key-to-the-Future-of-Healthcare/ArticleStandard/Article/detail/616678?contextCategoryId=39717>

Article that mentions coollearnings.com where you get a backpack for giving your personal information (the backpack program is no longer available).

<http://pharmexec.findpharma.com/pharmexec/article/articleDetail.jsp?id=533844&pageID=1&sk=&date>

This is a My Space site which addresses opioid addiction and links through to a drug company site's program: <http://www.myspace.com/addiction411>

This is a site by the makers of an MS drug which has online games. If you want to track your score, you have to sign in: <http://mymsmyway.com/>