



# Privacy and Wearables

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# Presented by

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# Who are the Enforcers?



- Federal Trade Commission (FTC)
- State Attorneys General
- Department of Health & Human Services
- Other Federal Regulators?



## ■ FTC

- Consumer Protection (under the FTC Act)
- Child Online Privacy Protection Act
- FTC website devoted to enforcement activities

- *Enforcing Privacy Promises*

- <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises>

## ■ Is there a harm to consumers?



- State AGs
  - Enforcement of Specific State Privacy Statutes
    - For example: California's Online Privacy Protection Act
  - Enforcement of Breach Reporting Statutes
    - Note some states have a broad description of the type of data that will trigger a reporting requirement
  - Consumer Protection

# Other Federal Regulators



- Department of Health and Human Services
  - Enforces HIPAA Privacy and Security
  - Enforcement is limited to entities in the health care industry specifically:
    - Providers, health plans, health care clearinghouses; and
    - Vendors of those entities
  - Others? (FCC, FDA)

# Child Online Privacy Protection Act



- COPPA applies to:
  - Operators of websites or online services (including apps) where the services are directed to children under 13;
  - Operators of other websites or online services (including apps) that have actual knowledge that they are collecting personal information online from a child under 13 years of age
- Special Rules Apply— Know the Rules!





## ■ Nomi

- Uses mobile device tracking technology to provide analytics services to brick and mortar retailers
- Provided opt out for consumers on Nomi website
- Did not identify individuals
- Website Privacy Policy stated:
  - “Nomi pledges to.... Always allow consumers to opt out of Nomi’s service on its website as well as at any retailer using Nomi’s technology”

# FTC Enforcement Action



- PaymentsMD LLC -- Patient Portal for consumers to bill health billing history
- FTC Allegation:
  - Although consumers could have seen statement: “[H]ealth records related to your treatment . . . may be used or disclosed pursuant to this Authorization,”
  - Site “design simultaneously made it hard to read the authorizations in their entirety, and easy to skip over them by clicking a single check box that preceded all of the authorizations”

# FTC Enforcement Action



- PaymentsMD LLC FTC Press Release
  - “Consumers’ health information is as sensitive as it gets,” said Jessica Rich, director of the FTC’s Bureau of Consumer Protection. “Using deceptive tactics to gain consumers’ ‘permission’ to collect their full health history is contrary to the most basic privacy principles.”

# State Enforcement Action



- California AG
  - Alleged Delta violated the California Online Privacy Protection Act and the state's Unfair Competition Law by failing to “conspicuously post a privacy policy in its Fly Delta app” and failing to comply with its own website privacy policy
  - Sought \$2500 in damages for each time the app was downloaded
- Case dismissed based on federal preemption specific to airline industry

# OCR Enforcement Actions



- Website details HHS enforcement actions

<http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/index.html>

- [Improper disclosure of research participants' protected health information results in \\$3.9 million HIPAA settlement - March 17, 2016](#)
- [\\$1.55 million settlement underscores the importance of executing HIPAA business associate agreements - March 16, 2016](#)

# Suggested Steps

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- Transparency

- Tell consumers:

- What data you are collecting
- How you are storing the data
- Who might receive the data

# Suggested Steps



## ■ Take Advantage of Resources

- FTC Guidance on Mobile Technology

<https://www.ftc.gov/news-events/media-resources/mobile-technology>

- FTC Best Practices for Mobile Health Apps

<https://www.ftc.gov/tips-advice/business-center/guidance/mobile-health-app-developers-ftc-best-practices>

# Suggested Steps



- California AG Information for Businesses and Privacy
  - <https://oag.ca.gov/privacy/business-privacy>
- Join a privacy organization - or subscribe to the newsletter
- Privacy by design
  - Not just what the wearable is now- but what potential does it have



# Questions?

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**Thank you.**