

Amazon’s Acquisition of One Medical: The Lack of Health Data Regulation in the Age of Big Tech

Angela M. Gasca*

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I. INTRODUCTION

On July 21, 2022, Amazon—the behemoth one-stop e-shop that can ship everything and anything to your doorstep—entered into an agreement to acquire One Medical, a membership-based healthcare provider.¹ Seven months later, on February 22, 2023, the acquisition was completed.² A friend, who had joined One Medical about a year prior to this announcement and had appreciated the primary care model One Medical provided, expressed concern over the tech giant’s acquisition: “If Amazon has access to my health information, I’m not keeping my membership.” Whether Amazon indeed has access to their patient health data is a valid concern, as patient health information is one of the most private forms of data.³

Amazon and One Medical claim that patient data in their possession is handled in compliance with the Health Insurance Portability and Accountability Act (HIPAA), but this statement is misleading.⁴ An early account of Amazon’s history notes how Amazon found a loophole to get around book distributor requirements that threatened the fledgling company’s viability.⁵ It appears history is repeating itself because others—U.S. Senator Amy Klobuchar and the Federal Trade Commission (FTC) included—also think this statement is misleading.⁶ Amazon is a company with a “passion for invention” that, as evidenced by its business model, clearly comprehends the

1. See Press Release, *Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical*, AMAZON (July 21, 2022), <https://press.aboutamazon.com/2022/7/amazon-and-one-medical-sign-an-agreement-for-amazon-to-acquire-one-medical> [<https://perma.cc/4GAR-LQJM>].

2. See Press Release, *One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, ONE MEDICAL (Feb. 22, 2023), <https://www.onemedical.com/mediacenter/one-medical-joins-amazon/> [<https://perma.cc/3EP2-AS9E>].

3. See Kristin Cohen, *Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, FED. TRADE COMM’N (July 11, 2022), <https://www.ftc.gov/business-guidance/blog/2022/07/location-health-and-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal> [<https://perma.cc/KL5W-EQQN>].

4. See Geoffrey A. Fowler, *Amazon Just Bought My Doctor’s Office. That Makes Me Very Nervous*, WASH. POST (July 22, 2022, 6:00 AM), <https://www.washingtonpost.com/technology/2022/07/22/amazon-one-medical-privacy/> [<https://perma.cc/7UVZ-D4XN>].

5. See Avery Hartmans, *Jeff Bezos Originally Wanted to Name Amazon ‘Cadabra,’ and 14 Other Little-Known Facts About the Early Days of the e-Commerce Giant*, BUS. INSIDER (last updated July 2, 2021, 2:42 PM), <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4#an-obscure-book-about-lichens-saved-amazon-from-going-bankrupt-3> [<https://perma.cc/AT25-65FB>].

6. See Press Release, *Klobuchar Urges Federal Trade Commission to Investigate Amazon’s Proposed Acquisition of One Medical*, OFF. OF U.S. SEN. AMY KLOBUCHAR (July 21, 2022), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=54F73C9C-F713-44A9-B33E-07E61F551DF2> [<https://perma.cc/S57S-YFFL>]; see also Dave Muoio, *Amazon’s \$3.9B One Medical Purchase is Being Reviewed by FTC, Filings Show*, FIERCE HEALTHCARE (Sept. 6, 2022, 11:05 AM), <https://www.fiercehealthcare.com/health-tech/amazons-39b-one-medical-purchase-being-reviewed-ftc-filings-show> [<https://perma.cc/R49W-UZ35>].

value of data to drive their business forward.⁷ Thus, there is a risk that Amazon will capitalize on customer health data.⁸

If major technology firms want to enter the healthcare sector, then, at a minimum, patient-consumers should know how their data is being handled and should be given the opportunity to control some aspects of its use. Current HIPAA regulations do not provide adequate protection for patient health information in the hands of major tech companies. There are too many gaps that allow for the disclosure of patient health information. When drafted, HIPAA likely did not envision a world where powerful e-commerce companies would enter the healthcare space. The pressing issue, among other concerns, is not only about who has access to this information but what is done with that information once access is acquired.

