Safe and Effective! Developing FDA-Compliant Advertising and Promotions for Drugs and Medical Devices

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LOEB & LOEB LLP

Today's Presenters

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Today's Topics

- Advertising and promotion of drugs and medical devices – the legal framework
  - FDA vs. FTC
  - Drug promotion
  - Medical device promotion
- Social media and digital advertising
- Optimizing data and consumer privacy concerns

Key Players:
FDA vs. FTC

The FDA

- The federal Food, Drug, and Cosmetic Act (FDCA) and its implementing regulations grant the Food and Drug Administration (FDA) broad authority over drugs and devices and their manufacturers' activities, including labeling and advertising

The FTC

- The Federal Trade Commission (FTC)
  - Bureau of Consumer Protection, Division of Advertising Practices

- The Federal Trade Commission Act (FTCA)
  - Prevents "**unfair or deceptive** acts or practices"
  - Section 12 of the FTCA – "False advertisements for foods, drugs, devices and services are prohibited."

FDA vs. FTC: Who Has Jurisdiction?

Depends on

- Type of product – drug or device
- Nature of how it is sold
  - **Prescription** drugs and **restricted** devices
  - OTC drugs and "unrestricted" devices
- Medium through which the information is disseminated
  - Advertising
  - Labeling

Overview				
	Rx Drugs	OTC Drugs	Restricted Devices	Unrestricted Devices
Advertising	FDA	FTC	FDA	FTC
Labeling	FDA	FDA	FDA	FDA

*

Advertisement vs. Labeling

Advertisements (subject to 21 CFR 202)	Promotional Labeling (subject to 21 CFR 201)
Print advertisements in published journals, magazines, other periodicals and newspapers Broadcast advertisements using media such as radio, television and telephone communication systems	Brochures, booklets, mailing pieces, detailing pieces, file cards, bulletins, calendars, price lists, catalogs, house organs, letters, motion picture films, filmstrips, lantern slides, sound recordings, exhibits, literature and reprints and similar pieces of printed, audio or visual matter descriptive of a drug and references published (for example, the *Physicians' Desk Reference*) for use by medical practitioners, pharmacists or nurses containing drug information supplied by the manufacturer, packer or distributor of the drug and that are disseminated by or on behalf of its manufacturer, packer or distributor

Drug Promotion

What Is Promotion?

- Broadly interpreted
- Includes materials and/or communications issued by or on behalf of a company that inform, solicit or make representations to the general public or the medical community
- In some instances, even without mention of drug name, statements may be viewed as promotion

Many Forms of Promotion

- Print advertisements
- TV advertisements
- Company website
- Certain interactions at medical conventions or product meetings
- Physician detailing session/sales calls
- Booths
- Direct-to-physician or consumer mailings
- Brochures/pamphlets
- Internet advertisements
- Certain oral or written statements by company employees or agents

The Basics

Labeling and Advertising

- Product claims must be **supported by substantial evidence**
- Product claims must be **true and not misleading**
- Advertising and promotional materials must have **fair balance**
- Advertising and promotional materials must contain a **brief summary** of the approved PI
- All promotion must be **consistent with FDA-approved labeling** (no off-label promotion)
  - No pre-approval promotion

*

Proper Support

- Claims must be supported by "**substantial evidence**" or "**substantial clinical experience**"
  - "Substantial evidence" means "adequate and well controlled investigations, including clinical investigations ... by experts qualified by training and experience to evaluate the safety and effectiveness of the drug involved, on the basis of which it can fairly and responsibly be concluded by such experts that the drug is safe and effective for such uses." 21 C.F.R. § 202.1(e)(4)(ii)(b)
  - The explanation of "substantial clinical experience" is more limited. It means "substantial clinical experience adequately documented in medical literature or by other data (to be supplied to [FDA], if requested), on the basis of which it can fairly and responsibly be concluded by qualified experts that the drug is safe and effective for such uses." 21 C.F.R. § 202.1(e)(4)(ii)(c)

*

Truthful and Not Misleading

- Product claims in promotion must be true and not presented in a misleading way
  - Omitting material facts, i.e., "facts material in the light of ... representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual." 21 U.S.C. § 321(n)
- 21 C.F.R. § 202 contains lists of ways in which a prescription drug advertisement will or may be deemed to be false or misleading

Fair Balance

- FDA interprets fair balance to mean that the **net impression** of a piece provides a **balance** of benefit and risk information
  - The quantity, location and order of risk information, including the use of “signals”
- Risk information exists in a hierarchical order as in the PI
  - A drug’s most serious risks and most common risks are material
- Risk information can be considered to be minimized if formatting makes the risk information harder to read than benefit information
- Risk information needs to be written at an appropriate level for the target audience (i.e., physicians versus patients)

Prescribing Information (PI) and Brief Summary

- Labeling must be accompanied by **Full PI**
- Print advertising must include a true statement in **Consumer Brief Summary** to include:
  - Information about side effects, contraindications, warnings and precautions
  - Information that is in PI under headings such as cautions, special considerations, important notes, etc.
- Direct to consumer (DTC) advertising require PI information in patient-friendly language and FDA Med Watch information
- TV ads require **major statement** and adequate provision of PI

On-Label

- Promotion must be consistent with the drug's labeling
- Promotion of an off-label use is illegal
  - Prescription drug advertising "shall not recommend or suggest any use that is not in the labeling" 21 C.F.R. § 202.1(e)(4)(ii)
  - Claim or statement about an FDA-regulated product that represents or implies that the product is safe and effective in ways/for a population/for a use/for a dosage that is not approved or cleared by the FDA
  - Statements, written or oral, or broadcast (express or implied) by the manufacturer or its representatives suggesting a different than approved use by FDA is unlawful and misbrands the product
  - Jan. 9, 2017 – FDA changes "intended use" definition in 21 C.F.R. §§ 201.128 for the purposes of labeling from objective standard to totality of the circumstance standard
- An investigational drug may not be promoted for uses for which it is under investigation 21 C.F.R. § 312.7

