



United States of America  
FEDERAL TRADE COMMISSION  
Washington, DC 20580

Via Federal Express

[Name]

Re: Notice of Penalty Offenses Concerning Misuse of Information Collected in Confidential Contexts

Dear [Name]:

I am enclosing a copy of the Federal Trade Commission's Notice of Penalty Offenses Concerning Misuse of Information Collected in Confidential Contexts. We recommend that you carefully review the notice and take any steps necessary to ensure that you and your company's practices do not violate the law.

The notice summarizes Commission determinations in a prior litigated case that particular acts or practices are penalty offenses—i.e., that they are deceptive or unfair, unlawful under Section 5 of the Federal Trade Commission Act ("FTC Act"), and prohibited by a final cease and desist order. As set forth in more detail in the notice, these acts and practices include engaging in the following unless the individual first provides affirmative express consent: (1) using information collected in a context where an individual reasonably expects that such information will remain confidential ("Confidential Context") for purposes not explicitly requested by the individual; (2) using such information to obtain a financial benefit that is separate from the benefit generated from providing the product or service requested by the individual; and (3) using such information to advertise, sell, or promote products or services. The notice also states that such acts or practices include making false, misleading, or deceptive representations concerning the use or confidentiality of such information. These uses are prohibited whether the information is disclosed to a third party or used internally to carry out the above-proscribed purposes, unless you and your company first obtain affirmative express consent.<sup>1</sup>

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<sup>1</sup>*Privacy Online: A Report to Congress*, Federal Trade Commission, at 8 (June 1998) (noting that choice applies to "uses [of data] beyond those necessary to complete the contemplated transaction" including uses that are "internal, such as placing the consumer on the collecting company's mailing list in order to market additional products or promotions, or external, such as the transfer of information to third parties"), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>. This position is consistent with *In re: Beneficial Corp.*, in which the Commission stated that "the confidential relationship is breached whenever the customer's information is used for the financial gain of the [business] . . . [w]hether or not [the business] brokered confidential

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The concepts espoused in *Beneficial* concern the use of information collected in any Confidential Context, whether online or offline. In applying the determinations of *Beneficial* to today's technologies, the Commission considers it an unfair or deceptive act or practice to use tracking technologies such as pixels, cookies, APIs, or SDKs to amass, analyze, infer, and transfer information collected in a Confidential Context for the purposes described in the prior paragraph without first obtaining affirmative express consent. It is also an unfair or deceptive practice to misrepresent or omit material facts regarding the use or confidentiality of information collected in a Confidential Context through tracking technologies such as pixels, cookies, or SDKs. The Commission's Office of Technology has issued guidance on the risks and concerns associated with tracking technologies.<sup>2</sup>

In order to use information collected in a Confidential Context for purposes other than those explicitly requested by the individual (including to obtain a separate financial benefit or for advertising purposes), you and your company must obtain affirmative express consent from the individual. Affirmative express consent means a freely given, specific, informed, and unambiguous indication of an individual's wishes via a separate agreement.<sup>3</sup> To obtain affirmative consent you must provide a clear and conspicuous disclosure containing the contents set forth in the Commission's final order in *In re: Beneficial Corp.*, 86 F.T.C. 119, 179 (1975), and all other relevant information necessary for the provision of consent. For purposes of interpretation, the Commission has long stated that terms buried in privacy policies and terms of service are not "clear and conspicuous."<sup>4</sup>

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information to other businesses, or simply capitalized on it themselves . . . ." *In re: Beneficial Corp.*, 86 F.T.C. 119, 173 (1975), *aff'd in relevant part*, 542 F.2d 611 (3rd Cir. 1976).

<sup>2</sup> *Lurking Beneath the Surface: Hidden Impacts of Pixel Tracking*, FTC Office of Technology (Mar. 16, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/03/lurking-beneath-surface-hidden-impacts-pixel-tracking>.

<sup>3</sup> For further information on what constitutes affirmative express consent, please see recent Commission orders. *See, e.g., BetterHelp, Inc.*, File No. 2023169 (Mar. 2, 2023) (consent order), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/202\\_3169-betterhelp-consent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/202_3169-betterhelp-consent.pdf); *United States v. GoodRx Holdings, Inc.*, Case Number 4:23-cv-00460-DMR (N.D. Cal. Feb. 17, 2023) (stipulated order), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/goodrxfinalstipulatedorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/goodrxfinalstipulatedorder.pdf); *United States v. Epic Games Inc.*, Civil Action Number 5:22-CV-00518-BO (E.D.N.C. Feb. 7, 2023) (stipulated order), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2223087EpicGamesSettlement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesSettlement.pdf). Note that what constitutes affirmative express consent may change as technology develops, thereby requiring that you and your company keep informed of new requirements. Obtaining consent through an interface that has the effect of subverting or impairing user autonomy, decision-making, or choice does not constitute valid consent.

<sup>4</sup> *Federal Trade Commission Staff Report: Self-Regulatory Principles for Online Behavioral Advertising: Tracking, Targeting, and Technology*, at 40 n.70 (Feb. 2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>.

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**Receipt of this notice of penalty offenses puts you and your company on notice that engaging in the conduct described therein could subject you and your company to civil penalties of up to \$50,120 per violation.<sup>5</sup>**

We are aware of information suggesting that you have engaged in or are engaging in deceptive or unfair conduct. You should take prompt action, including by reviewing all your practices, to ensure any deceptive or unlawful claims cease and are removed or corrected, as appropriate, and any other required disclosures are made. We request that you distribute copies of the notice and this letter to your subsidiaries.

Copies of the case decision discussed in the notice are available on the Commission's website at <https://www.ftc.gov/enforcement/notices-penalty-offenses/penalty-offenses-concerning-confidential-context>.

Please note that nothing in this letter or the attached notices alters, modifies, or impacts your obligations, if any, under any other federal rule or statute. This letter and the notices do not purport to list all the deceptive or unfair practices that violate the FTC Act or all the federal court cases addressing when conduct is unfair or deceptive in violation of the FTC Act.

If you have any questions about this letter or the enclosed materials, please contact Michael Sherling at [msherling@ftc.gov](mailto:msherling@ftc.gov) or (202) 326-3286 and Manmeet Dhindsa at [mdhindsa@ftc.gov](mailto:mdhindsa@ftc.gov) or (202) 326-2877.

Very truly yours,

Benjamin Wiseman  
Associate Director  
Division of Privacy and Identity Protection

Enclosure

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<sup>5</sup> See 15 U.S.C. § 45(m)(1)(B); 16 C.F.R. § 1.98(e).