With Amazon nudging its way into sectors outside of e-commerce, the effects of major tech firms' acquisitions and the protection and regulation of consumer data need greater attention, specifically in the context of sensitive health data. The principal concern with Amazon's acquisition of One Medical is that sensitive health information was acquired—without any notice or consent from the patients to whom the data belongs—and is subsequently being converted into revenue-generating data fueling Amazon's growth.⁹

Protection and regulation of patient health information cannot be viewed solely through the lens of HIPAA. Nor is HIPAA reform the solution. One approach to protecting sensitive health data acquired through mergers and acquisitions would be to regulate at entry. Provisions in existing laws—namely the Hart-Scott-Rodino Act and the California Consumer Privacy Act—may prove adequate to regulate and protect the use of patient health data obtained through tech company mergers.

This Note begins with a brief background on Amazon, One Medical, and the heightened sensitivity to information disclosure in the healthcare space. In Section III, this Note will discuss how data collected by One Medical (and other technology firms) falls outside the scope of HIPAA regulation and how the FTC's Section 5 authority can address these gaps. Section IV will look at the Hart-Scott-Rodino Act and the California Consumer Privacy Act as existing tools for regulating sensitive health data. Finally, Section V will discuss how the FTC's Section 5 authority, the Hart-Scott-Rodino Act, and elements from the California Consumer Privacy Act could be used at the pre-merger stage to regulate health data acquired by non-clinical entities through mergers and acquisitions.

7. See *Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical*, *supra* note 1.

8. See Fowler, *supra* note 4.

9. See Klobuchar *Urges Federal Trade Commission to Investigate Amazon's Proposed Acquisition of One Medical*, *supra* note 6.

II. BACKGROUND

A. *The Giant Called Amazon*

Amazon began in 1994, selling books out of Jeff Bezos' garage.¹⁰ Nearly thirty years later, Amazon is the fifth most valuable company in the world with a market capitalization near \$1.5 trillion USD.¹¹ Amazon is a member of the "big five" tech companies, along with Apple, Alphabet, Microsoft, and Meta.¹²

The list of Amazon's acquisitions is long. Highlights include the \$930 million acquisition of online shoe retailer Zappos (2009), the \$13.7 billion acquisition of Whole Foods (2017), and the subsequent pivot to big-screen entertainment with the \$8.45 billion purchase of Metro-Goldwyn-Mayer (MGM) Studios (2021).¹³ With each acquisition, Amazon gained access not only to customers but to more data which fuels the company's growth.¹⁴

Most individuals interact daily with a product or service provided by Big Tech companies.¹⁵ We get from one place to another by using Uber or Lyft (dependent on Google Maps), watch movies on Netflix (hosted on the Amazon Web Services cloud), and use Instagram (owned by Meta) as a social and e-commerce platform.¹⁶ Healthcare is the one area where Big Tech's presence has not felt quite as pervasive. While technology underlies the infrastructure of healthcare services, the ways in which we receive care and interact with providers remain largely traditional—Amazon's entrance into the healthcare space could change this. The acquisition of One Medical gives Amazon a new type of data to collect, probe, and capitalize on. As Senator Klobuchar stated in her letter to the FTC, the "proposed deal could result in the accumulation of highly sensitive personal health data in the hands of an already data-intensive company."¹⁷ As data-driven companies (Amazon included) use data to push growth in their healthcare services offerings,

10. See Hartmans, *supra* note 5.

11. See *The 100 Largest Companies in the World by Market Capitalization in 2022*, STATISTA, <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/> [<https://perma.cc/4JAT-MH2J>] (last visited Nov. 14, 2022).

