

NetChoice

Comments on PL 2009, C. 230 (LD 1183),

An Act to Prevent Predatory Marketing Practices against Minors

Joint Standing Committee on Judiciary

Maine State Legislature

October 9, 2009

NetChoice welcomes this opportunity to comment on the Act to Prevent Predatory Marketing Practices against Minors (hereinafter the “Act”).

NetChoice is a national coalition of online businesses and trade associations who share the goal of promoting choice, commerce, and convenience on the Internet. Our members include the nation’s leading platforms for Internet communities and e-commerce, along with major trade associations and several thousand small online businesses. NetChoice works in Washington DC and in many state capitals to oppose regulatory barriers to online services. At the same time, NetChoice advocates for aggressive enforcement and new regulations against fraud and deception that undermine consumer trust and confidence in online information and commerce.

We focus our comments on how, if operative parts of this law are preserved by the Legislature, the Act will have negative impacts on Internet users in Maine, a predictable consequence because online services would restrict their content to avoid the risk of prosecution and private lawsuits.

For the time being, these negative consequences have not occurred, because the state is not enforcing the Act and the Federal District Court issued a strong warning against private lawsuits. This Joint Standing Committee should follow through on the Court order and repeal the Act. Then it can consider enforcement action and possibly new legislation to address concerns about marketing to minors.

The Act Broadly Impacts Internet Services & Harms Maine Residents

The Act creates statutory damages liability for websites that collect, transfer for any purpose, or use information from minors. Since no online service can know who’s sitting at a computer, or with any certainty what state they are from, much less their age, this threat will effectively force online services either to try to screen out Maine residents altogether or to try to determine the age of any user who’s potentially a Maine resident. For services that really want to reach minors, the Act requires verifiable parental consent before obtaining any personal information or a very wide range of “health-related information” information that may be used even in part for marketing or advertising.

But the fact is that in the online channel, age determination and parental consent are notoriously difficult to do and highly unreliable when they are done. There is simply no reasonably available mechanism to determine and verify the identity, age, and parental relationships of minors who

seek to register for online services. Moreover, online services will be reluctant to deploy age and consent mechanisms when the inherent shortcomings of these mechanisms will still leave them vulnerable to class action lawsuits seeking statutory damages and attorney's fees. As a result, online services will have to find ways to prevent Maine residents from viewing their content or using their services.

Below we describe several examples of how the provisions of this Act could impose significant prosecution and lawsuit risks for online services that presently offer valuable information and services to Maine residents of all ages.

The Act Harms Online Platforms and Services supported by Advertising

We are now witnessing explosive growth in Web 2.0 services, where users can post their own content and participate in online communities. Web 2.0 services like Twitter, Facebook, Wikipedia, online forums, and blogs have become extremely popular, especially among younger users. The services and platforms that make Web 2.0 possible invest heavily in software development, servers and storage, and high-speed bandwidth. In addition, these services must expand their customer support and legal teams to respond to complaints when user-generated content crosses the line of acceptable behavior.

Online services and platforms rely almost entirely on advertising revenue to pay for their investments. Ad-based sites are often viewed as being "free"—and while consumers can access content at no charge, there are costs that must be recouped from advertisers. In many instances, consumers help subsidize online services by providing information about themselves, including by registering with the website. This information allows content providers to deliver advertisements that are tailored to the interests of their users, which makes advertising much more effective.

The Act Burdens Legitimate Commerce and Content by Restricting User Registrations

User registration is a vitally important way for users to consensually provide information about themselves. This information helps to make advertising and marketing more effective, but it is also essential for building an online community. User registration allows users to foster community values through identification, and allows the operators of online forums to appropriately and responsibly moderate user communications.

But the Act seriously restricts the exchange of information between Web 2.0 services and their users. Section 9552 makes it unlawful to knowingly collect or receive health-related or personal information for marketing purposes from a minor, without first obtaining verifiable parental consent. “Marketing” is broadly defined to mean marketing or advertising products or services to individuals. In effect, the Act restricts advertising that is most relevant to user interests.

