

Concurring Statement of Commissioner Christine S. Wilson

GoodRx

Matter No. 2023090

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Today the Commission announces a settlement against GoodRx resolving allegations that the company violated Section 5 of the FTC Act and the Health Breach Notification Rule (“HBNR”). While I support the settlement, I write to make two points. First, I would have supported a higher civil penalty. Second, I am dismayed by the abrupt and dramatic about-face my colleagues have made since taking charge at the FTC — not because I agreed with them on their previously espoused policy views, but because the agency and staff repeatedly were excoriated for outcomes that my colleagues now routinely authorize and vote to accept.

GoodRx has a diversified business model that includes operating a telehealth platform, tracking drug prices, and offering free drug coupons for discounts on medications. Its app has been downloaded more than 10 million times, and the company boasts more than 5 million monthly active consumers.¹ The complaint includes, but is not limited to, allegations that GoodRx violated its assurances to consumers when it promised it would (1) never share personal health information with advertisers, (2) only share personal information externally for limited purposes like delivery of services, and (3) restrict third parties’ use of personal health information when it does share such information.

Under the HBNR, the alleged conduct of GoodRx constitutes a “breach” that requires notice to impacted users.² Having received notice, consumers then could decide whether the benefit of using GoodRx services like obtaining prescription discount coupons or using the platform for telehealth appointments is worth the price of having psychiatric diagnoses, prescription information, and other intimate health data disseminated to third parties. Health data in the hands of the wrong entities can be used in pernicious ways — for example, consider a data broker that compiles a list of Alzheimer’s patients which a fraudster then uses to scam them.³ Consumers typically are well-equipped to make trade-offs that account for the costs and benefits of using a product or service, *assuming they have full information*. But here, even after a consumer watchdog publicly revealed GoodRx’s actions nearly two years ago, the company allegedly

¹ Q3 2022 Earnings Presentation, GOODRX 23 (Nov. 8, 2022), <https://investors.goodrx.com/static-files/eb2e41d9-a2ac-46a7-ba8b-e574412be5c0>. Investor materials indicate that the GoodRx website hosts approximately 20 million monthly visitors. *GoodRx 101: Building the Leading Digital Platform for Consumer Healthcare*, GOODRX 12 (Sept. 2021), <https://investors.goodrx.com/static-files/85cc6483-b907-4e04-847f-0196fe749473>.

² GoodRx has violated the HBNR based on a plain reading of the text, setting aside any gloss the Commission sought to add in its September 2021 Statement on Breaches by Health Apps and Other Connected Devices.

³ U.S. v. Macromark, No. 3:20-cr-00171-AWT (D. Colo. Sept. 25, 2020), <https://www.justice.gov/civil/case/file/1326376/download>. See also U.S. v. Epsilon Data Mgmt., LLC., No. 21-cr-00006-RM (D. Colo. Jan. 19, 2021), <https://www.justice.gov/opa/pr/marketing-company-agrees-pay-150-million-facilitating-elder-fraud-schemes> (defendants provided the private information of 30 million consumers to scammers for nearly a decade); U.S. v. KBM Grp., No. 21-c-00198 (D. Colo. June 14, 2021), <https://www.justice.gov/civil/case/united-states-v-kbm-group-llc> (defendants sold the data of millions of consumers to companies engaged in fraudulent mass-mailing schemes).

failed to notify users that it disclosed sensitive health information without authorization, precluding consumers from evaluating accurately for themselves the pros and cons of using GoodRx.

Today's settlement marks the first enforcement matter in which the FTC has invoked the HBNR. I congratulate staff on this important step — the agency rightly is focused on protecting the privacy of sensitive health data and empowering consumers to make informed choices about the goods and services they use. Those on the front lines implementing this mission, our FTC career staff, are dedicated professionals who work across administrations that bring shifting priorities and policies to the agency. Our staff nevertheless consistently endeavor to implement leadership directives and fulfill management priorities. This statement is not intended to detract from staff's dedication to identifying and prosecuting law violations swiftly and vigorously, a job they do with excellence every day.