12. See Conor Sen, *The 'Big Five' Could Destroy the Tech Ecosystem*, BLOOMBERG (Nov. 15, 2017, 11:00 AM), <https://www.bloomberg.com/opinion/articles/2017-11-15/the-big-five-could-destroy-the-tech-ecosystem> [<https://perma.cc/S9KP-EQB6>].

13. See Stacy Mitchell & Olivia LaVecchia, *Amazon's Stranglehold: How the Company's Tightening Grip on the Economy Is Stifling Competition, Eroding Jobs, and Threatening Communities*, INST. FOR LOC. SELF-RELIANCE (Nov. 29, 2016), <https://ilsr.org/amazon-stranglehold/> [<https://perma.cc/23C2-67YT>]; *Amazon's Major Acquisitions Over the Years*, REUTERS (May 26, 2021, 10:16 AM), <https://www.reuters.com/technology/amazons-major-acquisitions-over-years-2021-05-26/> [<https://perma.cc/GG3D-K4ZK>].

14. See Elma Mrkonjić, *How Amazon Uses Big Data*, SEEDSCIENTIFIC (Aug. 29, 2022), <https://seedscientific.com/how-amazon-uses-big-data/> [<https://perma.cc/4622-ACCG>].

15. See Kashmir Hill, *I Tried to Live Without the Tech Giants. It Was Impossible*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html> [<https://perma.cc/C35J-MZMT>].

16. *Id.*

17. See Klobuchar Urges Federal Trade Commission to Investigate Amazon's Proposed Acquisition of One Medical, *supra* note 6.

sensitive data gleaned from patient-consumers needs sufficient regulatory protection because patients face risks if their data is compromised or misused.

B. *One Medical—The “Starbucks of Primary Care”*

Physician and entrepreneur Tom Lee founded One Medical in 2007.¹⁸ Dr. Lee's mission was to use a technology-based infrastructure to create efficient delivery of primary care services.¹⁹ Based in San Francisco, the single-office healthcare startup now has offices in over twenty major U.S. cities.²⁰ The One Medical model differs from other primary care providers in that it is membership-based; that is, patients pay a membership fee to have access to One Medical care and all the perks that accompany a yearly subscription.²¹ Member benefits include 24/7 access to virtual care, in-office lab services, and efficient appointment scheduling via the One Medical app, as well as in-app prescription management.²² An investor in One Medical described the company as the “Starbucks of primary care.”²³

Amazon's proposed acquisition of One Medical was announced on July 21, 2022,²⁴ and was completed on February 22, 2023.²⁵ In 2022, One Medical reported 836,000 total members.²⁶ In addition to having a substantial membership count and a unique “pay for care” model, the company also “built its own medical records technology from the ground up to help doctors

18. See Christina Farr, *How Tech-Infused Primary Care Centers Turned One Medical into a \$2 Billion Business*, CNBC TECH (July 28, 2019, 9:56 AM), <https://www.cnbc.com/2019/07/28/one-medical-opening-primary-clinics-in-portland-and-atlanta.html> [https://perma.cc/C2FR-HKF8].

19. See Tom Taulli, *One Medical: Playbook to Disrupt the Massive Healthcare Industry*, FORBES (Feb. 1, 2020, 1:58 PM), <https://www.forbes.com/sites/tomtaulli/2020/02/01/one-medical-playbook-to-disrupt-the-massive-healthcare-industry/?sh=1f52608867a2> [https://perma.cc/766A-AGZC].

20. See *Locations*, ONE MEDICAL, <https://www.onemedical.com/> [https://perma.cc/6SHY-ZJAP] (last visited Jan. 16, 2023).

21. Currently, One Medical membership costs \$199 per year, but the company does provide membership alternatives for those with financial hardships. See *Membership*, ONE MEDICAL, <https://www.onemedical.com/membership/> [https://perma.cc/R56K-KUCT] (last visited Jan. 16, 2023).

