

FTC Pressed on Online Health and Medical Information Privacy Issues

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Privacy issues regarding tracking and use of information concerning pharmaceuticals and other medical or health information will continue to receive close scrutiny in 2011. In particular, consumer advocates have sought regulation and oversight of a number of marketing techniques that they allege raise consumer privacy concerns. Challenged practices include online profiling, behavioral tracking, medical condition identification based on consumer input regarding health concerns, and social media mining to monitor online conversations about pharmaceutical products and brands. In addition, attention is being drawn to the use of viral online campaigns to drive interest in medications and health remedies and the use of "unbranded" websites and video channels, sponsored by pharmaceutical manufacturers, to raise interest in pharmaceutical brands. Consumer advocates express concern about alleged failures by sponsors and advertisers to clearly delineate between editorial content and promotional material and the use of "neuromarketing" techniques to influence subconscious perceptions in favor of certain pharmaceuticals.

These were the key issues highlighted in a complaint filed November 23, 2010, with the Federal Trade Commission (FTC) by the Center for Digital Democracy, U.S. PIRG, Consumer Watchdog and the World Privacy Forum (the Consumer Advocacy Groups). Their complaint requested that the FTC investigate advertising practices utilized by providers of online health information and services that are alleged to be unfair and deceptive. Among those named as defendants are Google, Microsoft, QualityHealth, WebMD, Yahoo, AOL, HealthCentral, Healthline and Everyday Health. The Consumer Advocacy Groups requested that the FTC take the following actions:

- Scrutinize the data collection and usage practices of providers of online health information and services, to determine the extent of consumer information collected through online interactions;
- Require providers of online health information and services to disclose their online targeting techniques and methods, with special emphasis on behavioral advertising and retargeting;
- Review online privacy policy disclosures of the providers of online health information and services;
- Analyze the impact of health-related social media marketing on consumer behavior and attitudes regarding drug use and various medical conditions;
- Investigate possible violations of the FTC's endorsement guidelines by health bloggers;

- Investigate the use of "unbranded" sites that appear independent but are funded by pharmaceutical companies;
- Investigate neuromarketing-related techniques; and
- Cooperate with the Food and Drug Administration (FDA) and other government agencies to develop a set of policies for regulating providers of online health information and services.

Through their complaint, the Consumer Advocacy Groups may seek to influence ongoing consideration of the FTC's draft proposal for "Protecting Consumer Privacy in an Era of Rapid Change," which was released on December 1, 2010. In the draft report, which was summarized in the January issue of *Privacy In Focus*, the FTC "proposes a framework to balance the privacy interests of consumers with innovation that relies on consumer information to develop beneficial new products and services." The FTC has extended the deadline for comments on the draft report to February 18, 2011, and expects to adopt a final report later in the year. This final report is designed to frame a national debate about privacy and to preview the agency's future enforcement actions.

By requesting broad FTC action concerning online health information and services, the Consumer Advocacy Groups may seek not only to obtain greater regulatory oversight, but also to weaken the FDA's authority to regulate consumer pharmaceutical advertising through its Division of Drug Marketing, Advertising, and Communications. Jeffrey K. Francer, assistant general counsel to the Pharmaceutical Research and Manufacturers of America, has voiced concern about the role of the FTC in relation to the FDA's long-standing oversight of public communications about pharmaceuticals. He stressed that "there are clear public health benefits for health care providers and patients to be able to access truthful, scientifically accurate and . . . [Food and Drug Administration]-regulated information about medicines online from the companies that research and develop them" and that "PhRMA would be concerned by any effort to weaken the FDA's oversight over this important communication."

As these comments underscore, there are significant issues about the respective roles of the FTC and FDA in overseeing online communications about pharmaceuticals, as well as about the nature and scope of any review or investigation of online tracking of pharmaceutical and other medical information that may be undertaken. While the outcome will not be known for many months, it is clear now that privacy issues regarding provision of online health information and service will remain at the forefront of the privacy debate in 2011.