Instead, as noted above, I write to underscore two points. First, I would have supported a larger civil penalty. Existing studies make clear that consumers place significant value on their personal health information.⁴ I have reason to believe that GoodRx deliberately chose to disclose intimate health information without authorization, directly contravening assurances it gave to consumers. The Director of the FTC's Bureau of Consumer Protection, Sam Levine, himself has made clear that if the FTC is to deter wrongdoing, "we need to recover more than companies earned from that wrongdoing."⁵ 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. Indeed, until recently, the company boasted a market valuation of \$18 billion.⁶ I believe the company profited significantly from its silence about its scurrilous privacy practices — far in excess of the \$1.5 million penalty the Commission levies today.

Second, 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.⁷

⁴ An economic study, reporting on a hypothetical choice experiment, indicates that a significant portion of customers would categorically refuse to share previous and current health information with a marketing company no matter what payment they were offered. The value that consumers place on health information is substantial and potentially limitless. Alessandro Acquisti and Jens Grossklags, *An Online Survey Experiment on Ambiguity and Privacy*, 88 COMM'NS & STRATEGIES 19 (2012).

⁵ *Transcript of Conference Call to Discuss Law Review Article About Resurrecting the FTC Act's Penalty Offense Authority with Samuel Levine*, CAPITOL FORUM, Feb 16, 2021 at 1, https://www.ftc.gov/system/files/documents/public_statements/1582322/ftc_policy_transcript_20210216.pdf. Mr. Levine served as an Attorney Advisor to Commissioner Rohit Chopra, whose views are summarized in subsequent footnotes.

⁶ GoodRx was valued at nearly \$18 billion when the company went public in 2020. Niket Nishant, *GoodRx shares jump 40% in Nasdaq debut after \$1 billion IPO*, REUTERS (Sept. 23, 2020), <https://www.reuters.com/article/goodrx-hldg-ipo/goodrx-shares-jump-40-in-nasdaq-debut-after-1-billion-ipo-idUSKCN26E31E>.

⁷ For example, this Commission also authorized a settlement with Twitter in 2022 that was strikingly similar to the 2019 Facebook settlement that was considered not just a failure but an abdication of our duty. Concurring Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *Twitter* (May 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/05-25-

Current and former colleagues have argued that (1) non-monetary settlements are meaningless;⁸ (2) gargantuan civil penalties are imperative to change corporate culture and foster real deterrence;⁹ (3) injunctive relief should require changes to otherwise lawful business models;¹⁰ (4) failing to hold senior executives liable allows wrong-doers to skate free;¹¹ and (5) the

[2022%20Twitter%20Joint%20Statement%20Wilson%20Phillips_0.pdf](https://www.ftc.gov/legal-library/browse/cases-proceedings/2023062-twitter-inc-us-v) (comparing key elements of Facebook and Twitter order violation settlements). As with Facebook, the privacy practices at issue in the Twitter matter did not involve sensitive personal health information. Instead, the allegations there pertained to the company's use of phone numbers not for multi-factor authentication, as represented to consumers, but for marketing. *In the Matter of Twitter, Inc.*, C-4316 (May 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023062-twitter-inc-us-v>.

⁸ Dissenting Statement of Commissioner Rohit Chopra joined by Commissioner Rebecca Kelly Slaughter, *In re Sunday Riley, LLC* (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf (discussing how no-money settlement is a setback to the Commission's credibility as a watchdog over digital markets and how no-money settlements constitute no-consequences settlements). *See also* Dissenting Statement of Commissioner Rohit Chopra, *Regarding Final Approval of the Settlement with Zoom Video Communications, Inc.* (Feb. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586865/20210129_final_chopra_zoom_statement_0.pdf (equating injunctive relief obligations with "simply requiring more paperwork"); Dissenting Statement Commission Rohit Chopra, *Regarding Zoom Video Communications, Inc.* (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf (claiming settlement's lack of monetary relief, in part, resulted in no meaningful accountability); Dissenting Statement Commissioner Rebecca Kelly Slaughter, *In the Matter of Zoom Video Communications, Inc.* (Nov. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582918/1923167zoomslaughterstatement.pdf (rejecting settlement, in part because settlement did not require redress or refunds to consumers). *But See* Christine S. Wilson, Remarks at NAD, One Step Forward, Two Steps Back: Sound Policy on Consumer Protection, at 11-12 (Oct. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581434/wilson_remarks_at_nad_100520.pdf (discussing value of non-monetary settlements).