No Pre-Approval Promotion

- Before FDA approval/clearance:
  - Cannot say a product is approved until the FDA sends the approval letter to the company
  - Cannot say Product X is safe
  - Cannot say Product X is effective
  - Cannot imply either
  - Cannot make a claim that Product X is superior to another product
  - **A company cannot represent in ANY promotional context** that Product X **is safe or effective**
  - Promoting Product X prior to its approval violates the law

Medical Device Promotion

Oversight of Medical Device Promotion

Jurisdictional Split

- Labeling
  - FDA (through Center for Devices and Radiological Health)
  - Concept of “promotional labeling” not formally adopted by CDRH
  - Has applied similar principles from drug world to medical device promotional labeling materials
- Advertising
  - FDA for advertising of restricted devices (Class III or others restricted)
  - FTC for advertising of “nonrestricted devices” (Class I & II)

Medical Device Advertising

- Unlike prescription drugs, not specifically defined in the FDCA or regulations
- The FDCA includes just two specific provisions regarding restricted device advertising:
  - 21 U.S.C. § 352(q) provides that a restricted device is misbranded if its advertising is false and misleading in any particular, and
  - 21 U.S.C. 352(r) provides that a restricted device is misbranded if its advertising does not contain a brief statement of the device's intended use and relevant warnings, precautions, side effects and contraindications
- Borrow from 21 CFR § 202.1 (1) Lists Examples of Drug Advertisements
  - Advertisements in journals, magazines, periodicals, newspapers
  - Advertisement broadcasts such as on radio, TV, and phone

Unrestricted Device Advertising Specifically

- FTC normally focuses on whether claims made for a product are **truthful, non-misleading and substantiated by "competent and reliable scientific evidence"**

FTC

“Competent and reliable scientific evidence”

- Tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, which have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results

Substantiation

FTC Policy on Advertising Substantiation

- The issue is **not** the truth or falsity of the claim – it is the failure to have and rely upon a **reasonable basis** that is actionable
- The advertiser must have at least the degree of substantiation that it claims
- Key is matching claims to **evidence**

Social Media

Getting Social: Education

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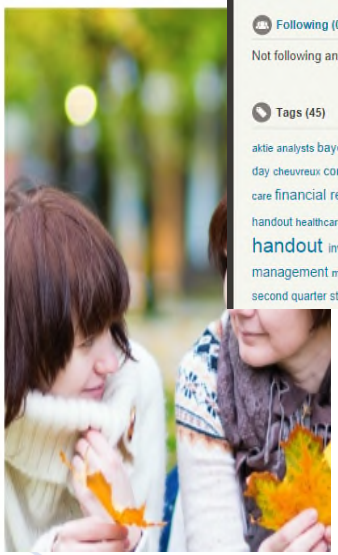
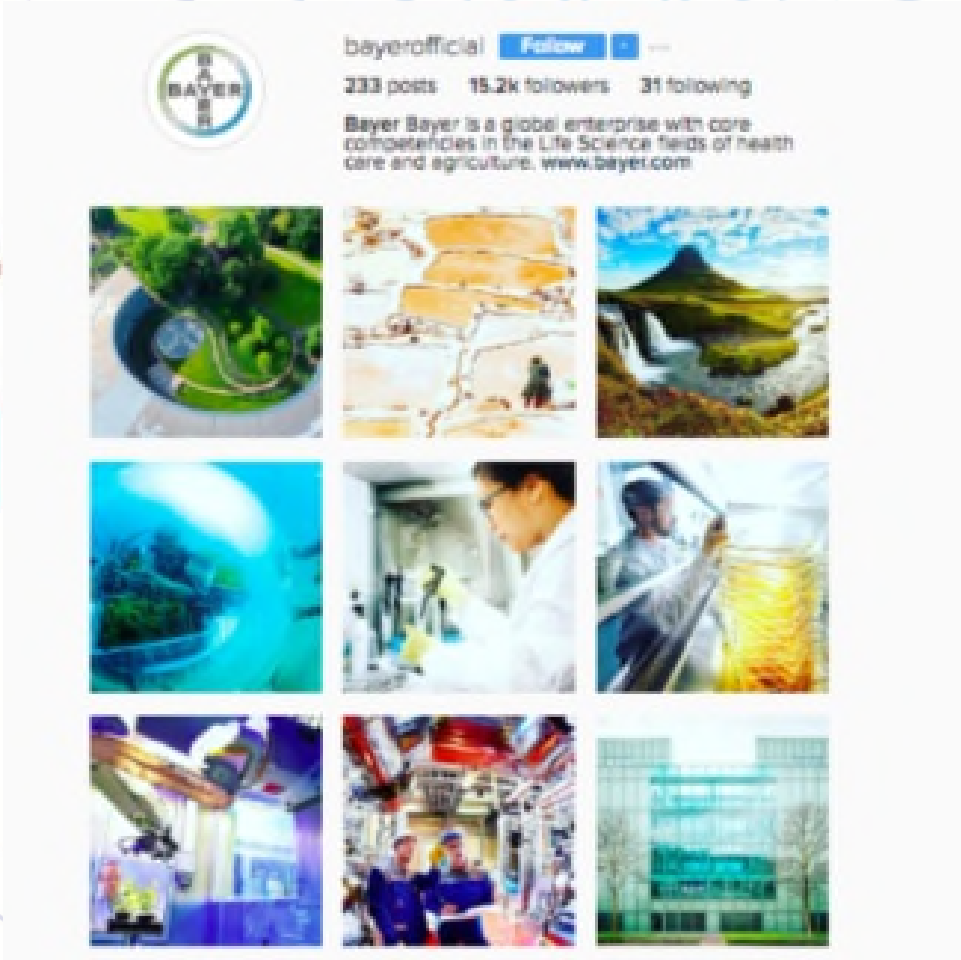
Speaker: Juan Frias, MD, FACE
Standards of Medical Care in Diabetes: Focus on Complications
Thursday, February 23 from 1 – 2 PM ET