Whether it is intentional or by accident, the Act impacts a broad spectrum of websites and online services. For instance, consider Something Fishy, an online forum on eating disorders.¹ This site hosts a forum where pre-registered teens can discuss their problems with anorexia and bulimia, conditions that often afflict image-conscious adolescents. Because it is supported by advertisers, this site is free to users.



SFWED Remember It Hurts Community > SFWED Eating Disorders Discussion (Post & Reply)
Anorexia and Bulimia

User Name Remember Me?
 Password

[Register](#) [FAQ](#) [Fishys](#) [Calendar](#)

[New Thread](#)

Page 1 of 5 [1](#) [2](#) [3](#) > [Last »](#)

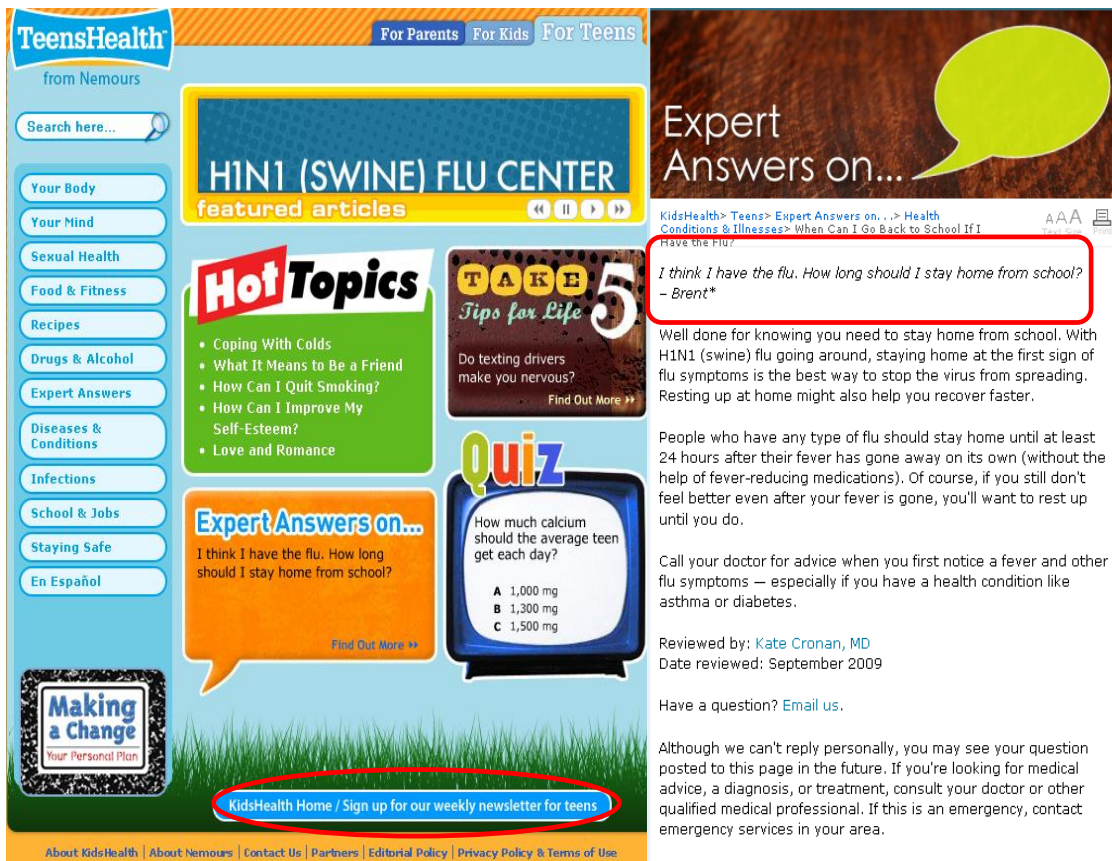
Threads in Forum : Anorexia and Bulimia

Forum Tools ▼

	Thread / Thread Starter	Last Post	Replies	Views
	STICKY: How to Sabotage Your Program (1 2) nc	09-13-2009 08:59 PM by BrownEyedRunner	78	1,897
	STICKY: Changing Some of the Boards Kensington	08-27-2009 06:20 PM by Kensington	0	93
	Conflicted, trapped, frustrated as heck. Medstudent	Today 11:12 AM by nc	17	349
	Trying to figure out where to begin ParadoxalPixie	Today 10:42 AM by Alethea	9	148
	Struggling with body hatred enpointe	Today 08:15 AM by enpointe	32	655
	They changed the date of my procedure! zealia	Today 05:47 AM by ducksquack	1	43

