

FTC Shows Privacy Heft With Groundbreaking GoodRx Action

By **Allison Grande**

Law360 (February 7, 2023, 9:07 PM EST) -- The Federal Trade Commission signaled it won't hesitate to wield its full range of enforcement powers when it dinged GoodRx for allegedly sharing sensitive health data with advertisers, teeing up a big year for the agency and boosting efforts to regulate data privacy on a larger scale.

Building on an aggressive enforcement agenda being pressed under Democratic Chair Lina Khan, the FTC last week disclosed its first action under the little-used Health Breach Notification Rule, which has been on the books since 2009. The commission used the long-dormant rule to hit telehealth and prescription discount company GoodRx with a \$1.5 million civil penalty and secure a ban on the platform's sharing of personal health data for advertising purposes.

"If businesses don't know about this rule yet, they better learn about it," said Erik Weinick, a co-founder of the privacy and cybersecurity practice at Otterbourg PC. "The leadership at the FTC is very committed to raising awareness of and dusting off every enforcement tool that's available to it to protect consumers."

In the absence of Congress giving the FTC specific powers to regulate and impose penalties for data privacy missteps, and in the wake of an April 2021 U.S. Supreme Court decision that dealt a serious blow to the agency's ability to recoup monetary relief, the commission has initiated sweeping rulemaking and pursued enforcement actions that highlight its priorities of cracking down on the misuse of sensitive personal data and finding fresh avenues to impose meaningful penalties on companies.

The GoodRx action falls squarely into the commission's recent push to dial up the consequences for companies that stand accused of failing to properly handle, share and secure the personal data that consumers entrust to them, said Phyllis Marcus, a Hunton Andrews Kurth LLP partner and former chief of staff at the FTC's Advertising Practices Division.

"It's not surprising that the commission is thinking through ways to get money based on their current authority and is looking at its existing authority in new ways," Marcus said.

To prop up its data privacy and security enforcement actions, the FTC typically uses the prohibition on unfair and deceptive trade practices under Section 5 of the FTC Act, which doesn't allow for monetary penalties for first-time violations. While GoodRx's allegedly deceptive privacy promises and unfair sharing of health data played a major role in the latest enforcement action, it was the Health Breach Notice Rule that enabled the FTC to recoup the \$1.5 million penalty for the company's purported failure

to inform consumers, the commission or the press about these unauthorized data disclosures.

Justin Brookman, director of technology policy at Consumer Reports, called the GoodRx resolution "arguably one of the strongest privacy settlements" that the FTC has ever obtained.

"By using the health breach notification rule, that gives the FTC penalty authority and therefore more leverage to negotiate and force a strong settlement," Brookman said. "This is one of the rare cases where the FTC was operating from a position of strength."

The FTC has long faced backlash from advocacy groups like Consumer Reports and the Electronic Privacy Information Center about the strength of its privacy and data security enforcement work, including the commission's landmark \$5 billion deal with Facebook over a string of data misuse scandals. These critics have pushed for larger penalty amounts and stronger injunctive relief that would result in business models being completely overhauled and senior executives being held individually liable.

While some of these components were still missing from the GoodRx deal, Consumer Reports — whose own investigation into GoodRx's data-sharing practices was what the FTC acknowledged led to its action — praised the deal. Consumer Reports President and CEO Marta Tellado called the matter "a win for consumers" that "could have a profound effect on how our health information is kept private moving forward," and Brookman characterized it as a potential "turning point" in privacy enforcement.

"This settlement establishes as FTC precedent that any sharing of health information without affirmative consent is illegal," Brookman added. "Now companies have to understand that sharing customer data without clear permission will lead to investigations and fines."

In a concurring statement accompanying the FTC's complaint and proposed order filed in California federal court against GoodRx, the agency's lone Republican commissioner, Christine S. Wilson, flagged issues with the praise being paid to the deal on the heels of years of criticism.

Wilson said she was "dismayed" by the "abrupt and dramatic about-face" made by her Democratic colleagues — who have been at the forefront of deriding past enforcement actions as toothless — since they've assumed control at the FTC.

"I find disconcerting the sudden U-turn my colleagues have made under Democrat leadership — not because I shared their prior views, but because the agency and staff were subjected to torrents of criticism for outcomes that my colleagues now routinely support," the commissioner said. "Will those who characterized FTC staff as lazy, dishonest, coddled, and corrupt now admit they were wrong?"

Wilson also called out her colleagues for not imposing a larger civil penalty against GoodRx, which she noted until recently had boasted a market valuation of \$18 billion.