22. *Id.*

23. Farr, *supra* note 18.

24. See *Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical*, *supra* note 1.

25. See *One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, *supra* note 2. The acquisition was finalized after the FTC said “it would not challenge the purchase.” However, an FTC spokesperson stated the investigation of “Amazon's acquisition of One Medical continues” due to the “possible harms to consumers that may result from Amazon's control and use of sensitive consumer health information held by One Medical” as a core reason for continuing their investigation. See Brian Fung, *Amazon closes \$3.9 Billion Deal to Acquire One Medical*, CNN BUS. (Feb. 22, 2023, 2:13 PM), <https://edition.cnn.com/2023/02/22/tech/ftc-amazon-one-medical-deal/index.html> [https://perma.cc/C5TE-538A].

26. See *One Medical Announces Results for Fourth Quarter and Full year 2022*, GLOBALNEWswire (Feb. 21, 2023, 5:53 PM) <https://www.globenewswire.com/en/news-release/2023/02/21/2612770/0/en/One-Medical-Announces-Results-for-Fourth-Quarter-and-Full-Year-2022.html> [https://perma.cc/R7HT-LWDG].

manage patient relationships” instead of relying on third-party medical record software systems.²⁷

The acquisition of One Medical aligns with Amazon’s other acquisitions in terms of existing customer bases absorbed, services offered, product delivery, and most importantly, proprietary technology acquired.²⁸ Notably, this was not Amazon’s first foray into the health services industry; in 2018 it acquired PillPack, a “full-service [online] pharmacy.”²⁹ The general consensus for the PillPack acquisition was that it “is just a piece of Amazon’s expansive plan to uproot the \$3 trillion U.S. health-care industry.”³⁰ Acquiring One Medical brings Amazon one step closer to realizing that plan.

C. Healthcare is a Trusted Space

The way healthcare is delivered in the U.S. is far from efficient. A host of factors influence a patient’s level of care.³¹ One Medical’s founder (who had left the company by the time of the acquisition) commented that “healthcare . . . is a private, personal, trusted space.”³² Dr. Lee went on to say that some patients will accept the idea of a “non-clinical entity” overseeing this trusted space, while others will not. In other words, there is an inherent tension in trusting a non-clinical entity to properly handle sensitive medical information such as family clinical history, medical diagnostics, and digital appointment notes and care summaries.

A paper published by the American Economic Liberties Project notes that “Amazon’s power is not primarily based on providing a better set of products or services, but on *exploiting gaps* in antitrust, tax, *privacy* or other forms of law to acquire a continual set of competitive advantages.”³³ One journalist reporting on the proposed acquisition has found that “lots of companies find completely legal ways to grab intimate health data for

27. Farr, *supra* note 18.

28. See Daniela Coppola, *Amazon Prime – Statistics & Facts*, STATISTA (Nov. 17, 2022), https://www.statista.com/topics/4076/amazon-prime/#topicHeader__wrapper [<https://perma.cc/7G4A-QRDJ>].

29. Christina Farr, *The Inside Story of Why Amazon Bought PillPack in its Effort to Crack the \$500 Billion Prescription Market*, CNBC TECH (May 10, 2019, 2:40 PM), <https://www.cnbc.com/2019/05/10/why-amazon-bought-pillpack-for-753-million-and-what-happens-next.html> [<https://perma.cc/D76S-4ETP>]; PILLPACK, <https://www.pillpack.com/> [<https://perma.cc/UUK3-97JE>] (last visited Jan. 16, 2023).

30. Farr, *supra* note 18.

31. Factors that affect levels of access to healthcare include inadequate health insurance coverage, limited access to public transportation, and limited resources to receive specialized care. For further information on this point, see *Access to Health Services*, U.S. DEPT. OF HEALTH & HUM. SERVS., <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/access-health-services> [<https://perma.cc/3FSD-Q9QM>] (last visited Mar. 4, 2023).

