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April 27, 2009

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 550

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 550, "Online Child Safety Act of 2009" for constitutionality and legal sufficiency. In reviewing the bill, we have concluded that it does not violate the Commerce Clause of the United States Constitution.

Senate Bill 550 requires an Internet access provider that knows or has reason to know that a subscriber resides in the State to make parental control available to each subscriber in the State. The parental control must allow the subscriber, in a commercially reasonable manner, to block all access to the Internet, and to block a child's access to web sites by specifying prohibited sites or prohibited categories; restrict a child's access to specific permitted sites; restrict a child's access to sites the parental control provider designates or monitor a child's use of the Internet. The parental control is to be made available to the subscriber at or near the time of the subscription and may be made available either directly or through a link to a third party. The Internet access provider may charge for the parental control. Finally, the bill specifies that it does not require an Internet access provider to provide a parental control "that is not reasonably and commercially available for the technology that the subscriber uses to obtain access to the Internet."

The requirements of Senate Bill 550 clearly apply to out-of-state Internet access providers, but only with respect to their Maryland customers.[1] Thus, it has no effect on

[1] The bill applies only where the Internet access provider knows or should know that the subscriber is a Maryland resident. Because this information should be easily available from

transactions that take place entirely outside the State. Moreover, there is no apparent reason why it would have a more burdensome effect on out-of-state Internet access providers than on instate Internet access providers. Therefore, it is our view that the bill does not violate the Commerce Clause.

The Commerce Clause of the United States Constitution, Article I, § 8, cl.3, provides that the Congress "shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." The Commerce Clause is also understood to have a negative aspect that prohibits states from interfering with, or imposing burdens on, interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). This aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988). Thus, State statutes that directly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

A statute that does not discriminate against interstate commerce will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). One facet of this burden is whether companies are subjected to an array of conflicting regulations from different states. Goldsmith & Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 806 (2001). Courts will also look to whether the statute has any effect on transactions that take place entirely outside of the State.

It is clear that the statute in question does not discriminate against out-of-state Internet access providers. All providers, regardless of location, are subject to the same requirements. As such, it is comparable to the statute upheld in *MaryCLE v. First Choice*, 166 Md.App. 481, 522 (2006), which was found to be facially neutral because it applied "to all email advertisers, regardless of their geographic location." It is also our view that the local benefits of Senate Bill 550 clearly outweigh any burdens imposed on interstate commerce.

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billing records, it is unlikely there will be many cases where an Internet access provider legitimately does not know of the residency of a subscriber.

The basic requirement of Senate Bill 550 is that parental controls be made available to subscribers. This can be done directly by the Internet access provider, or indirectly, by reference to a third party web site. Moreover, the Internet access provider is permitted to impose a charge for the parental controls, so compliance with the legislation is not, or need not be, a financial burden on any Internet access provider. This is also not a case where the burden of compliance with conflicting State regulations is such that it amounts to an excessive burden.[2] While early Internet regulation cases suggested that the "boundary-less nature" of the Internet meant that it would "soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand a single uniform rule,'" *American Booksellers Foundation v. Dean*, 342 F.3d 96, 103-104 (2d Cir. 2003), *see also*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 182 (S.D.N.Y.1997), more recent cases have recognized that, outside the context of content regulation, state level regulation can be appropriate. *MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md.App. 481, 525 (Md.App.2006); *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523, PAGE (D.Md. 2006); *Ferguson v. Friendfinders, Inc.*, 115 Cal.Rptr.2d 258, 266 (Cal.App. 2002); *State v. Heckel*, 24 P.3d 404, 412 (Wash. 2001).[3]

In this instance, federal law already requires an Internet access provider to notify customers of the available parental control protections, 47 U.S.C. § 230(d), and strongly encourages the provision of parental controls by withholding the exemption from taxation for an Internet access provider that does not make screening software available (either for a fee or at no charge) at the time of entering into an agreement with a customer for the

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[2] "The mere fact that states may promulgate different substantive regulations of the same activity cannot possibly be the touchstone for illegality under the dormant Commerce Clause." Goldsmith & Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 806 (2001). Instead, a violation arises when "nonuniform state regulations might impose compliance costs that are so severe that they counsel against permitting the states to regulate a particular subject matter. At the limit, actors may become subject to different regulations to such an extent that compliance becomes effectively impossible if they are to engage in interstate commerce. Similarly, firms may become subject to regulatory requirements in one jurisdiction that accomplish no more than different regulatory requirements imposed by another jurisdiction, with the result that regulatory compliance costs increase significantly for no good reason." *Id.* at 806-807.

[3] In fact federal law recognizes that state regulation is appropriate in this area. The federal law governing blocking and screening of offensive material on the Internet expressly permits states to enforce any State law that is consistent with the section. 47 U.S.C. § 230(e)(3).

provision of Internet access services. Internet Tax Freedom Act, 47 U.S.C. § 151, note, § 1101(e)(1). As a result, the requirements of Senate Bill 550 reflect practices that are already most likely in place nationwide, and is unlikely to impose a significant burden on interstate commerce.

The local benefits, on the other hand, are likely to be significant. Screening software has been recognized as an effective tool, and a practical alternative to restrictions on Internet content. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-667 (2004); *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 202-203 (3rd Cir. 2008), *cert. denied* 129 S.Ct. 1032 (2009). Requiring an Internet access provider to make screening software or other parental controls available ensures that this effective tool is available even to those who lack the technical knowledge to know of its availability or to select effective products. As a result, the local benefit is substantial and outweighs any burden that Senate Bill 550 might place on interstate commerce.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Nancy J. King
The Honorable John P. McDonough
Joseph Bryce
Karl Aro