

Separate Statement of Commissioner Noah Joshua Phillips

In the Matter of Flo Health, Inc.

Commission File No. 1923133

January 13, 2021

consumer notice for the mere sake of the notice itself. Commissioners Chopra and Slaughter stress that notice is warranted especially where redress is not paid to consumers. How consumer notice substitutes for redress, an equitable mechanism to return to consumers what they have lost, is not clear. Nor is it clear what, if anything, limits this approach to notice to data security and privacy cases. To the extent notice is intended as a penalty, I disagree. My view is that we should target notice as a means to help consumers take action to protect themselves. Contacting consumers when there is no remedial action that they can take runs the risk of undermining consumer trust and needlessly overwhelming consumers.¹²

¹² I am also concerned about the possibility of notice fatigue. For example, in the context of security warnings on mobile devices, there is evidence of a decreased neurological response after repeated exposure to warnings. *See, e.g.,* Anthony Vance et al., *Tuning Out Security Warnings: A Longitudinal Examination of Habituation Through fMRI, Eye Tracking, and Field Experiments*, 42 MIS Quarterly, No. 2, June 2018, at 1, https://misq.org/skin/frontend/default/misq/pdf/appendices/2018/V42I1Appendices/14124_RA_VanceJenkins.pdf.