

A Moment of Privacy

August 2009

Welcome to “A Moment of Privacy,” a newsletter brought to you by the Privacy and Data Security Practice Group at Proskauer Rose LLP.

“A Moment of Privacy” addresses one legal development each month in the area of privacy and data security law. We answer the questions our clients are asking, in a way that we hope gives practical information to our readers. If you send us your question, you may find your answer in an upcoming newsletter.

And now for this month’s question:

Q: My company does not target marketing towards kids, nor does it collect health-related information. Do I have to worry about [Maine’s new “Act to Prevent Predatory Marketing Practices Against Minors”](#)?

A: Surprisingly to many people, yes. If you market to individuals without knowing that they are either: (i) adults (over 18 years old) or (ii) not Maine residents, then you need to address Maine’s new law, and you need to do so by its effective date of September 12, 2009.

Maine’s recently enacted “Act to Prevent Predatory Marketing Practices Against Minors” (the “Act”) applies more broadly than its title suggests. First, since a strict liability standard applies to most of its requirements, a company can be liable for noncompliance if it markets to minors who reside in Maine, even without knowing it. Second, the Act applies to the collection or use of either health-related information or any other kind of personally identifiable information (collectively, “covered information”) for marketing purposes.

The Act prohibits the following activities:

- Knowingly collecting or receiving covered information from a minor for marketing purposes without advance parental consent;
- Using covered information about a minor to market a product or service to that minor or to promote any course of action for the minor relating to a product;

- Selling, offering for sale, or transferring covered information about a minor that was knowingly collected or received from a minor for marketing purposes without advance parental consent;
- Selling, offering for sale, or transferring covered information about a minor that individually identifies the minor, and
- Selling, offering for sale, or transferring covered information about a minor that will be used to market a product or service to that minor or to promote any course of action for the minor relating to a product.

For some companies, the only practical compliance strategy is to screen individuals by age and/or by state of residence, and to simply avoid marketing to Maine's minors.

The Act is enforceable under Maine's Unfair Trade Practices Act by Maine's Attorney General or by private claimants. Maine's Unfair Trade Practices Act only protects Maine residents, so the Act does not protect minors who reside in other states.

Many commentators have suggested that the Act would not likely survive judicial challenge on constitutional grounds, and some suggest that it may be preempted by the federal Children's Online Privacy Protection Act. Some industry groups are attempting to convince the Maine legislature to amend the law; however, since Maine's legislature has gone out of session until January 6th, it seems unlikely that any resolution will happen quickly. In the meantime, all companies that market their products, goods or services should develop a plan to address the Act's requirements.

For more information about Maine's Act to Prevent Predatory Marketing Practices Against Minors, see our [blog post](#) at Proskauer's Privacy Law Blog.

Have a question? E-mail Kristen J. Mathews at kmathews@proskauer.com.

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