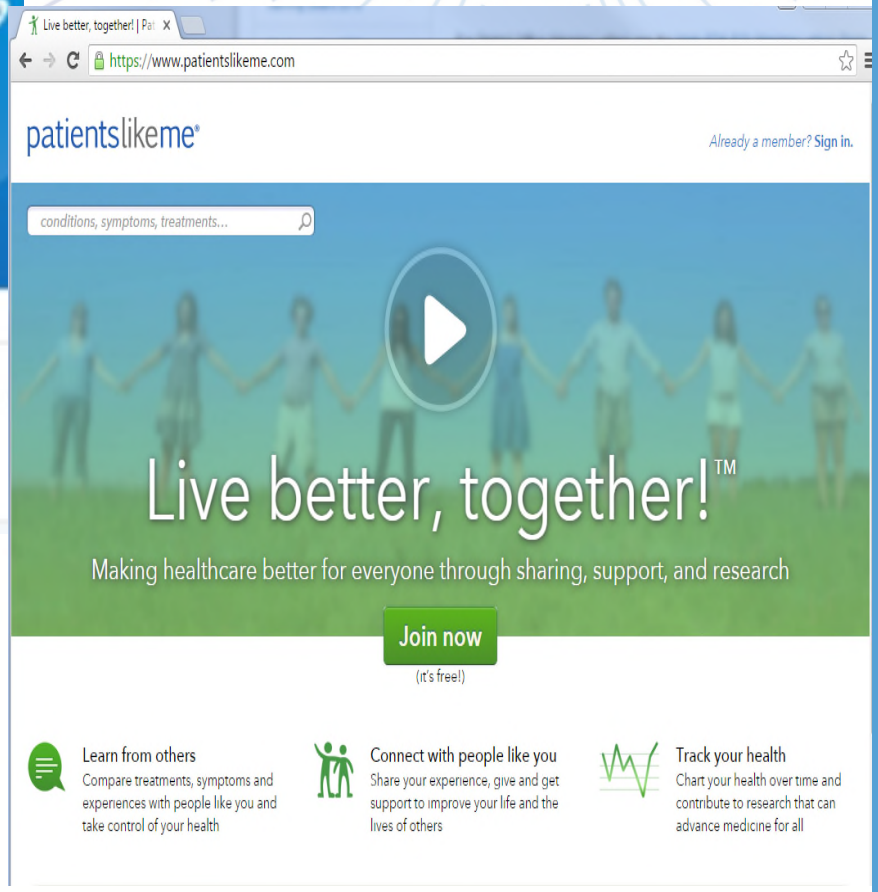
Speaker: Alexis Chettiar RN, MSN, ACNP-BC
Kidney Disease of Diabetes
Thursday, March 23 from 1 – 2 PM ET