Something Fishy asks for age and currently complies with federal law by requiring parental permission for users under age 13. However, the site would not comply with Maine’s Act because it allows minors 13 and over to register and reveal information about their physical and mental condition. Requiring parental permission for all minors would create substantial hurdles for the very people the site seeks to help—teenagers. Because of the sensitivity teens have about anorexia and bulimia, it is likely that most teens would not seek their parents’ permission and would be blocked from receiving life-improving advice.

In addition, consider TeensHealth, a health-related site for parents and kids.² The site has a “for teens” section about H1N1 (Swine) Flu, an issue of national concern for educators, parents and children alike.



The site is sponsored and managed by Nemours, one of the nation’s largest health care businesses dedicated to the health of children. It collects user data by soliciting users to “Sign up for our weekly newsletter for teens.” It also publishes health-related questions from minors to experts. The Nemours Foundation is a nonprofit, charitable foundation and as such is not subject to the Children's

Online Privacy Protection Act. However, the TeensHealth website would likely be covered by Maine's Act because it collects both personal and health-related information. Teens would first need parental approval to learn about swine flu and other critical public health issues.

Another site covered by the Act is Runner+, where runners can join online forums and chat areas to discuss workouts and injury recovery.³ This site has a registration page where new users can enter their name, email address, and location. The site displays advertisements that would naturally interest runners, including ads for shoes and clothing.

RUNNER+
FORUMS ACTIVE CHAT GROUPS ARTICLES CHALLENGES REGISTER LOGIN CONTROL PANEL

Login

Email:

Password:

Login Lost Password

New User Registration

Joining RUNNER+ is easy and free. Just fill out the following form.
Red bordered-boxes are required fields. Your email must be valid, as we will send you an email in order to login.

Screen Name: (Min 3 chars)

Email Address:

Location: (e.g. "Seattle, WA")

Country:

Enter the code exactly as you see it in the image:

Are you Human? Load New Code

Create Account

[Privacy policy](#): We will not use or retain your information for any other purpose as a result of this website. Read our [Privacy Statement](#).

Ads by Google

ASICS Shoes at Zappos
Free Shipping Both Ways On ASICS Shoes. 365 Day Return Policy!
www.Zappos.com

Pearl Izumi Wear
Order Running Outerwear Direct
Ideal for Professional Runners.
Pearlizumi.com

Keen Outdoor Footwear
Outdoor sandals, shoes and boots for active lifestyle in any terrain
www.KeenFootwear.com

The Act likely applies to Runner+ because it collects personal information during user registration. To comply, this site would have to add another category to its registration page to ask and verify age. It would also need a mechanism for soliciting and verifying parental consent for minors. Parents of users under age 18 would have to submit their permission and Runner+ would need a system for retaining this consent as evidence of compliance with the Act.

Next we turn to the most popular of Web 2.0 services—social networking. The Act harms the ability of organizations in Maine and elsewhere to reach new members through social media platforms. For example, Ski Maine is a site devoted to skiing in Maine and is supported by advertisements for ski equipment, hotels and resorts.⁴ The site markets itself through social media platforms such as Facebook, which allows Ski Maine to reach more people and develop a virtual community of members.

The screenshot displays the Facebook profile for the 'Ski Maine' group. At the top, the Facebook navigation bar is visible with options like Home, Profile, Friends, and Inbox. The group's name 'Ski Maine' is prominently displayed, along with its category 'Sports & Recreation - Recreational Sports'. The description states that the Ski Maine Association is a non-profit dedicated to increasing the availability and enjoyment of skiing and snowboarding in Maine. Contact information for Bo Bigelow is provided. A 'Members' section shows 8 of 18 members, including Greg Morell, Confluence Works, Kim Devine, Ben Ryan, Amy Drake Beaulieu, Steve DelBianco, Tom Donaghue, and Dan Ventura. An 'Events' section lists a past event at the Ski Museum of Maine. The right sidebar contains options to 'Invite People to Join', 'Leave Group', and 'Share', along with 'Group Type' information indicating it is an open group.

