



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
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**Remarks of Chair Khan at the
May Open Commission Meeting**

May 18, 2023

Ben, thank you for providing an overview of recent work out of the Division of Privacy and Identity Protection. It's great to hear about the Commission's many privacy accomplishments. I'd also like to thank the team litigating the Kochava matter—Brian Shull, Julia Horwitz, and Libby Scott. This is a critical case for protecting American's sensitive information, and I'm grateful for all the hard work that's gone into driving it forward.

Before moving to the items on the agenda, I want to briefly underscore a couple of throughlines across the trio of health privacy cases that Ben discussed. All of these cases—Premom, BetterHelp, and GoodRx—underscore how seriously we take protecting Americans' privacy, especially when it concerns people's most sensitive health information. Each case also highlights how business models based on monetizing people's data can lead to situations where companies that Americans trust with their sensitive information are then exposing that data for the sake of targeted advertising, analytics, and engagement. Each complaint also reflects the deep technical expertise that our staff has built, which has allowed our agency to bring our law enforcement tools to bear on what can be technically complex business practices.

The other big step forward that these cases represent is a move beyond disclosure and towards substantive protections and bright line rules.

At our Open Commission Meeting one year ago, we voted unanimously to issue a Policy Statement on Education Technology and the Children's Online Privacy Protection Act. In that statement, we highlighted the substantive protections of COPPA—prohibitions against mandatory collection, use restrictions, retention prohibitions, and security requirements. We underscored the need for these substantive protections because “notice and choice” often fails to protect consumers' privacy.

There are several reasons that today's business practices render “consent” in these contexts a fiction. We've seen, for example, how businesses can and do use dark patterns to trick consumers into “consent.” People also often feel like they don't have any meaningful choice—either because they already feel locked in to using the service or because the service is too critical.

Premom, BetterHelp, and GoodRx build on last year's policy statement—showing how the Commission is moving past notice and choice, and instead, using our unfairness authority. In each of the health cases discussed today, we alleged that the companies' conduct was not only deceptive, but also that their collection, use, and disclosure of consumer health information for advertising purposes was an unfair practice. Our use of unfairness authority in each of these

cases makes companies aware that, regardless of what they disclose, they cannot engage in certain practices—period.

In each settlement order, the Commission has banned the company from transferring consumers' health information to third parties for advertising. Recognizing that health information is especially sensitive, these bright-line bans are designed to maximally protect it.

We are continuing to seriously evaluate the problem of companies conditioning access to their services on the collection of more information than is reasonably necessary, and I'm grateful to our teams for vigorously using all our tools to protect American's privacy.

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The Biometric Policy Statement is another crucial addition to our privacy agenda. The growth of biometric information technologies puts consumers at risk in several ways. Companies can use biometric data to persistently identify and track consumers. Biometric information can be misused to permit unauthorized access to devices secured with biometric information. Biometric information technologies are also less reliable across gender and races—paving the way for potentially discriminatory effects.

One thing that is clear from this statement, and from the Commission's recent blog posts about artificial intelligence, is that the flexible nature of the FTC Act positions the Commission well to protect consumers regardless of changing technologies. In this case, the Biometric Policy Statement sets forth how the framework of the Commission's consumer protection work, especially around privacy and data security, maps onto the consumer protection risks implicated by biometric information technologies.

Especially significant in this statement is the need to assess and address risks proactively. These obligations exist both for the developers and for the end-users of the technologies. Analogously, the Commission has brought actions against developers of network equipment that fail to issue patches for vulnerabilities, but also has brought actions against companies that use that equipment and fail to implement patches. Precautions both from the developers and end users of these technologies are necessary to protect consumers from harms.

It is critical that companies take these actions proactively, rather than wait for consumers to be harmed. Similarly, the Commission should not have to wait for consumers to be injured before bringing an action. Notably, the prohibition against unfairness in the FTC Act only requires the *likelihood* of harm. The Commission will be taking a hard look at companies developing or using biometric technologies to determine whether they are taking the steps necessary to avoid consumer harm.

Thank you to the team that worked on this statement, including Robin Wetherill, Amanda Koulousias, and Tiffany George in DPIP; Josephine Liu in OGC; Mike LeGower and Devesh Raval in BE; and Alejandro Rosenberg in the BCP front office.

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At the Commission, we are constantly assessing how we can activate the full set of authorities that Congress gave us to protect Americans. The proposals in the Notice of Proposed Rulemaking for the Health Breach Notification Rule fall squarely in that category. Although we need more authorities in privacy and data security, and we continue to need a fix for Section 13(b), the Commission must use the authorities it currently has to vindicate people’s privacy rights.

The HBNR, which has laid dormant for years, implements a statute that plainly requires companies to notify consumers when they disclose consumers’ personal information without authorization. In September 2021, the Commission issued a policy statement articulating its intention to enforce this rule, consistent with its plain meaning. In both GoodRx and Premom, the Commission has delivered on that promise.

Today, the Commission proposes changes to the rule to make the requirements of the rule explicit, and to clarify certain provisions based on feedback received during the rule review. We look forward to hearing from the public on these proposed changes.

Two related items on which I am particularly interested in hearing from the public are (a) what types of disclosures require authorization and (b) what “authorization” means. In the trio of health app cases discussed earlier, the Commission charged that it was an unfair practice to transfer to third-parties consumers’ health information for advertising without affirmative express consent. Although we do not propose to define “authorization” here, the commentary to the original rule makes clear that authorization is implied for disclosures of information in order “to enhance the individuals’ experience,” provided they are disclosed and within a consumer’s reasonable expectations. Transfers for any other purpose require the user to be able to “exercise meaningful choice in consenting to such sharing.” I am interested in hearing from the public about whether the Commission has provided enough information about what types of disclosures require consent, as well as whether we should be more explicit about the need for the consent to be affirmative and express in order to be “meaningful.”

Thank you to the team that worked on this rule, including Tiffany George, Ryan Mehm, Ronnie Solomon, and Elisa Jillson in DPIP; Maggie Cole in DLTA; Beth Freeborn in BE; Josephine Liu, Rich Gold, and Franziska Schroder in OGC; and Alejandro Rosenberg in the BCP front office. I also want to extend a special thank you to my former advisor, Rashida Richardson, for her critical support of this project.
