Concurring Statement of Commissioner Maureen K. Ohlhausen
In the Matter of Breathometer, Inc.
Matter No. 1623057
January 18, 2017

Today the Federal Trade Commission authorizes staff to file a complaint and enter a consent agreement to settle a court action against Breathometer, Inc. The complaint alleges that Breathometer made false and unsubstantiated advertising claims that their breathalyzer devices had "undergone rigorous government lab grade testing" for ability to accurately detect consumers' blood alcohol content (BAC) and were "law-enforcement grade product[s]" for the purpose of complying with impaired driving laws.[1]

I support this complaint and settlement. Companies must substantiate their advertising claims, and I have reason to believe that Breathometer failed to do so. The settlement requires that Breathometer's future breathalyzer accuracy claims be substantiated using a subset of the Department of Transportation's *Model Specifications for Devices to Measure Breath Alcohol*. Although it is somewhat unusual to include such a specific substantiation requirement in a settlement, it is appropriate fencing in for this settlement.

However, it is important to note that this order's specific requirements are limited to Breathometer, which claimed its products were as accurate as law-enforcement grade products. Truthfully marketed consumer breathalyzer devices could provide significant, possibly life-saving, consumer benefits, even if such devices are not as precise as those used to criminally prosecute drunk drivers. Imposing on these devices a substantiation standard higher than needed to support their advertising claims could raise their cost or keep them off the market entirely. This would harm consumers by depriving them of access to useful devices and information.[2]

Fortunately, today's order does not impose an industry-wide substantiation standard. Companies remain free to market their breathalyzer devices, provided their claims match their substantiation and do not mislead consumers.

[1] The complaint also alleges that it was an unfair practice for Breathometer to wait more than a year after learning about the devices' accuracy problems to notify consumers.

[2] *See, e.g.*, In re of POM Wonderful, 2013 FTC LEXIS 6 at note 36 (F.T.C. Jan. 10, 2013) (noting Commissioner Ohlhausen's objection to the order requirement of two randomized controlled trials ("RCTs") because "requiring two RCTs does so at the expense of limiting consumer access to potentially useful information."), *aff'd POM Wonderful v. FTC*, 777 F.3d 478 (D.C. Cir. 2015) (overturning the two RCT requirement because "[r]equiring additional RCTs without adequate justification exacts considerable costs" in part because "consumers may be denied useful, truthful information about products…").