32. *Interview by Jeremy Corr and Dr. Robert Pearl with Dr. Tom Lee, CEO*, GALILEO (Aug. 30, 2022), https://www.fixinghealthcarepodcast.com/wp-content/uploads/2022/08/Fixing-Healthcare-Transcript_Tom-Lee_Episode-63.pdf [<https://perma.cc/8Y6H-XQ6R>].

33. Matt Stoller et al., *Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy*, AM. ECON. LIBERTIES PROJECT (July 24, 2020) (emphasis added), https://www.economicliberties.us/our-work/understanding-amazon-making-the-21st-century-gatekeeper-safe-for-democracy/#_ftn4 [<https://perma.cc/GEG8-NWE8>].

marketing and other purposes with ‘consent’ few patients realized they were giving.”³⁴ Even though an Amazon spokesperson stated the company “will never share One Medical customers’ personal health information outside of One Medical . . . without clear permission from the customer,”³⁵ Amazon’s reputation for coloring outside the lines is well-established.³⁶ The lack of direct notice to existing One Medical members regarding the proposed merger raises another red flag.³⁷ Failing to notify existing customers their primary care provider could be acquired by Amazon goes against the grain of basic procedural due process.³⁸

The intentions behind the Amazon-One Medical merger could very well be aimed at “mak[ing] the health care experience more accessible, affordable, and . . . enjoyable.”³⁹ But the fact remains that Amazon—a company with an unprecedented amount of customer data—will now be in possession of its customers’ highly sensitive health data.⁴⁰

III. HIPAA AND THE FTC ACT

The popular fallback for health privacy concerns is to refer to HIPAA. However, in 1996, HIPAA was not drafted with Amazon, and other similar

34. Fowler, *supra* note 4.

35. *Id.*; see also Stoller et al., *supra* note 33.

36. Amazon’s Ring and Alexa technology have raised privacy and surveillance concerns. See Yael Grauer & Daniel Wroclawski, *Amazon Shared Ring Security Camera and Video Doorbell Footage with Police Without a Warrant*, CONSUMER REPS. (July 15, 2022), <https://www.consumerreports.org/law-enforcement/amazon-shared-ring-footage-with-police-without-a-warrant-a6093504500/> [<https://perma.cc/3TJ7-X8YA>]; Geoffrey A. Fowler, *Amazon May Be Sharing Your Internet Connection with Neighbors. Here’s How to Turn It Off*, WASH. POST (June 8, 2021, 11:07 AM), <https://www.washingtonpost.com/technology/2021/06/07/amazon-sidewalk-network/> [<https://perma.cc/4BWK-LQSF>]; Geoffrey A. Fowler, *Alexa Has Been Eavesdropping on You This Whole Time*, WASH. POST (May 6, 2019, 9:00 AM), <https://www.washingtonpost.com/technology/2019/05/06/alexa-has-been-eavesdropping-you-this-whole-time/> [<https://perma.cc/BTZA-7VC7>].

37. See Ari Levy, *Amazon Already Knows a Lot About Me, But One Medical Takes It to a Whole New Level*, CNBC (July 23, 2022, 12:22 PM), <https://www.cnbc.com/2022/07/23/amazon-one-medical-deal-gives-it-access-to-my-most-personal-info.html> [<https://perma.cc/4HAZ-NE4D>]. The CEO of One Medical provided an update to existing members about the proposed transaction via a blog post eleven days after the proposed transaction was announced. See Amir D. Rubin, *Update from One Medical on Agreement to be Acquired by Amazon*, ONE MEDICAL (Aug. 2, 2022), <https://www.onemedical.com/blog/newsworthy/update-one-medical-agreement-be-acquired-amazon/> [<https://perma.cc/C36P-WKUZ>].

38. See *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (finding that “[t]he essence of due process is [the] requirement that a ‘a person . . . be given notice . . . and [an] opportunity . . . to be heard.’”) (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (Frankfurter, J., concurring)); see *infra* Section IV.

