

## Concurring Statement of Commissioner Christine S. Wilson

BetterHelp

Matter No. 2023169

March 2, 2023

Today the Commission announces a consent agreement with BetterHelp resolving allegations that it failed to protect consumers' health information and failed to disclose or misrepresented its marketing practices. I support the allegations in the proposed complaint and the relief in the negotiated consent.

The complaint explains that BetterHelp provides an online counseling service that matches users with the respondent's therapists and facilitates counseling via its websites and apps. Millions of consumers have used the service and provided BetterHelp with sensitive personal information regarding their health status and history, in addition to their name, email address, and IP address. Contrary to its repeated representations to keep this information private, the complaint explains that BetterHelp monetized consumers' health information to target them and others with advertisements. To this end, Respondent provided sensitive consumer health information to third-party advertising platforms including Facebook, Pinterest, Snapchat, and Criteo. I agree that this alleged conduct violates Section 5 of the FTC Act.

Notably, the complaint does not include an allegation that BetterHelp violated the Health Breach Notification Rule (HBNR or Rule). I support this careful approach to the application of the Rule, particularly given the FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Policy Statement). The Commission, in a 3-2 party-line vote, issued this Policy Statement in September 2021.<sup>1</sup> I dissented<sup>2</sup> because the Policy Statement included a novel expansion of the application of the Rule that contradicted earlier business guidance<sup>3</sup> and was issued during the pendency of the ongoing HBNR rulemaking proceeding.<sup>4</sup>

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<sup>1</sup> FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), <https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-september-15-2021>.

<sup>2</sup> Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596356/wilson\\_health\\_apps\\_policy\\_statement\\_dissent\\_combined\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf).

<sup>3</sup> See Exhibit A, Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021) (prior Commission business guidance on the HBNR), [https://www.ftc.gov/system/files/documents/public\\_statements/1596356/wilson\\_health\\_apps\\_policy\\_statement\\_dissent\\_combined\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf).

<sup>4</sup> Health Breach Notification Rule, Request for Public Comment, 85 Fed. Reg. 31085 (May 22, 2020).

One could argue that BetterHelp would fall within the ambit of the HBNR because it offers a health platform and app, particularly under the expansive view espoused in the Policy Statement. I am pleased to see that the Commission has not taken this approach.<sup>5</sup>

The information BetterHelp collects from consumers and provides to therapists on its platform does not constitute a personal health record of identifiable health information under the Rule because it does not include records that “can be drawn from multiple sources,” as required by the existing formulation of the Rule.<sup>6</sup> A consumer provides his or her information to BetterHelp but the company does not pull additional health information from another source or vendor. For this reason, foregoing an HBNR count is appropriate.

I note further that I support the imposition of monetary relief in this matter. BetterHelp told consumers: “Rest assured—your health information will stay private between you and your counselor” but, as alleged, shared this highly sensitive information with third parties for the purpose of monetizing it. I am comfortable that this conduct falls within our authority to seek relief under Section 19 of the FTC Act. I commend the staff on the successful resolution of this matter.

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<sup>5</sup> This is especially appropriate because, according to the complaint, BetterHelp’s violative conduct ceased in December 2020, before the issuance of the Policy Statement. I recently supported the application of the Rule to the conduct in the GoodRx matter because the alleged conduct at issue there fell squarely within the scope of the HBNR as drafted. *See* Concurring Statement of Commissioner Christine S. Wilson, GoodRx (Feb. 3, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/goodrx-concurring-statement-commissioner-christine-wilson>.

<sup>6</sup> *See* 16 C.F.R. §318.2(d); 42 U.S.C. 1320d(6).