Whether Ski Maine realizes it or not, marketing through Facebook exposes it to liability under the Act. The Ski Maine group page on Facebook allows the company to see the names and visible personal information of its group members. If any of its group members are minors, Ski Maine would violate the Act if it collected personal information without first receiving parental permission.

All of the above sites likely do not comply with the Act and are vulnerable to lawsuits authorized under the Act. These four sites are just a sampling of the thousands of helpful services that could be similarly affected. It is our belief that the legislature did not mean for the law to burden so many legitimate sites.

However, it's entirely possible that the legislature intended to regulate such a broad range of sites and services. If so, then it's worth noting that the Act would affect only US based websites, whereas Maine residents can interact with online services from around the world.

For example, [Angling Masters International](#) describes itself as the "world's largest fishing community."⁵ The site hosts a forum where fishing enthusiasts of all ages can discuss their latest catch and reveal personal information, including personal information and photos. The site serves advertisements. But the site is located in Canada, outside of the enforcement jurisdiction of the State of Maine.

Angling MASTERS INTERNATIONAL

YOSEMITE NATIONAL PARK
GREAT YOSEMITE BED & BREAKFAST
ARE NOW AVAILABLE FOR AS LITTLE AS **\$59** PER NIGHT
Click here.

CABINS MARINAS LODGES

Blogs Catches Videos Rankings Fish Calculator Promotions Media Help

My Cabin My Profile Inbox (1) Requests Comments

My Message Center

My Buddies

My Marinas

My Photos

My Videos

My Blogs

My Livewell

My Competitions

Discover Bear Naked. GET A SWEET FREE reusable grocery bag with an online purchase of \$50 or more.

Blogs

Angler	Title
 moorefish5	Episode 1 Did a little kayak fishing on a large river in Middle Georgia and caught some small fish, but decided to get out and wade a bit to see if I could really sneak up on a shoal bass. Check out my...
 chrisfen	my fish best fish ever...
 Recycled Fish	First Ever 24 Hour Fish A Thon a Success The Recycled Fish 24 Hour Fish-A-Thon raised over \$6,000 for Recycled Fish, and some of the n facing our fisheries. Our anglers caught and released over 750 fish from Minnesota to...
 Videos and Tips	Videos and Tips I would like to share a video I recently stumbled upon on Youtube. You may click HERE for the v tip for you guys out there, I've read several scientific essay papers...

The Act Also Prohibits Legitimate Online Advertising—With or Without User Registration

In addition to burdening sites that collect personal and health-related information through user registrations or newsletter email subscriptions, the Act may force websites to remove advertisements that could be construed as targeting minors.

Section 9553 prohibits using *any* health-related or personal information of minors to market products or services to them. The law could make it illegal for search engines to show targeted display ads on a page where users search for health info, even if they don't provide any personal information.

As an example, consider the millions of keyword searches that Internet users conduct daily on Google. A search by a Maine resident on “teenage acne scars” reveals websites that fit the search description. But the search page results also display advertisements triggered by “teenage acne scars.” The fact that a search operator knows that a user is interested in health issues related to minors—particularly when coupled with prior search history—could be considered predatory marketing under Section 9553 of the Act.