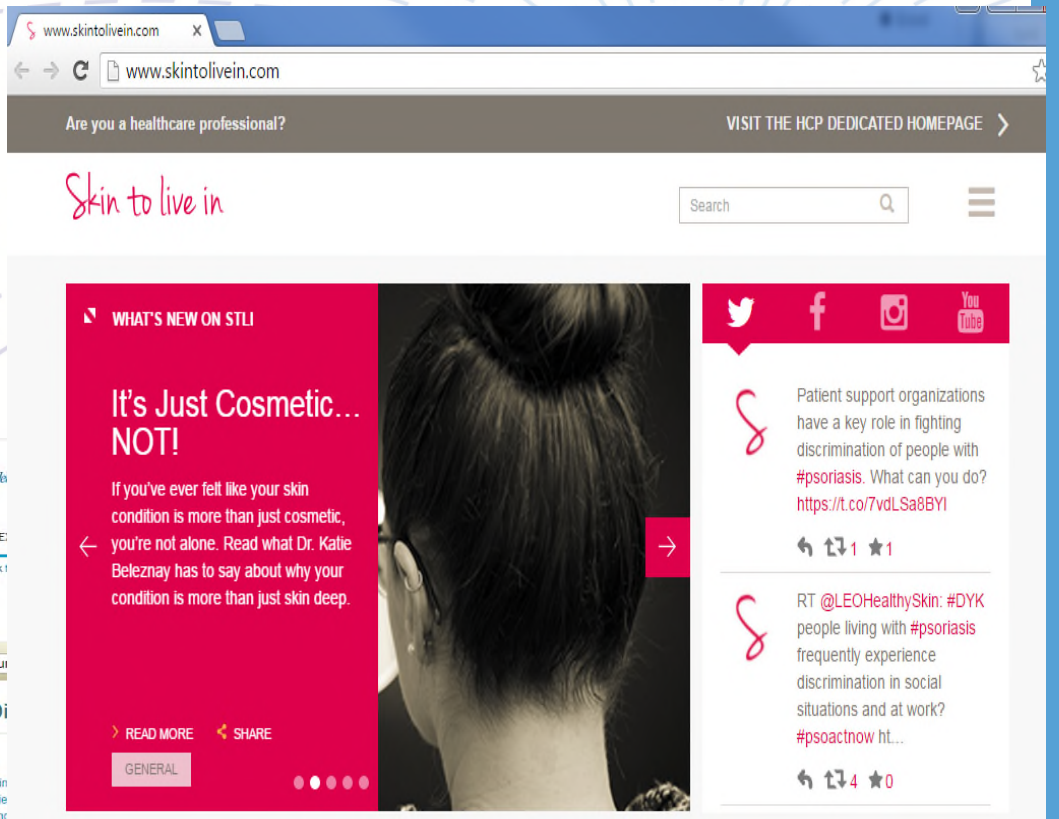
Getting Social: Marketing

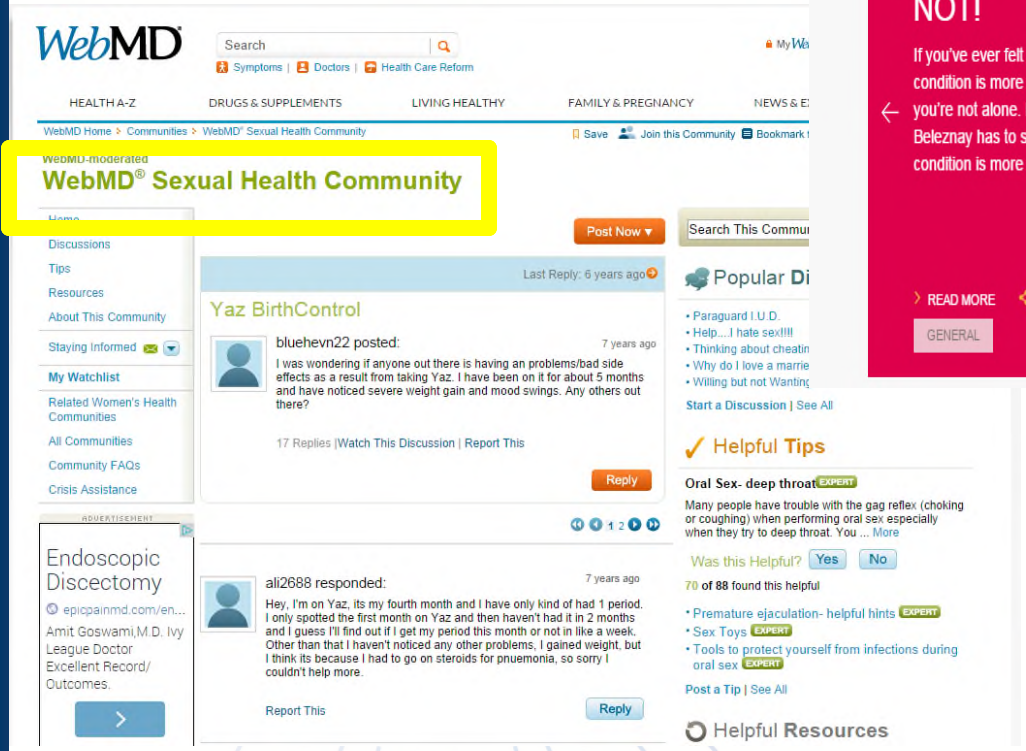


Getting Social: Making Connections



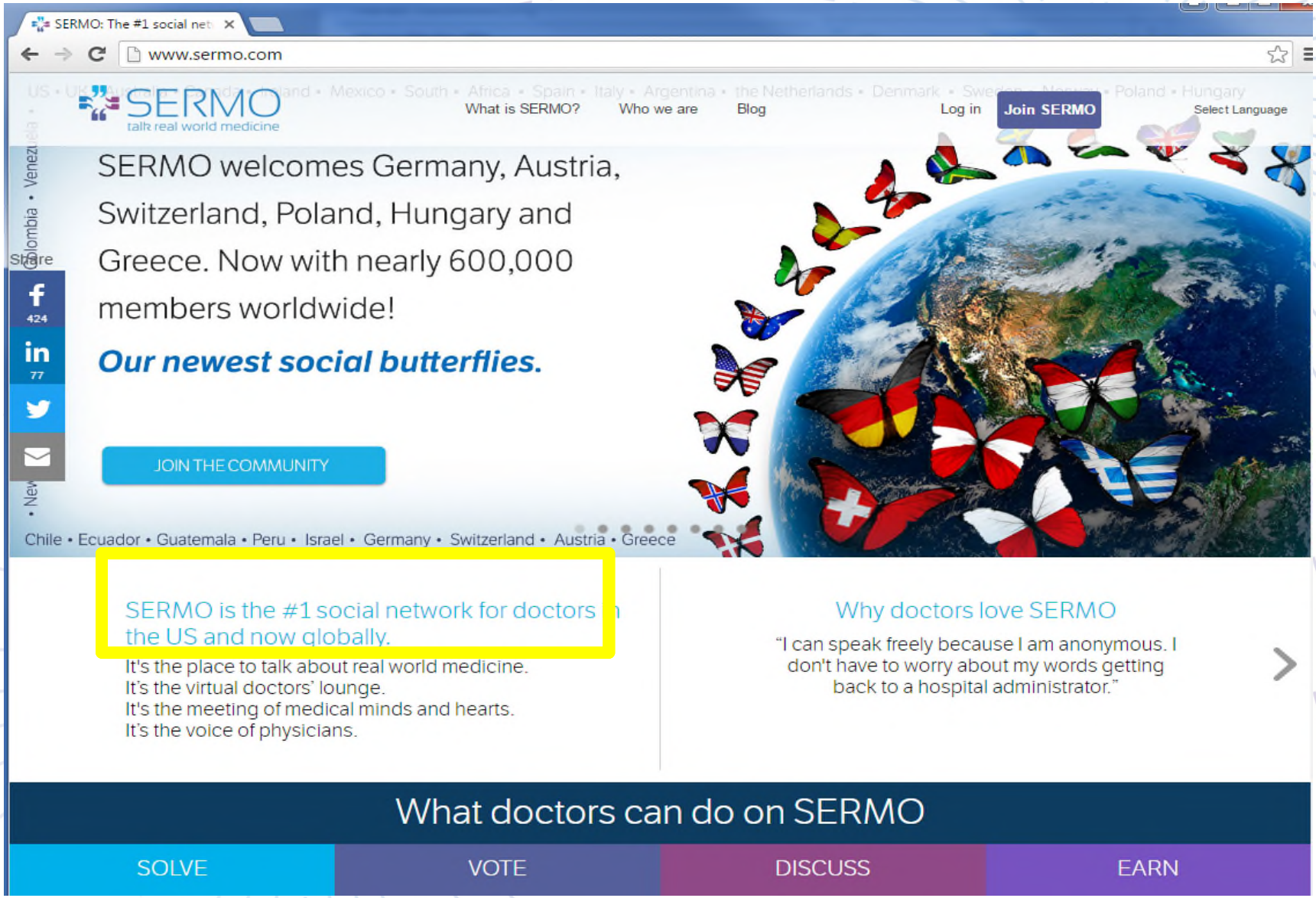
Getting Social: Communities & Support Groups