39. See *Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical*, *supra* note 1.

40. News of the proposed merger made current One Medical members question whether Amazon would “act in good faith with [their] health data.” See Levy, *supra* note 37.

Big Tech companies, in mind.⁴¹ Rather, HIPAA was initially designed to reform the health insurance market.⁴² It was revised in 2002 to include the HIPAA Privacy Rule, which addressed gaps in the regulation of health information known as protected health information (PHI).⁴³ The Privacy Rule set out national standards for health care entities to abide by when handling sensitive health information.⁴⁴ In 2005, the HIPAA Security Rule was added to include the national standards for the protection of electronic patient health information held by, or transferred to, HIPAA covered entities, which include “health plans, health care clearinghouses, and . . . any health care provider.”⁴⁵ Then in 2013, the U.S. Department of Health and Human Services (HHS) implemented the HIPAA Omnibus Rule which incorporated provisions from the Health Information Technology for Economic and Clinical Health Act (HITECH), which was signed into law four years prior.⁴⁶ The goal of implementing HITECH was to “promote the adoption and meaningful use of health information technology.”⁴⁷ In other words, HITECH was introduced to push the use of electronic health records (EHR), and thus, spur technological innovation in the health services industry via financial incentives at a time when the American economy needed a financial boost.⁴⁸

When HITECH was introduced in 2009, it strengthened existing HIPAA privacy and security provisions and focused on healthcare providers

41. See Press Release, *Statement of Commissioner Alvaro M. Bedoya Joined by Commissioner Rebecca Kelly Slaughter Regarding Amazon.com, Inc.’s Acquisition of 1Life Healthcare, Inc.*, FED. TRADE COMM’N (Feb. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210191amazononemedicalambstmt.pdf [https://perma.cc/AH7U-KDEK].

42. See S. REP. NO. 104-156, at 1-3 (1995), <https://www.govinfo.gov/content/pkg/CRPT-104srt156/pdf/CRPT-104srt156.pdf> [https://perma.cc/48M8-MM9T].

43. Protected Health Information is defined as “individually identifiable health information” related to the physical or mental condition of an individual, the care provided to the individual, and information related to the payment of care. See generally *Summary of the HIPAA Privacy Rule*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated Oct. 19, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> [https://perma.cc/E6JJ-2X9B].

44. *Id.*

45. See *Brief History of HIPAA and the Privacy Rule*, in *BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH* 63-64 (Sharyl J. Nass et al. eds., 2009), <https://nap.nationalacademies.org/catalog/12458/beyond-the-hipaa-privacy-rule-enhancing-privacy-improving-health-through> [https://perma.cc/D3MT-WMZD]; see also *Summary of the HIPAA Security Rule*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated Oct. 19, 2022), <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html> [https://perma.cc/JB6L-5RXE].

46. See *Omnibus HIPAA Rulemaking*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated Sept. 13, 2019), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/combined-regulation-text/omnibus-hipaa-rulemaking/index.html> [https://perma.cc/83TE-3NW7]; *HITECH Act Enforcement Interim Final Rule*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated June 16, 2017), <https://www.hhs.gov/hipaa/for-professionals/special-topics/hitech-act-enforcement-interim-final-rule/index.html> [https://perma.cc/LFV8-AJ7U].

47. *HITECH Act Enforcement Interim Final Rule*, *supra*, note 46.

48. See Howard Burde, *The HITECH Act—An Overview*, 13 AM. MED. ASSOC. J. OF ETHICS 172-75 (2011), <https://journalofethics.ama-assn.org/article/hitech-act-overview/2011-03> [https://perma.cc/W38D-3XCJ].

looking to adopt new technology to bolster patient services.⁴⁹ Amazon acquiring One Medical flips this model around; Amazon has now tacked on a pre-built healthcare service to the menu of products and services offered to its customers.⁵⁰ Combining the strengths of Amazon with the One Medical model to streamline the patient experience and improve the delivery of healthcare services for those who can access care in this manner is not, in and of itself, a bad concept.⁵¹ The data driving the innovation,⁵² and the apparent lack of regulation over this data, are the cause for concern.