The image is a screenshot of a Google search results page. At the top, the Google logo is on the left, followed by a search bar containing the text "teenage acne scars". To the right of the search bar is a "Search" button and a link to "Advanced Search". Below the search bar, the page indicates "Results 1 - 10 of about 168,000 for teenage acne scars. (0.27 seconds)". The results are divided into two columns. The left column contains organic search results, and the right column contains sponsored links. The organic results include: "Laser Scar Reduction" from www.lasersurgery.com/Scars, "Acne Driving You Nuts?" from www.TruthAboutZits.com, "Striaex®: Acne Scar Cream" from www.striaex.com, "Can Acne Scars Be Removed?" from kidshhealth.org/teen/your_body/skin_stuff/acne_scars.html, and "Teenage Acne Scarring Can Be Prevented and Treated" from www.medscape.com/viewarticle/412155. The sponsored links on the right include: "Acne Scar Treatment Kit" from www.ZENMED.COM/ScarKit, "Acne Scars" from www.lakeviewderm.com/acne, "Top 10 Acne Scar Creams" from SkinCareCop.com/Reviews, and "Murad® Acne Scar Solution" from www.Murad.com/Acne-Scar.

Furthermore, just visiting a webpage may trigger the predatory marketing prohibition of Section 9553. Consider the website of An Abuse, Rape and Domestic Violence Aid and Resource Collection (AARDVARC).⁶ AARDVARC is a site targeted to women and children who are victims of violence. The website contains display ads for a scholarship contest and contextual ads from Amazon.com that show books for sale about abusive relationships.

The screenshot shows the AARDVARC website with several advertisements and navigation elements:

- Header:** AARDVARC logo with the tagline "An Abuse, Rape and Domestic Violence Aid and Resource Collection".
- Navigation Bar:** Links for Abuse in Relationships, Sexual Violence, Stalking, Statistics, Victim Assistance, and Bookstore.
- Advertisements:**
 - LegalMatch:** "Find a Lawyer - Free" with a "FIND A LAWYER NOW" button.
 - Psychiatric Excellence:** "Highly Knowledgeable, Skilled, and Compassionate Mental Health Care" with a link to www.maheenpatelmd.com.
 - Amazon.com:** An advertisement for the book "It's My Life Now: Starting Over After an Abusive Relationship or Domestic Violence" by Meg Kennedy Dugan, priced at \$3.75.
- Footer:** "From the Bookshelf" section featuring the book cover for "It's My Life Now".

Visiting a site on a specific issue such as domestic violence says something about the person behind the computer. It is reasonable for site operators and advertisers to infer that people who visit this site are looking for information on mental health or other health-related effects of abuse. AARDVARC.org could be sued for using that kind of health-related inference to market self-help books or other materials to minors.

As described above, the Act seriously restricts online services from using information provided by users to serve ads that are more relevant to the user's actual interests. Websites where users can register personal information will be subject to Section 9552. Other websites that target advertisements to health-related interests could be captured under Section 9553. As the section below explains, the Act

will force online services to respond in ways that could provide fewer content choices for Maine’s adults and teens.

How Will Online Services Respond to the Act?

As shown above, the Act would broadly and adversely affect a wide variety of valuable commercial and noncommercial online services. If the Act is allowed to take effect, these services will be forced to respond in order to comply with the law and reduce risks of being sued for statutory damages. The question is, *how will they respond* if this Act is actually enforced and the plaintiff’s bar becomes emboldened to round-up Maine teens for class action lawsuits?

In this section, we describe how likely responses would result in Maine users—both teens and adults—having less access to online content and Web 2.0 services.

To begin, it’s worth recalling how online services responded when Congress enacted the Children’s Online Privacy Protection Act (COPPA, 1998) to regulate information collection from children under the age of 13. Compared to the Act that Maine is now reconsidering, COPPA was much narrower and less punitive: COPPA covers websites that are directed at children under 13 and websites that have actual knowledge that a user is under 13 years of age. For covered websites that collect personal information, COPPA provides a sliding scale of parental notification/consent requirements that range from no consent (for one-time use of a child’s email address), to parental notification (for repeated communication with a child’s email address, such as a newsletter), to verifiable parental consent (for collection of additional personal information from a child and sharing of such information with third parties). Moreover, COPPA relied upon state enforcement without creating a private right of action that includes statutory damages and attorney’s fees.

Although COPPA was narrowly tailored, its enactment quickly triggered responses from many online services. Some removed content that could be construed as being directed at young children. Others stopped asking users to enter their names or indicate their age. Ironically, COPPA did have the effect of shutting-out kids of all demographics, because only those with parents willing to log on and pay with a credit card (to evidence parental consent) were able to access some of the best new content. Any websites that attempted to obtain parental permission could turn to the Federal Trade Commission for guidance on COPPA-compliant mechanisms.