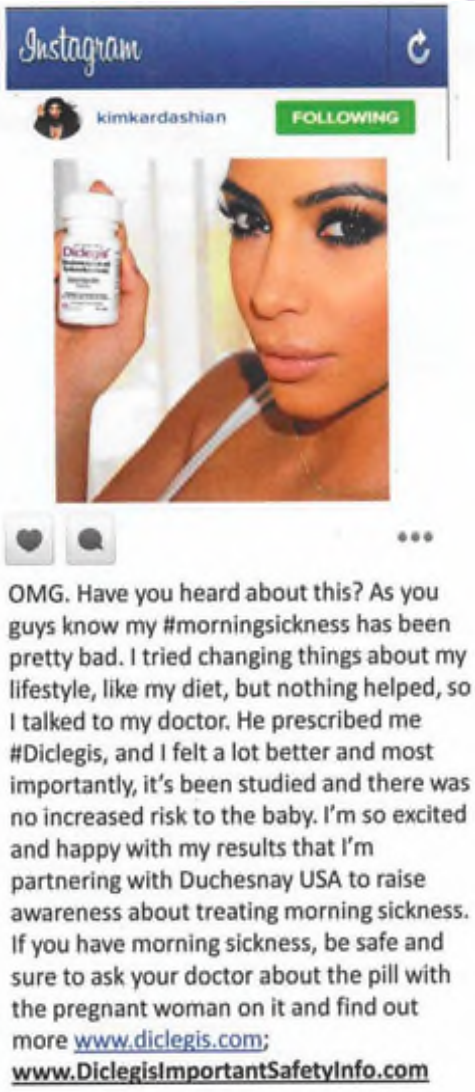


Source: http://forums.webmd.com/3/sex-and-relationships-exchange/forum/6034

Getting Social: Connecting With Physicians



What Can Go Wrong? Post Leads to FDA Warning



What Can Go Wrong: FDA Warns Drug Maker Over Kim's Posts

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Silver Spring, MD 20993

TRANSMITTED BY FACSIMILE

Eric Gervais, Executive Vice President
Duchesnay, Inc.
919 Conestoga Road
Building One, Suite 203
Rosemont, PA 19010

RE: NDA: 021876
DICLEGIS (doxylamine succinate and pyridoxine hydrochloride) delayed-release tablets, for oral use
MA # 350

WARNING LETTER

Dear Mr. Gervais:

The Office of Prescription Drug Promotion (OPDP) of the U.S. Food and Drug Administration (FDA) has reviewed the Kim Kardashian Social Media Post (social media post) (2015-0069-01) [1] for DICLEGIS (doxylamine succinate and pyridoxine hydrochloride) delayed-release tablets, for oral use (DICLEGIS) submitted by Duchesnay, Inc. (Duchesnay) under cover of Form FDA 2253. The social media post was also submitted as a complaint to the OPDP Bad Ad Program. The social media post is false or misleading in that it presents efficacy claims for DICLEGIS, but fails to communicate any risk information associated with its use and it omits material facts. Thus, the social media post misbrands DICLEGIS within the meaning of the Federal Food, Drug, and Cosmetic Act (FD&C Act) and makes its distribution violative. 21 U.S.C. 352(a), (n); 321(n); 331(a). *See* 21 CFR 202.1(e)(5). These violations are concerning from a public health perspective because they suggest that DICLEGIS is safer than has been demonstrated.

What Can Go Wrong? Government Inquiries

Grassley Probes WebMd's Ties To Eli Lilly for running TV ad encouraging depression screening—sponsored by Eli Lilly

Grassley, who is the ranking Republican on the US Senate Finance Committee, is investigating the relationship between WebMD and drugmakers after learning the web site is running a TV ad that encourage people to take a depression-screening test sponsored by Eli Lilly, which sells Cymbalta.

What Are the Rules?

- Internet/Social Media Platforms with Character Space Limitations – Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices – June 2014
- Internet/Social Media Platforms: Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices – aJune 2014
- Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics – January 2014
- Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices – December 2011

Old Rules Apply on New Platforms: Fair Balance in 140 Characters or Less

- Balance the risk
  - **Benefits should be factual** – Avoid misleading or inaccurate statements.
  - **Communicate the risk** – Include information about the most serious risk of the product, along with a descriptive hyperlink to a more complete list of risk information. (www.productname.com/risk)

    ****Symbols (such as &), punctuation marks and scientific abbreviations can be used to help reduce space constraints***
  - **Include material facts** – reveal material facts about the use of the product.

- Use the full FDA-approved product name.

Correcting Misinformation: How/When to Respond to Third-Party Misinformation

****There is no obligation to correct truly independent third-party UGC, but if you do…**

- **Options for correcting**
  - Provide appropriate truthful and non-misleading corrective information, OR
  - Provide a reputable source from which to obtain the correct information, such as the firm's contact information
- **"Appropriate corrective information" should be:**
  - Relevant and responsive
  - Limited and tailored
  - Non-promotional
  - Accurate (supported by sufficient evidence)
  - Consistent with the FDA-required labeling for the product
- Disclose that the person providing the corrective information is affiliated with the firm that manufactures, packs or distributes the product

Likes, Retweets and Comments

Fulfilling Regulatory Requirements for Post-Marketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics *(Draft, Jan. 2014)*

- **What should you submit?**
  - Influence/control standard
  - Form 2253 (human) and Form 2301 (animal)

- **How should you submit it?**
  - Initial submission
    - Firm-controlled site vs. third-party site
  - Updated submissions:
    - Monthly list
    - Restricted sites
  - Ceasing activity
    - Notify on first day

Postmarketing Submissions*

"The applicant shall submit specimens of mailing pieces and any other labeling or advertising … at the time of initial dissemination of the labeling and at the time of initial publication of the advertisement …. accompanied by … Form FDA-2253…" and the current PI.