⁹ Dissenting Statement of Commissioner Rebecca Kelly Slaughter *In the matter of FTC v. Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf ("Five billion dollars represents an astronomical penalty compared to prior Commission settlements or to the financial position of most individuals and firms. In the context of Facebook's financial position and scope of violations, it is a substantially less significant sum."); Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (stating that a civil penalty should exceed unjust gains "otherwise we are allowing a defendant to break even or even profit by breaking the law" and asserting that "I do not believe a \$5 billion penalty, especially as part of a settlement that otherwise blesses the company's business model, will restore the public's confidence or vindicate our authority."); Statement of Commissioner Rohit Chopra, *In the Matters of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck* (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf (arguing that no-money, no fault settlements for deceptive Made in USA claims were inadequate).

¹⁰ Dissenting Statement of Commissioner Rebecca Kelly Slaughter *In the matter of Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf ("I believe it is important and appropriate for the order to apply stringent limitations to how Facebook collects, uses, and shares data."); Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf ("The settlement imposes no meaningful changes to the company's structure or financial incentives...Nor does it include any restrictions on the company's mass surveillance or advertising tactics.").

¹¹ *See* Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *FTC v. Progressive Leasing* (April 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571915/182_3127_prog_leasing_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_0.pdf (stating that the

consistent failure of the FTC and its staff to extract massive civil penalties, modify lawful business models, and hold senior executives liable underscores that the FTC is toothless and ineffective and its staff is lax, feckless, and corrupt.¹² Democrats in Congress and members of our own Commission decried the FTC's \$5 billion settlement with Facebook as a slap on the wrist that would fail to deter future wrongdoing,¹³ and dismissed meaningful injunctive relief as inadequate, arguing instead that the Commission should have changed Facebook's legitimate

settlement falls short because it does not name the individual and does not make consumers whole); Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf (asserting that not naming Mr. Zuckerberg did not ensure the accountability needed for compliance); Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (arguing, among other criticisms, that the failure to name Mr. Zuckerberg and other executives "lets them off the hook" completely).

¹² See Prepared Opening Statement of Commissioner Rohit Chopra, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf ("And when Big Tech companies egregiously violate our privacy and the law, the FTC has shown it is willing to be lax and forgiving."); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. OF CONST. L. & PUB. POL'Y 37, 44 (2014), <https://scholarship.law.duke.edu/djclpp/vol9/iss2/4/> ("The former agribusiness lobbyist who joins the Food and Drug Administration may loosen labeling requirements if he intends to return to industry, while the Department of Justice enforcer who aspires eventually to join J.P. Morgan may hesitate to antagonize a potential employer."). See also Lucas Manfield, *Rent-a-Center Gets Nailed for Suppressing Competition Walks Away With a Slap on the Wrist*, DALLAS OBSERVER (Mar. 6, 2020), <https://www.dallasobserver.com/news/ftc-plano-based-rent-a-center-suppressing-competition-11884287> (noting that Commissioner "Chopra has repeatedly slammed his own agency for failing to go after wrongdoers. Last year, the FTC declined to seek meaningful penalties after it uncovered evidence of wage-fixing by a local temp agency. Then, as now, Chopra argued that declining to pursue a financial penalty and not requiring an admission of wrongdoing rendered the FTC's enforcement toothless."). See also Dissenting Statement Commission Rohit Chopra, *Regarding Zoom Video Communications, Inc.* (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf (claiming Zoom settlement undermined FTC's credibility as a data security enforcer and reflected an ineffective approach to policing privacy and data security practices).