The Act under consideration here is substantially broader and more prohibitive and punitive than COPPA. As described in the previous section, the Act requires online services to obtain verifiable parental consent before collecting *any* health-related or personal information from anyone under the age of 18. “Health-related information” is so broad that it encompasses information related to what a child likes to eat (nutrition), how they feel that day (physical condition), and what mood they are in (mental health).

Faced with an overbroad law that invites class action lawsuits, we can expect online services to respond in more dramatic ways than they did when COPPA was enacted. Because it is so difficult to verify age, parental relationships, and consent as well as location, online services may choose to respond what amounts to a *Lockout* or *Blackout* of services available to Maine users and even users in other states who appear that they may be from Maine:

Lockout for Maine users. Online services may stop allowing known Maine residents to register to receive newsletters, participate in forums, or post personal profiles. A ‘lockout’ such as this would avoid costs and legal risks of verifying the age of Maine users and attempting to obtain verifiable consent for teens from Maine. Unfortunately, a lockout could deny all Maine residents—both adults and minors—from participating in the Web 2.0 world of interactive services and user-generated content.

Alternatively, online services that require user registrations may just lockout those Maine teens who admit they are not yet 18 years old. By locking-out minors, these websites avoid costs and legal risks of obtaining verifiable parental consent. For sites that don’t currently ask for users’ home state or age, the lockout strategy could compel them to collect personal information that was not otherwise required by the service.

Blackout for Maine users. Many online services publish content that is useful and attractive to teens, and these pages often include advertisements that could be seen as marketing to minors. The Act creates a very real risk of lawsuits just for displaying marketing-related content to Maine minors. Some services may attempt to mitigate that risk with warning messages or stop altogether the delivery of pages to IP addresses known to be in Maine. But a blackout strategy will not cover all Maine users, since some use intermediary internet services that use IP addresses generated dynamically or from unknown locations. Moreover, any IP-based blackout

plan would also impose blackouts on those outside of Maine who share the same address blocks used by residents.

These *Lockout* and *Blackout* responses may seem extreme, but they are not out of line with how some online services responded to COPPA, a law that was far narrower and less punitive than the Act. Either response would leave fewer teen-friendly websites and online services accessible to Maine teens, making the Internet *less safe* as a result of this Act. Moreover, sites that attempt to comply with the parental consent requirement in the Act will navigate unknown territory with unpredictable consequences, as explored in the next section.

What happens when Maine teens must obtain consent before accessing online content?

The Act requires “verifiable parental consent” if entities collect or market a minor’s health-related or personal information. Operators of online services must first differentiate adults from minors, but there are numerous problems with verifying age in the online world.

First, it is impossible to precisely determine a child’s age online. According to a report of Harvard University’s Berkman Center, “*age verification and identity authentication technologies are appealing in concept but challenged in terms of effectiveness.*”⁷ In addition, there are privacy and security concerns related to age verification methods. After all, the process of verifying age necessarily entails the collection of data sufficient to determine proof of age, and all this data must be transmitted, processed, and stored. Finally, because it requires involvement by parents, relying on parental verification may not protect society’s most vulnerable minors who have absentee parents.

Congress chose not to apply COPPA’s parental consent regime to teenagers because it recognized the rights of 13 to 17 year olds to access and receive information. Moreover, the reality is that verifiable parental consent is difficult to implement, such that many websites simply lock-out their websites to anyone indicating they are under 13 years old.⁸ However, a simple COPPA lock-out won’t easily translate to the 13 to 17 age bracket affected by this Act, because teenagers are more adept at circumventing online locks of any kind.

Ironically, teenagers will be inclined to bypass or circumvent websites that comply with the Act by requesting a user’s age. Teens readily lie about their age rather than ask a parent for permission and explain why they’re looking for information about sensitive topics. Impatient teens will lie about their

age to bypass the hours or days it takes to get a parent or guardian to go online and provide consent. And if they're not keen about lying, teens can always search for other online services that don't ask for age at all.