"Based on the economic literature, I am confident that a sizable percentage of consumers would have foregone the benefits of using GoodRx's coupons and other services had they known about the company's sieve-like data practices, an indicator that the company's ill-gotten gains almost certainly constitute a large multiple of the \$1.5 million civil penalty," Wilson said.

Marcus, the Hunton partner and former FTC official, said that the unprecedented nature of the alleged rule violation may have played a role in setting the penalty this time around, but that the commission was likely to use its fairly broad discretion in calculating penalties to increase those totals moving

forward, now that companies have been given clear warning.

"Perhaps, in the agency's thinking, the fact that this is the first enforcement action means that this puts down a marker, and one would expect the amount to be larger in subsequent actions, if they are to come," Marcus said.

The enforcement action against GoodRx complements the commission's growing focus on safeguarding personal health information and other categories of data that can reveal sensitive information about consumers' movements and preferences.

Perhaps most notably on this front, the FTC is pressing an action against Kochava Inc., a mobile app analytics provider that is refusing to settle the commission's claims the company is violating Section 5 by unfairly selling geolocation information that can be used to track people to reproductive health clinics and other sensitive places.

In 2022, the FTC also launched a yearslong effort to craft privacy and data security rules that could upend how companies use and disclose consumer data. The sweeping rulemaking encompasses most of the hot-button issues in data privacy, including targeted advertising, artificial intelligence, algorithmic bias and manipulative design tactics known as dark patterns, and is aimed at establishing regulations that the FTC could then enforce with monetary penalties.

While the agency has spent a "considerable amount of time" ramping up following Khan's ascension to the helm in June 2021, its first major privacy enforcement strike of 2023 indicates that the FTC "is going to turn its attention to a lot more enforcement" in the coming year, said Reed Freeman, partner and co-chair of the privacy and data security practice group at ArentFox Schiff LLP.

"The FTC has slowed down in its investigations in privacy over the last couple years while the Democratic majority got into place, but it's poised for a very aggressive enforcement push in 2023 and into 2024," Freeman said.

Enforcement actions like the GoodRx case are also likely to aid the FTC in its lengthy rulemaking efforts, which require the commission to show that the practice it's seeking to regulate is prevalent and can be considered unfair or deceptive.

"In the course of rulemaking, the FTC has to find a legal leg to stand on," Freeman said. "This enforcement action can be looked at as the FTC pulling itself up by the bootstraps and establishing a record to say that these types of practices are unfair, deceptive and prevalent."

The latest action also adds to a broader push at the federal, state and international levels to set tighter limits on the use and sharing of personal information, especially for personalized advertising.

Europe's privacy regulators last month hit Meta Platforms Inc. with fines totaling nearly €400 million (\$430 million) for unlawfully relying on contractual agreements with Facebook and Instagram users to process their personal information for targeted advertising.

Additionally, several U.S. states have enacted or are pushing to enact laws that allow consumers to opt out of the sharing or sale of their personal information and establish heightened protections for sensitive information, while Congress is expected to again consider legislation this year that would set a national data privacy framework.

"There's certainly an expectation at this point that sensitive data needs to be treated with heightened protections, and this FTC matter gives more teeth to the idea of specifically having additional protections for sensitive information at the federal level," said Melissa Crespo, a privacy and data security partner at Morrison & Foerster LLP.

Enacting the American Data Privacy and Protection Act or a similar federal measure would answer the call being made by both businesses and consumer advocates for a unified nationwide framework to replace a growing patchwork of what currently stands at five similar but not identical state laws. A federal measure would also most likely enhance the FTC's profile by giving the agency enhanced rulemaking and fining authority.

"Everyone appears to agree that the dispersed nature of privacy laws now certainly weighs in favor of one federal common standard, but the question is whether Congress has the will to get it done in light of the big issues of preemption and private right of action," Freeman of ArentFox Schiff said. "It's uncertain which straw will break the camel's back, but this enforcement action is one more straw on that camel's back."

While the broader implications of the GoodRx action are likely to take a while to play out, the case provides several more immediate lessons for companies that handle sensitive data that's not clearly covered by the federal Health Insurance Portability and Accountability Act, or another regulatory framework.

Jodi Daniel, who leads the digital health practice at Crowell & Moring LLP, noted that the latest FTC action appeared to be driven by both the "dramatic" uptick in the number of mobile health apps that collect health data and the "significant increase in the ease of individuals to access their health data from health care providers and plans" due to interoperability rules published by the U.S. Department of Health and Human Services in 2020.