—21 CFR 314.81(b)(3)(i) and 21 CFR 601.12(f)(4)

Off-Label On-Line

Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices *(Draft, Dec. 2011)*

- Public unsolicited requests for off-label information
  - Respond only when the request pertains specifically to your named product
  - Limit the response to providing contact information for medical affairs
  - Convey that the question pertains to an unapproved use of the product
  - Do not include any off-label information
  - Clearly disclose your involvement with a particular firm
  - Do not respond in a promotional nature or tone
  - Do not include links except to the current FDA-required labeling

What Are the Rules? FTC Truth in Advertising Rules Also Apply

General principles:

- All of the "old" rules still apply
- "Clear and conspicuous" requirement applies equally to all marketing channels
- Clear, straightforward, accurate main messages require fewer disclosures
- Don't bury important things in Terms of Use or rely on disclosures

→ Regulator POV: If you can't make a required disclosure in a particular channel (such as Twitter), don't use that channel for that message!

Effectiveness of Disclosures – General Principles

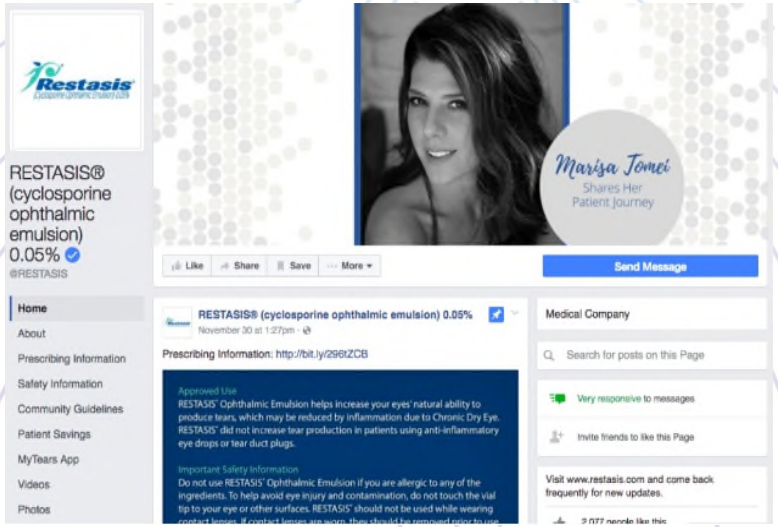
The Four P's: factors that affect whether disclosures are effective

- **P**rominence – prominent enough to be seen and/or heard by consumers
- **P**resentation – worded in a way that consumers can easily understand
- **P**lacement – where a consumer is likely to look
  - Avoid distracting factors!
    - For TV and video, disclosures should not be set against moving backgrounds
    - Account for viewing on different devices and on different platforms
    - Optimize sites for smartphone/tablet use; if consumers have to zoom or scroll, they may miss important disclosures
- **P**roximity – "as close as possible" to the main claim it modifies (not just "near" the claim)

→ ***Disclosures can be incorporated organically, which is equally effective!***

Disclosures in Limited Spaces

- If a disclosure is necessary in a space-constrained ad (for example, tweets), be sure the disclosure appears in each message
  - You shouldn't assume that a consumer will see and associate multiple messages
- Make sure disclosures will be maintained if republished (for example, retweeted)
  - If disclosure appears at end of message, leave enough free space so the disclosure is not lost in republication due to 140-character limit
- Endorsements should be clearly disclosed



"When it's not obvious that it is an ad, people should disclose that they are being paid… It only takes up two extra characters."

- Mary Engle, FTC

Don’t Forget the Platform Policies

Offers

If you create an offer using Facebook’s offer creation tool, the following policies apply:

- Facebook offers must be available for a limited time.
- You may only run an offer if you are the merchant for or the manufacturer of the product or service you are promoting.
- You must clearly and prominently disclose any restrictions on your offer (such as expiration date or limitations on redemption).
- You are solely responsible for improper redemption, fraud, disputes or other issues that arise from the distribution and/or redemption of your offer.
- You must use the offer creation tool only for its intended functionality and not to promote your website or other contact information, or to offer the equivalent of a gift card, gift certificate or stored value card.

Policies for Conversion Tracking and Tailored Audiences

Advertisers using these products in their mobile applications must provide their application users with legally sufficient notice that they are working with third parties to collect user data through their application for purposes of conversion tracking and serving ads targeted to users’ interests, and legally sufficient instructions for such users on how they can opt out of interest-based advertising.

Twitter prohibits the creation of tailored audiences or conversion events based on any sensitive information, which includes:

Alleged or actual commission of a crime

Health

Negative financial status or condition

Political affiliation or beliefs

Racial or ethnic origin

Religious or philosophical affiliation or beliefs

Sex life

Trade union membership

Advertisers may not use these products in any website, application, or service directed to children under 13, or in any website, application, or service that collects or stores age information from individuals under the age of 13.

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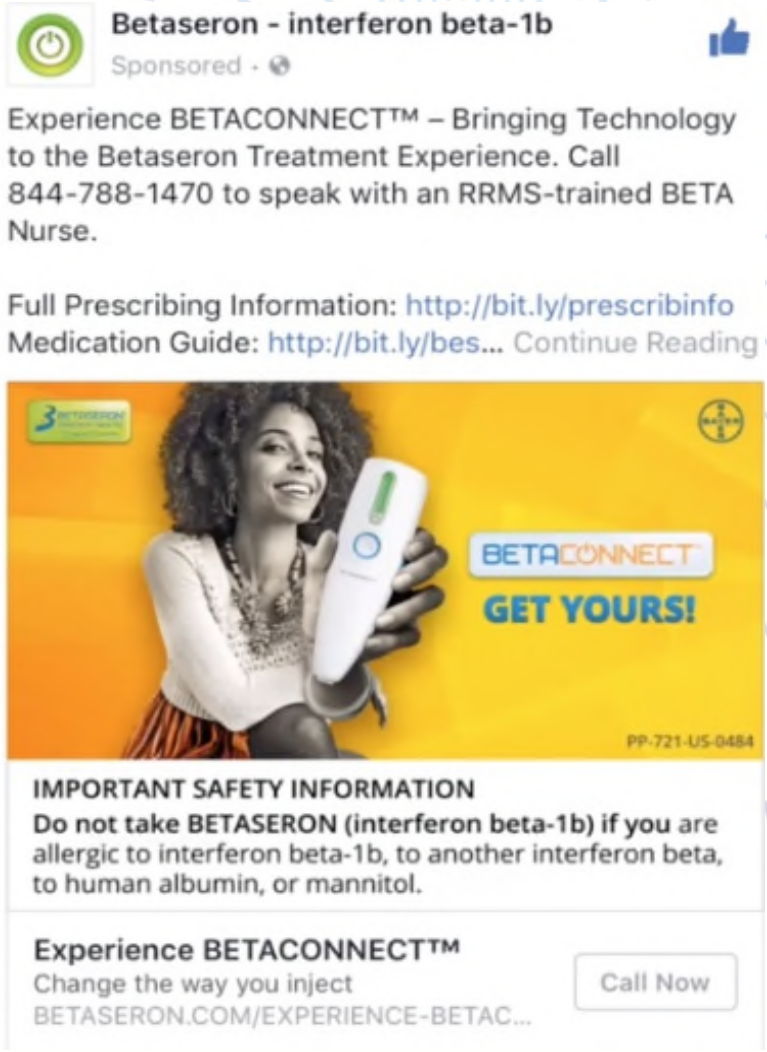
Terms Common to Many Social Media Platforms

