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To: FTC.SERIOUS("consentagreement@ftc.gov")
Date: Tue, Feb 19, 2002 12:50 PM
Subject: ACLU comments on Eli Lilly privacy settlement

February 19, 2002

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: File No. 012 3214

The American Civil Liberties Union (ACLU) respectfully submits the following comments to the Federal Trade Commission (FTC) in response to the notice and request for public comment in the above referenced matter.

Given Eli Lilly's egregious conduct, the FTC should impose a fine and damages awards.

Our involvement in this case began over seven months ago. In a letter dated July 3, 2001, we alerted the FTC to a privacy violation committed by Eli Lilly and Company (Lilly) in connection with its Medi-Messenger email reminder service. Despite promises to protect the privacy of its users, the corporation disclosed the identities of nearly 700 previously anonymous Medi-Messenger customers, without their prior knowledge or consent.

The Commission's subsequent investigation of this affair suggests that the corporation committed gross negligence in its handling of personal data. According to the FTC, although "Lilly claimed that it employs measures and takes steps appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through its Prozac.com and Lilly.com Web sites, ... in fact Lilly had not employed such measures and had not taken such steps." (Emphasis added.) Among other things, "Lilly failed to provide appropriate training for its employees regarding consumer privacy and information security. ... Lilly's failure to implement appropriate measures also violated certain of its own written policies."

Moreover, as to the specific incident which precipitated the investigation, the Commission stated in its complaint that the company "failed to provide appropriate oversight and assistance for the employee who sent out the email, who had no prior experience in creating, testing, or implementing the computer program used; and failed to implement appropriate checks and controls on the process, such as reviewing the computer program with experienced personnel and pretesting the program internally before sending out the email."

Given the seriousness of these transgressions, Lilly should pay restitution to those Medi-Messenger customers whose privacy it violated. We are disappointed that the proposed settlement does not contain such a

requirement, but merely codifies the privacy protections the company should have been taking to begin with.

The FTC has the power to impose fines against parties (such as Eli Lilly) who have engaged in unfair or deceptive trade practices. Federal law authorizes the FTC to seek monetary redress for conduct injurious to consumers, subject to judicial approval. (See 15 U.S.C. §§ 45(m)(1)(A)(2002).) Indeed, the Commission has mandated such penalties in other Internet privacy cases. (See, e.g. Consent Decree at 4, U.S. v. Looksmart Ltd., Civ. Action No. 01-606-A (E.D. Va. 2001), available at <http://www.ftc.gov/os/2001/04/looksmartorder.pdf>; Consent Decree at 4, U.S. v. Monarch Services, Inc., Civ. Action No. AMD01CV1165 (D. Md. 2001), available at <http://www.ftc.gov/os/2001/04/girlslifeorder.pdf>; Consent Decree at 4, U.S. v. BigMailbox.com, Inc., Civ. Action No. 01-605-A (E.D. Va. 2001), available at <http://www.ftc.gov/os/2001/04/bigmailboxorder.pdf>.) Using this legal authority, the FTC should alter the order to impose a fine and order Lilly to pay damages to the victims of the company's privacy breach. Imposing a financial penalty will impress upon online medical providers that there is a price to pay for being careless with highly sensitive information.

The FTC should mandate that Eli Lilly's future privacy compliance records are made available to the public.

The proposed settlement requires Lilly to submit and/or retain numerous documents to demonstrate its compliance with the Commission's directives. More precisely, these include annual written reviews "by qualified persons," "materials relating to its privacy and security representations and to its compliance with the order's information security program," and reports "setting forth in detail the manner and form in which" Lilly has complied with the FTC's order.

The FTC should clarify that these documents will be available for public discussion so as to prevent future privacy violations. The Commission is authorized to disclose information it obtains if that material is "in the public interest." (See 15 U.S.C. § 46(f).) The heavy press coverage of this case, as well as the significant number of people affected by Eli Lilly's privacy breach, represents clear evidence of the high level of public interest in this matter. (See, e.g. Charles Wilson, *People on Prozac Revealed*, ASSOCIATED PRESS, July 5, 2001; Robert O'Harrow Jr., *Lilly Admits E-mail Privacy Lapse*, WASHINGTON POST, July 4, 2001; Robert MacMillan, *Eli Lilly Settles Privacy Charges With FTC*, NEWSBYTES, Jan. 18, 2002; Eli Lilly Cites Programming Error for Privacy Gaffe, IDG NEWS, July 5, 2001.)

Based on the FTC's investigation, Lilly's past failure to be open and forthcoming with the way it handled sensitive data made it more difficult to prevent incidents such as the one that formed the basis for our complaint. Claims of company confidentiality should not be used as an excuse to avoid such inquiries. At the same time, these disclosures should be carried out in a manner that is consistent with protecting the privacy of consumers who use Lilly products and services.

Towards this end, should the consent order become final, we request that any such information be made public to the greatest extent possible, while ensuring that the privacy of Lilly's individual customers is maintained (through redaction if necessary). In particular, the FTC should discourage

any undue attempts by Lilly to prevent disclosure on the pretext of trade secrets or corporate proprietary information. We further request to receive copies of any and all documents submitted and/or retained by Lilly in connection with the order.

Conclusion

In conclusion, we urge the Commission to order Lilly to pay a fine and afford damages to the parties whose email addresses were disclosed. We further request, should this consent order become final, that any and all documents submitted and/or retained by Lilly in connection with the order be made public to the greatest extent possible, while ensuring that the privacy of Lilly's individual customers is maintained. We also ask that you send us copies of any and all such materials when they are disclosed.

Sincerely,

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