"These trends lead to vast amounts of health data not regulated by HIPAA and to new companies being created to capture consumer health data," Daniel said. "The FTC's statement that 'it will use all of its legal authority to protect American consumers' sensitive data from misuse and illegal exploitation' suggests that the FTC plans to continue to enforce compliance with this rule."

The FTC first brought the Health Breach Notification Rule back from obscurity in May 2020, when it announced that it was considering updating the rule. The commission followed up that move in September 2021 by putting health apps and smart devices that collect health data on notice that they must warn users when their medical data has been breached or face penalties.

"The FTC's action against GoodRx is a harbinger for health care adjacent entities, like sleep apps and wearable health technology, that they too must comply with privacy protection regulations," said Jay DeVoy, a partner in Holland & Hart LLP's health care practice group.

The rule requires vendors of personal health records and related entities to notify consumers following a breach involving unsecured information, which encompasses not only cyberattacks or similar incidents where personal data is stolen or accessed without authorization but also instances where businesses are intentionally disclosing data to third parties without users' permission.

"The FTC has been chipping away at targeted advertising and data-sharing practices for a while,"

Consumer Report's Brookman said. "This is definitely one of the more aggressive shots across the bow."

FTC watchers are expecting the agency to continue to wield the Health Breach Notification Rule, making it imperative for companies that handle health information to review their data sharing practices and the disclosures they're making about these activities.

"This is really sounding the alarm for most companies to dig into what they're doing from an ad targeting perspective," said Crespo, the Morrison & Foerster partner. "It's going to shake up things and require some hard and fast decisions around how companies engage in advertising."

Whether and how businesses make adjustments will be dependent on "a number of factors," but "now the market has new information to use for its corporate decision making and risk tolerance assessment," said Chris Leach, a former FTC attorney who is now a partner at Mayer Brown LLP.

"Like any federal agency, the FTC respects its own internal precedents," Leach said. "Companies covered by the Health Breach Notification Rule should regard the enforcement action against GoodRx as an ongoing tool in the FTC's kit."

The GoodRx matter also instructs that the FTC will continue to harness its more traditional power to police unfair and deceptive trade practices under Section 5 to pad out its enforcement actions.

According to the FTC, GoodRx had deceptively promised its millions of users since at least 2017 that it would never share the personal health information it collects, both from the users themselves and from pharmacy benefit managers, with advertisers or other third parties like Facebook and Google, and that this unauthorized sharing constituted an unfair practice.

The commission also alleged that GoodRx falsely asserted that it complied with the Digital Advertising Alliance's principles, which mandate that companies obtain consent before using health information for advertising, and misrepresented its compliance with HIPAA by displaying a seal at the bottom of its telehealth services home page that indicated it was in step with the law when it wasn't.

"This tells companies that the FTC thinks that businesses need to have internal policies and procedures to ensure that they don't disclose sensitive personal information in a way that they said they wouldn't, and that if they want to disclose this personal health information, they need affirmative consent," said Freeman, the ArentFox Schiff partner.

In response to the enforcement action being announced, GoodRx stressed that its settlement with the FTC focused on "an old issue that was proactively addressed almost three years ago, before the FTC inquiry began."

"We do not agree with the FTC's allegations, and we admit no wrongdoing," the company said, adding that penning an agreement allowed it to "avoid the time and expense of protracted litigation" and that the terms of the deal, which requires GoodRx to stop sharing health data for advertising purposes, would "have no material impact on our business or on our current or future operations."

The impact of the FTC's action on the marketplace, though, is already starting to become apparent.

GoodRx competitor SmartRx, one of the newest players in the prescription discount cards market, responded to the enforcement action by issuing a statement asserting that services that collect

prescription preference data "should never engage" in any sharing of data with third-party advertisers.

"For example, any personal information shared with SmartRx is only shared with third party service providers who are necessary to provide the service to SmartRx's customers and who are bound by contracts that prohibit these service providers from using personal information for any other purpose," SmartRx CEO and founder Vipin Porwal said. "Whether us or our competition, they should only store personal information, including any sensitive health information, for so long as necessary to provide the services requested by its customers."

The FTC is represented by Ronnie Solomon of the Federal Trade Commission's Bureau of Consumer Protection and Sarah Williams of the U.S. Department of Justice.

GoodRx is represented by Richard H. Cunningham, Olivia Adendorff and Rachael A. Rezabek of Kirkland & Ellis LLP.

The case is U.S. v. GoodRx Holdings Inc., case number 3:23-cv-00460, in the U.S. District Court for the Northern District of California.

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