

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of Flo Health, Inc.
File No. 1923133

The Federal Trade Commission (the “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Flo Health, Inc. (“Respondent” or “Flo Health”).

The proposed consent order (“Proposed Order”) has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement, along with any comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the Proposed Order.

This matter involves Flo Health, a technology start-up that develops and distributes a mobile application called the Flo Period & Ovulation Tracker (“App”), which collects and stores menstruation and fertility information about millions of users worldwide. Respondent has been a participant in the EU-U.S. Privacy Shield (“Privacy Shield”) and the U.S.-Swiss Privacy Shield framework since August 12, 2018.

The Commission’s proposed complaint alleges that Flo Health deceived consumers, in violation of Section 5(a) of the Federal Trade Commission Act, in seven ways:

- First, the complaint alleges that Flo Health represented that it would not disclose “information regarding ... marked cycles, pregnancy, symptoms, notes ...” to any third parties, or disclose “any data related to health” to particular third parties. In fact, Flo Health disclosed custom app events—records of individual users’ interactions with various features of the App, which conveyed identifying information about App users’ menstrual cycles, fertility, and pregnancies—to various third-party marketing and analytics firms.
- Second, the complaint alleges that Flo Health represented that it would *only* disclose device identifiers or personal data “like” device identifiers to certain third parties. In fact, in addition to disclosing device and advertising identifiers, Flo Health also disclosed custom app events conveying health information to those parties.
- Third, the complaint alleges that Flo Health represented that third parties would not use Flo App users’ personal information “for any purpose except to provide services in connection with the App.” In fact, Flo Health agreed to terms with multiple third parties that permitted these third parties to use Flo App users’ personal health information for the third parties’ own purposes, including for advertising and product improvement. Indeed, from June 2016 to February 2019, one of the third parties (Facebook, Inc.) used Flo App users’ personal health

information for its own purposes, including its own research and product development.

- Counts IV through VII allege misrepresentations of compliance with the Privacy Shield Principles of Notice (Count IV), Choice (Count V), Accountability for Onward Transfers (Count VI), and Purpose Limitation (Count VII). Count IV alleges that Flo Health represented compliance with the Privacy Shield frameworks, when in fact it did not give Flo App users notice about to whom their data would be disclosed and for what purposes. Count V alleges that Flo Health disclosed this information without providing Flo App users with choice with respect to these disclosures or the purposes for which the data could be processed (e.g., Facebook’s advertising). Count VI alleges that Flo Health failed to limit by contract the third parties’ use of users’ health data or require by contract the third parties’ compliance with the Privacy Shield principles. And Count VII alleges that Flo Health processed users’ health data in a manner incompatible with the purposes for which it had been collected because Flo disclosed the data to third parties under contracts permitting them to use the data for their own purposes.

The Proposed Order contains injunctive provisions addressing the alleged deceptive conduct. Part I prohibits Flo Health from making false or deceptive statements regarding: (1) the purposes for which Flo Health or any entity to whom it discloses Covered Information (i.e., personal information, including identifiable health information) collects, maintains, uses, or discloses such information; (2) the extent to which consumers may exercise control over Flo Health’s access, collection, maintenance, use, disclosure, or deletion of Covered Information; (3) the extent to which Flo Health complies with any privacy, security, or compliance program, including the Privacy Shield; and (4) the extent to which Flo Health collects, maintains, uses, discloses, deletes, or permits or denies access to any Covered Information, or the extent to which Flo Health protects the availability, confidentiality, or integrity of Covered Information.

Part II of the Proposed Order requires Flo Health to ask any “Third Party” (i.e., any party other than Flo Health, its service providers, or subcontractors) that has received “Health Information” about “Covered App Users” to destroy such information.

Part III of the Proposed Order requires that Flo provide notice to users and the public that it shared certain information about users’ periods and pregnancies with the data analytics divisions (but not the social media divisions) of a number of third parties, including Facebook, Flurry, Fabric, and Google.

Part IV of the Proposed Order requires that, before disclosing any consumer’s health information to a third party, Flo Health must provide notice and obtain express affirmative consent, including informing the user of the categories of information to be disclosed, the identities of the third parties, and how the information will be used.

Part V of the Proposed Order requires an outside “Compliance Review,” conducted within 180 days after entry of the Proposed Order, to verify any attestations

and assertions Flo Health made pursuant to the EU-U.S. Privacy Shield or the U.S.-Swiss Privacy Shield framework.

Part VI of the Proposed Order requires Flo Health to cooperate with the Compliance Reviewer and Part VII requires that a senior manager of Flo Health certify Flo Health's compliance with the Proposed Order.

Part VIII of the Proposed Order requires notification of the Commission following any "Covered Incident," which includes any incident in which Flo Health disclosed individually identifiable Health Information from or about a consumer to a third party without first receiving the consumer's affirmative express consent.

Parts IX through XII of the Proposed Order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Flo Health to provide information or documents necessary for the Commission to monitor compliance with the Proposed Order. Part XIII states that the Proposed Order will remain in effect for twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the Proposed Order. It is not intended to constitute an official interpretation of the complaint or Proposed Order, or to modify in any way the Proposed Order's terms.