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Maine Kids' Privacy Law Conflicts with COPPA

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A recently-enacted privacy law in Maine purports to impose restrictions on the collection of personal information from all minors for "marketing purposes" in a manner that is inconsistent with the Children's Online Privacy Protection Act (COPPA). Complying with the Maine law will be burdensome; it will require excluding both kids and teens in Maine from offline promotions, and will also require complicated new age-screening for online promotions, newsletter signups, and other online data collection activities. The law will also limit social networking options for teens in Maine. The law should be viewed to be preempted by COPPA.

Maine Children's Privacy Requirements

The Maine legislature enacted LD 1183, *An Act to Prevent Predatory Marketing Practices against Minors, to protect the privacy of all minors*. It prohibits (1) the collection or use of health-related information and "personal information" for marketing purposes from individuals under the age of 18 without verifiable parental consent, and (2) the sale or transfer to a third party of health-related information or personal information about a minor if that information was unlawfully collected, individually identifies the minor, or will be used for "predatory marketing." The new law, scheduled to take effect on September 15, 2009, not only will restrict promotional and marketing activities involving collection of personal information from teens, but will also effectively bar social networking.

Each violation of the Act constitutes an unfair trade practice, and is also subject to a fine of \$10,000 to \$20,000 for a first violation and at least \$20,000 for a second or subsequent violation. The Act also provides for a private right of action by victims in the form of an injunction or the greater of \$250 or actual damages per violation (and the award may be increased for willful or knowing violations). The Act further provides that the Attorney General may bring a civil action upon finding a violation of COPPA.

Preemption

The Maine law is significant in that it goes beyond COPPA through its application to:

- all individuals under age 18, not only those under 13,
- all communications- whether online or offline – to such minors, and
- "personal information," which is broadly defined, although the impetus for the legislation seemed to be protecting health-related information of minors.

Section 1303(d) of COPPA, 15 U.S.C. § 6502(d), specifies:

(d) INCONSISTENT STATE LAW.—No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section.

We believe that portions of the Maine law that are inconsistent with COPPA are preempted by the plain language of the legislation. Specifically, in enacting COPPA, Congress evaluated the privacy risks to minors from the collection and use of personal information. Congress debated the age of "children" to be protected under the law during the legislative discussions, and concluded that the category of minors requiring legal protection in the form of verifiable parental consent included children under age 13. In reaching this decision, Congress recognized that teens do have personal privacy rights, that they understand commercial intent, and that it would be impractical and undesirable to treat teens and children identically. Moreover, Congress adopted certain exemptions from the verifiable parental consent

requirement even where children under 13 were concerned. Congress chose to regulate only the online collection of information from children under 13. Congress also concluded that a uniform national standard was necessary and desirable.

The Maine law would make illegal, or impose liability for, a commercial activity or action, namely, the collection of personal information from teens, including for marketing purposes, that is legal under federal law. The Maine law includes no exemptions or exceptions to the verifiable parental consent obligation. This is inconsistent with the treatment of those activities or actions under COPPA. Hence, a strong argument exists that the Maine law is preempted because it is inconsistent with the federal law. Companies interested in marketing to teens should consider the legal options carefully before deciding to make major changes in how they structure national promotions in response to this new state law.

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