

Comment:
FTC Workshop on Consumer Generated and Controlled Health Data
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James C. Cooper*

In this brief comment, I make one key point: Any FTC action taken to address privacy concerns associated with consumer generated and controlled health data should be guided by economic analysis of the relevant costs and benefits. As I have noted elsewhere, the FTC's consumer protection mission would benefit tremendously from greater integration of the FTC's formidable economic analysis capabilities.¹

As a threshold matter, the FTC should invest resources to develop an empirical understanding of likely privacy harms associated with consumer generated and controlled health data before taking any action. Broadly, privacy harms can be classified as tangible or intangible. Tangible harms include the extent to which the increasing use of consumer generated and controlled health data is likely to increase the risk of identity fraud or reputational harm from breaches of sensitive personal information. Such harms can be measured objectively with metrics like fraudulent charges, inconvenience costs associated with identity theft, or lost marketplace opportunities due to stigma.

Intangible harms include the discomfort associated with the observation, collection, or revelation of information that one would prefer to keep private. These harms are suffered internally, and therefore are not amendable to objective measurement. This is not to say that intangible harm should be ignored or could never form the basis for FTC action. The harm associated the revelation of sensitive health information, for example, is probably significant for most of the population. At the same time, however, any discomfort associated with the collection and analysis of anonymized data streams of personal health information for honing predictive algorithms, creating customized experiences, or targeting advertisements, is likely to vary widely.² Before relying on intangible harms as a basis for action, the FTC should develop an empirical understanding of their

* George Mason University School of Law.

¹ See James C. Cooper, Comment on FTC Strategic Plan 2014-2018 (August 16, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333794.

² In fact, many consumers may consider these uses benefits rather than costs.

variance and magnitude rather than merely relying on anecdotes or “worst-case” hypotheticals from workshop participants.

Any benefit-cost analysis of FTC action in this area also must consider countervailing impacts from such action. For example, the retardation of health information flows due to privacy regulation has been shown to reduce incentives to adopt health information technology systems, leading to worse health outcomes for some segments of the population.³ Economic tools are uniquely well-suited for such analysis, and the FTC is a uniquely well-suited agency given its large cadre of top-notch regulatory economists.

³ See, e.g., Amalia Miller & Catherine Tucker, *Can Healthcare Information Technology Save Babies?* 119 J. POL. ECON. 289 (2011); Daniel J. Gilman & James C. Cooper, *There is a Time to Keep Silent and a Time to Speak, the Hard Part is Knowing Which is Which: Striking the Balance Between Privacy Protection and the Flow of Health Care Information*, 16 MICH. TELCOM. & TECH. L. REV. 279 (2010).