¹³ Matt Laslo, *Congress Is Pissed at Facebook and the FTC*, WIRED (July 19, 2019), <https://www.wired.com/story/congress-pissed-facebook-ftc/>; Press Release, Office of Senator Ed Markey, Senator Markey Blasts FTC Facebook Privacy Settlement (July 24, 2019), <https://www.markey.senate.gov/news/press-releases/senator-markey-blasts-ftc-facebook-privacy-settlement>; Nancy Scola and Steven Overly, *FTC strikes \$5B Facebook settlement against fierce Democratic objections*, POLITICO (July 24, 2019), <https://www.politico.com/story/2019/07/24/ftc-facebook-settlement-1428432> (quoting Representative Cicilline as stating that the \$5 billion fine is "disappointing" and Senator Blumenthal as stating that the penalty is "[a] tap on the wrist, not even a slap"); see also Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the matter of FTC v. Facebook* (July 24, 2019) ("During the years of Facebook's continuous alleged lawlessness, its gross annual revenue increased from \$5 billion to over \$55 billion ... The negotiated civil penalty is insufficient under the applicable statutory factors we are charged with weighing for order violators: injury to the public, ability to pay, eliminating the benefits derived from the violation, and vindicating the authority of the FTC.") https://www.system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (stating that a civil penalty should exceed unjust gains "otherwise we are allowing a defendant to break even or even profit by breaking the law" and asserting that "I do not believe a \$5 billion penalty, especially as part of a settlement that otherwise blesses the company's business model, will restore the public's confidence or vindicate our authority.").

business model.¹⁴ My fellow Commissioners previously expressed significant concern about Facebook’s privacy-invasive practices that shared *publicly* posted information with third parties but – based on the size of the civil penalty in this matter – seem far less concerned about GoodRx’s business decision to share confidential medical information, including prescription information, medical treatments, sexual health, and other sensitive information with advertisers.¹⁵ Moreover, this settlement does not hold senior executives liable, and does not modify the core GoodRx business model. To be clear, I note these two omissions not to criticize the settlement, but to highlight the diametrically opposed positions my colleagues have advanced during their tenure at the agency.

Previously, the FTC was lambasted for taking into account litigation risk, the ability of the agency to advance important policy positions through case-by-case enforcement, and the benefits of meaningful injunctive relief.¹⁶ With a Democrat majority, these tradeoffs are made daily, without any acknowledgement of the about-face that has taken place. But the damage has been done. Many talented and dedicated FTC professionals who were committed to a life of public service at the agency ultimately chose, in the face of daily, undeserved, and withering criticism, to do what they had never previously contemplated — seek jobs elsewhere. And those who remain are understandably demoralized, as the most recent Federal Employee Viewpoint Survey confirms.¹⁷ Given this about-face, will those who previously decried the agency as toothless, lax, and feckless now apologize? Will those who characterized FTC staff as lazy, dishonest, coddled, and corrupt now admit they were wrong? At a minimum, will incumbent Commissioners defend staff when similar charges are levied by their allies?

I am proud of the good work that our staff do daily to protect American consumers. I am proud of their dedication to protecting the privacy of consumers, particularly with respect to sensitive health data. While I would have supported a larger civil penalty in this case, I recognize that this settlement with GoodRx is an important milestone in the Commission’s privacy work. I only

¹⁴ See sources cited *supra* note 10. While the FTC has authority to undertake fencing-in relief, the FTC cannot declare legal business models illegal. The agency worked within its limited jurisdiction to implement meaningful order provisions and the Commission also stressed to Congress the need for federal privacy legislation that would grant the FTC additional authority to address concerning privacy and data security practices.

¹⁵ GoodRx Compl. para 8.

¹⁶ This statement does not change my long-held view that strong injunctive relief itself may deter misconduct in certain cases, and that there is value to settling investigations and preserving limited FTC resources. But there are times when civil penalties are necessary to deter repeat offenses. The harm here, the exposure of sensitive health information despite assurances that its confidentiality would be maintained, is not matched by the magnitude of the civil penalty.

¹⁷ Office of Personnel Management, *2022 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*, available at <https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2022/2022-agency-report.pdf>. Indeed, the FTC under Chair Khan ranks second worst in the entire 2022 Federal Employee Viewpoint Survey (“FEVS”) for honesty and integrity of senior leadership. Only 49.2% of survey respondents “agree” or “strongly agree” with the proposition that “FTC senior leaders maintain high standards of honesty and integrity,” plummeting from 87% for the period before Chair Khan and other employees from the Office of Commissioner Chopra ascended to senior positions in the agency. On the other hand, FTC career staff supervisors continue to get high marks for trustworthiness; 89.3% of survey respondents “agree” or “strongly agree” with the statement that “I have trust and confidence in my supervisor.”

wish that my colleagues had recognized previous, similarly important milestones as equally laudable.