- You accept liability for all content
- You rep and warrant that content does not violate third-party rights (including ©, TM, right of publicity, privacy, defamation, etc.)
- You indemnify the platform against all claims relating to content
- You grant the platform a license to use content (including ©, TMs)
- Scope of license varies widely – can include right to edit content, right to create derivative works, right to permit other platform users to use/distribute content, right to use content for marketing/promotional activity of platform, even the right to sell content

Facebook on the Forefront: Using Technology for Compliance

- Added an automated scroll that allows the small print warning of a drug's possible side effects to be displayed
- Allows pharma companies to turn off comments on pages promoting specific products (allowing companies to avoid reports of unverified "adverse events")
- Working to build up "community pages" that bring together users who share a particular medical condition, which can be sponsored by drug makers

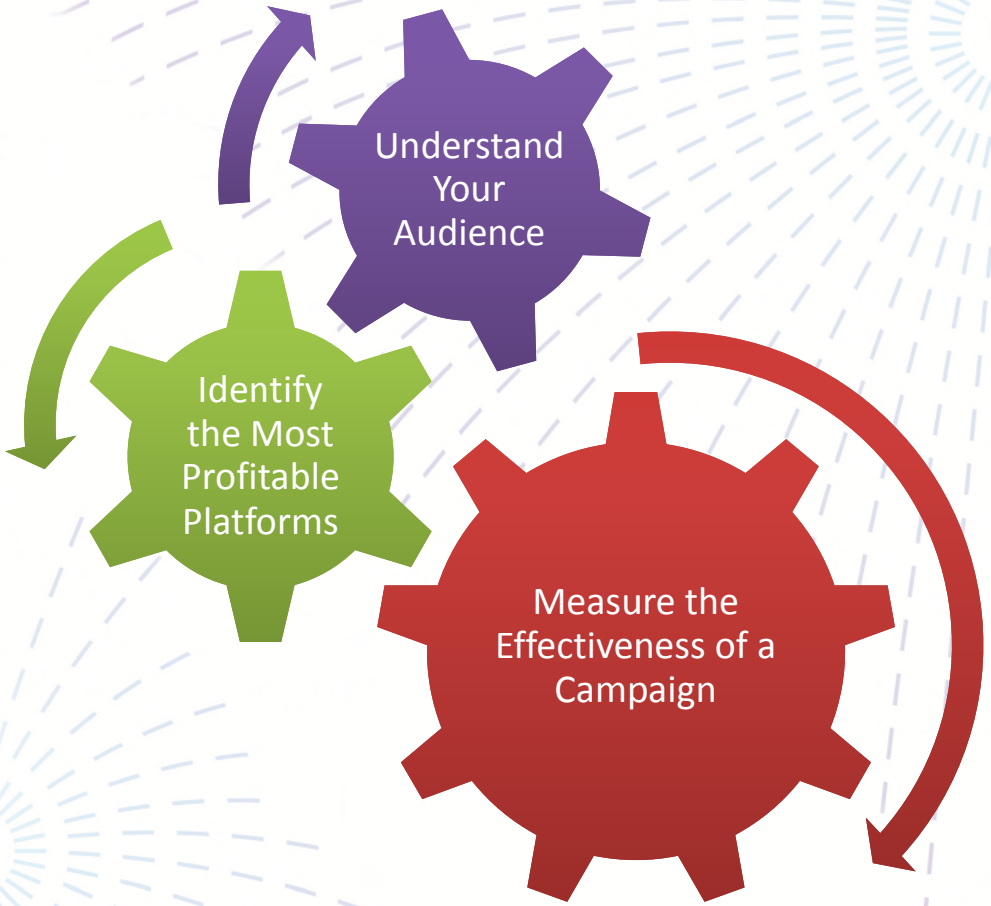


Key Takeaways from Regulatory Guidance

- ✓ Hyperlinks should be clearly labeled (e.g., productname.com/risks)
- ✓ Benefits and risks must be accurately described – even when symbols and shorthand are used
- ✓ Each post stands alone (multiple tweets won't do it)
- ✓ Don't force consumers to scroll: a disclosure should be as close to the relevant claim as possible
- ✓ Consider technological limitations – don't rely on disclosures that may not be accessible to consumers depending upon the device they are using
- ✓ Consider the risks of responding to third-party misinformation