Another irony is seen in situations where teens who want to be truthful about their age are disadvantaged by having to seek and obtain parental approval. A 17 year old, for instance, doesn't want to lie about her age when registering for college admissions information, as seen in the screen below from the University of Southern Maine.

The image shows a screenshot of the University of Southern Maine's website. At the top, there is a blue navigation bar with the university's name and links for 'CONTACT US | CALENDAR | DIRE'. Below this is a green navigation bar with links for 'DISCOVER USM', 'ACADEMIC PROGRAMS', 'GRADUATE STUDIES', 'LEARNING AT USM', and 'LIFE AT USM'. A 'FIND OUT MORE' button is also present. The main content area is titled 'Request Information' and includes a sub-header 'Request Information' in blue. Below this, there is a paragraph explaining the purpose of the form: 'To request more information about undergraduate admission at the University of Southern Maine, please complete and submit the form below.' A note states: 'Note: Those interested in graduate admissions should visit Graduate Studies.' The form itself consists of several fields: 'Name: [text box] Required', 'Street: [text box] Required', 'City: [text box] Required', 'State: [dropdown menu] Select One Required', 'Zip: [text box] Required', 'Country: [text box]', 'Telephone: [text box]', 'E-mail Address: [text box] Required', 'Gender: [radio button] Male [radio button] Female', and 'Date of Birth: [text box] Required'.

Colleges such as the University of Southern Maine have an obvious interest in wanting to market their services to prospective students. When an interested student indicates that she is 17 years old, the Act will require a three-step process:

1. the student will have to get her parents to provide consent to the school. Unfortunately, some parents are unavailable, and some would be unable or unwilling to go online and provide a form of verifiable consent.

2. the school will have to process and verify this consent.
3. finally, the school can send the high school student a packet of admissions information.

Next, we turn to the Joint Committee's request for possible solutions to the concerns raised by many about this Act.

How Should the State of Maine Address its Concerns about Marketing to Minors?

The best public policy solution will preserve teen access to useful information while protecting them from deceptive or coercive marketing tactics. To further both goals, policymakers should focus on actual harm to minors, without prohibiting the legitimate marketing and advertising that makes free content and Web 2.0 services possible.

But first, NetChoice strongly urges this Joint Committee to recommend immediate repeal of the *Act to Prevent Predatory Marketing Practices against Minors*. The state's promise not-to-enforce and the Court's order are non-permanent and non-binding, pending the deliberations of this committee and the Maine Legislature. Repeal would remove the cloud of uncertainty over online services used by Maine teens today and for new services being readied for launch.

Once the Act is repealed, Maine legislators and state law enforcement can count on help from the online industry to design a more practical—and constitutional—solution. The first step would be to review the teen-oriented marketing practices that generated so much concern in the first place. We will start by reviewing prior testimony provided for LD 1183 along with all comments submitted for this Joint Committee hearing.

The next step would be to review existing tools to protect Maine citizens from deceptive marketing practices, whatever their age, and whether health-related or otherwise. Existing Federal and Maine law, for instance, allows the attorney general and private litigants to sue online and offline entities for unfair and deceptive trade practices where appropriate. There are also federal laws governing use of health-related and financial information used for marketing purposes.

It may be that enforcement of existing federal and state laws can address a great deal of the marketing tactics of concern to this Committee. However, there may be some unsavory marketing practices that fall through the gaps of existing regulation. NetChoice and its member companies stand

ready to help craft legislation to close those gaps while preserving Maine residents' access to helpful information and valued online services.

Endnotes

¹ <http://www.something-fishy.org/>

² <http://kidshealth.org/teen/>

³ <http://www.runnerplus.com/>

⁴ <http://www.skimaine.com/>

⁵ <http://www.anglingmasters.com/index.aspx?sec=1&too=2003&eve=5&pag=freshwaterCache>

⁶ <http://aardvarc.org/>

⁷ Available at <http://cyber.law.harvard.edu/pubrelease/isttf/>

⁸ Berin Szoka and Adam Thierer, COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech, Progress & Freedom Foundation, available at <http://www.pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf>