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Controversial Maine Privacy Law Sidelined Pending Further Review

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In a move applauded by a wide coalition of companies doing business online, Maine's attorney general recently decided that she will not enforce a law banning the use of personal information about minors for marketing purposes that went into effect on September 12. The "Act To Prevent Predatory Marketing Practices against Minors", prohibits companies from collecting personal information—such as name and e-mail address—from minors without receiving verifiable parental consent. The restrictions are considerably broader than the federal Children's Online Privacy Protection Act ("COPPA"), applying to information related to everyone under 18 (COPPA is limited to children under 13) and extending to such information collected offline as well as on. If enforced, it would have compelled sites with broad appeal to teenagers, like Facebook and MySpace, as well as news, education and other sites requiring registration, to verify the ages of users from Maine and then obtain permission from the parents of minors from the state. In addition, the Maine Independent Colleges Association, argued that the law would prevent Maine colleges from sending marketing materials to prospective students without first obtaining consent from their parents. Before the attorney general decided to not to enforce the law, a group of companies including online advocacy coalition NetChoice (whose members include AOL, eBay, IAC, NewsCorp and Yahoo!, among others), challenged it in federal court, alleging that it violated the First Amendment and Commerce Clauses of the US Constitution and is preempted by COPPA. The suit was dismissed last week on consent of the parties when the AG announced her decision. However, prior to granting the dismissal, the federal judge to whom the case was assigned indicated that he agreed with the plaintiff's that the law is likely unconstitutional. The law was originally focused on protecting the health-related information of those under 18 in an attempt to prevent pharmaceutical companies from using such information to market drugs to minors. As the proposed bill passed through the Maine legislature, "personal information" was included in the marketing prohibitions. While the potential upheaval to many companies that would result from enforcement of the Maine law was real, it does not appear that this law is signaling a trend by the states to dramatically expand the coverage of their privacy laws. In fact, the law's author, Maine state senator Elizabeth Schneider, admitted that she intended the law to be limited to health-related information. Apparently, the broader coverage was added with little notice or debate. The Maine Senate's judiciary committee is planning on reviewing the bill in the upcoming legislative session in order to enact amendments to address the concerns that have been raised. However, while the attorney general's office will not be enforcing the law until then, the private right of action remains on the books.

It is unclear whether any such suits brought could survive a constitutional challenge on the same grounds as those brought in the dismissed lawsuit. But the specter of incurring costs to defend any such suits hangs over any company conducting business online since doing so on the internet means doing business in Maine.

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