Data Optimization and Consumer Privacy Concerns

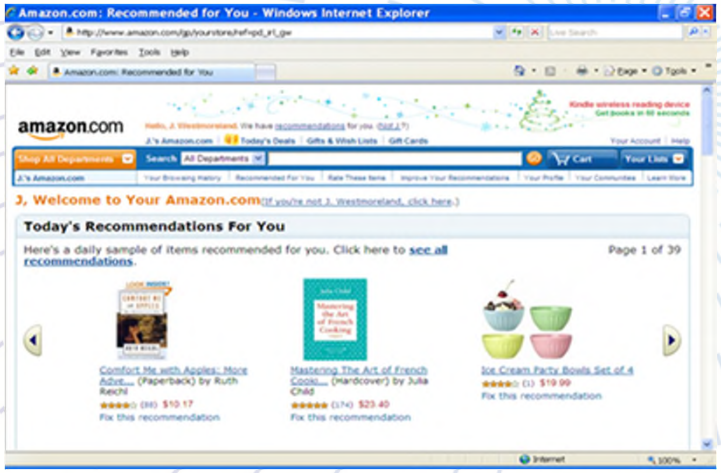
Using Data to Drive Marketing Campaigns



Evolution of Targeted Advertising

Targeting 1.0

- Keyword targeting
- Contextual targeting
- First-party targeting
- Behavioral targeting

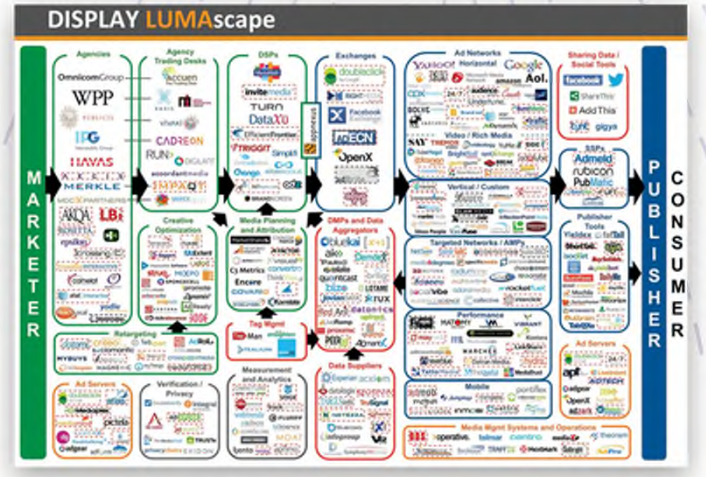


Targeting 2.0

- Programmatic buying
- Mobile targeted advertising

Targeting 3.0

- Real-time bidding
- Cross-device



Linking Consumer Activity to Health Care Events

Consumer

- Device ID
- IP Addresses
- Cookies
- Email Addresses
- Other Personally Identifiable Information:
  Name
  Address
  Age/Birth Date

Data Broker

- Households
- Individuals

Data Match

Life Sciences Company

- De-identified Trackable ID
- Trackable Health Care Data (Prescription, Medical Claims)

Analysis

- Patient-Driven Data

What Are the Rules?
U.S. Data Collection and Privacy Regime

Laws and regulations

- Federal – FTC Act, HIPAA, GLB, FCRA, COPPA, VPPA, FCC Broadband Privacy Rules
- State
- International

Self-regulation

- DAA/BBB
- DMA (Direct Marketing Association) / Data Driven Marketing Institute
- IAB (Interactive Advertising Bureau)
- NAI (Network Advertising Industry)
- MMA (Mobile Marketing Association)
- FTC

Platform policies

- Third-party platforms such as DoubleClick, Facebook and Twitter
- App store guidelines

Your own privacy policy

Select Federal Laws Regulating Collection and Use of Consumer Data

- FTC Act – requires companies to comply with their own privacy policies
- Health Insurance Portability and Accountability Act (HIPAA) – limits how covered entities may use health information
- New U.S.– EU Privacy Shield Program (replaces the U.S.-E.U. Safe Harbor Framework) – places limits on data transferred between the U.S. and EU

Health Data: When Does HIPAA Apply?

"Protected Health Information"

Protected by HIPAA

- **Any information, oral or recorded, transmitted in any medium, that…**
  - Is ***created or received by*** a covered entity
  - Relates to the past, present or future
    - Physical or mental health or condition
    - Provision of health care to an individual
    - Payment for the provision of health care to an individual
  - Identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual

Sensitive Data

Opt-In Consent Required for Marketing/Targeting

- Some medical conditions are likely to be particularly sensitive or private in nature.
- Consider:
  - The seriousness of the condition
  - Its prevalence, whether it is something that an average person would consider to be particularly private in nature
  - Whether it is treated by over-the-counter or prescription medications, and whether it can be treated by modifications in lifestyle as opposed to medical intervention
- Conditions such as acne, high blood pressure, heartburn, cold and flu, and cholesterol management may not be considered to be sensitive

Platform Policies Apply: Google Ad Words Example

Pharmaceutical Companies - Certification Required

- ✓ Prescription drugs
- ✓ Over-the-counter medicines
- ✓ Bulk drug manufacturers, medical professional suppliers, and antibody/peptide/compound suppliers for commercial labs
- ✓ Online pharmacies

Certain businesses such as online pharmacies and pharmaceutical manufacturers may use prescription drug terms in ad text and landing pages.

Prohibited substances

- x Products that contain ephedra
- x Products containing human chorionic gonadotropin (hCG) in relation to weight loss or weight control, or when promoted in conjunction with anabolic steroids
- x Herbal and dietary supplements with active pharmaceutical or dangerous ingredients
- x False or misleading health claims, including claims implying that a product is as effective as prescription drugs or controlled substances
- x Non-government approved products that are marketed in a way that implies that they're safe or effective for use in preventing, curing, or treating a particular disease or ailment
- x Products that have been subject to any government or regulatory action or warning
- x Products with names that are confusingly similar to an unapproved pharmaceutical or supplement or controlled substance

Other Privacy Guidance

- FTC
  - Online Behavioral Advertising
  - Mobile Apps
  - Internet of Things
- California AG
  - Mobile Apps
  - Privacy Policies and Do Not Track Disclosures
- Digital Advertising Alliance (DAA)
  - Online and Mobile Interest-Based Advertising
  - Cross Device Tracking
- Mobile Marketing Association
  - Text Message Marketing

Thank you!

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