A. Loopholes Within the Law

Despite the revisions to HIPAA, the law as it exists today does not adequately protect or regulate patient health information in the context of a non-clinical entity subsuming a provider of health care services. The HIPAA Privacy Rule concerns itself with protection of PHI used by covered entities.⁵³ One Medical is a covered entity under HIPAA but attempts to circumvent the law through language in its privacy notices.⁵⁴ The One Medical HIPAA Privacy Policy states the company may disclose a patient's protected health information *without authorization* to support "Healthcare Operations."⁵⁵ This broad characterization is defined as: "[t]o administer and support [One Medical's] *business activities* . . . [f]or example (and without limitation), [One

49. See 45 C.F.R. pt. 160, <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/enforcementrule/enfr.pdf> [<https://perma.cc/43W6-JT62>]; see also *HITECH Act Enforcement Interim Final Rule*, *supra* note 46.

50. See *A Letter from Amazon's CEO, Amazon Welcomes One Medical*, AMAZON, <https://www.amazon.com/welcomeomletter/b?node=86386266011> [<https://perma.cc/Y893-V3SQ>] (last visited Apr. 8, 2023).

51. See *Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical*, *supra* note 1.

52. Amazon's parallel acquisition of iRobot (also under FTC investigation) is another proposed purchase that further illustrates the company's eagerness to collect consumer data to feed the ever-growing Amazon machine. See Josh Sisco, *FTC Digs in on Amazon's iRobot Deal*, POLITICO (Sept. 2, 2022, 7:55 PM), <https://www.politico.com/news/2022/09/02/amazons-ftc-problem-keeps-growing-with-irobot-one-medical-probes-00054749> [<https://perma.cc/A6AR-Q2AK>].

53. See *Your Rights Under HIPAA*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated Jan. 19, 2022), <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html#:~:text=We%20call%20the%20entities%20that%20must%20follow%20the%20HIPAA%20regulations%20%22covered%20entities.%22> [<https://perma.cc/2RY2-5JDT>]. A covered entity under 45 CFR § 160.103 includes "a health plan, a health care clearinghouse, a health care provider who transmits any health information in electronic form in connection with a transaction covered" under Title 45. Covered entities can engage with business associates, which includes health information organizations, subcontractors, and other individuals who "provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information." *Covered Entities and Business Associates*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated June 16, 2017), <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html> [<https://perma.cc/NX5Q-ZF27>].

54. See *Notice of HIPAA Privacy Practices*, ONE MEDICAL (last updated Oct. 17, 2022), <https://www.onemedical.com/hipaa/> [<https://perma.cc/4R6Q-PEKC>]; see also *ILife Healthcare Inc. Privacy Policy*, ONE MEDICAL (last updated Nov. 3, 2022), <https://www.onemedical.com/privacy/> [<https://perma.cc/87UG-HK23>].

55. *Id.*

Medical] may use [a patient's] PHI to conduct quality analysis, data aggregation, review and improve our services and the care [patients] receive and to provide training.”⁵⁶ The broad language used here signals patient health information is already being used by One Medical in a manner that is beyond the reach of HIPAA protection.

With the announcement of the completed merger, One Medical and Amazon released a statement where they noted HIPAA “governs what One Medical, *Amazon, and others* can do with Protected Health Information . . . information like medication history, medical conditions, and treatment information.”⁵⁷ This language implies that Amazon sees itself not as a covered entity, but as a “business associate” which now has access to protected health information generated by a covered entity.⁵⁸ While the “business associate” designation grants access, and One Medical’s current HIPAA Privacy Policy uses broad language that technically still covers patient health information and data under HIPAA, it’s important to note that coverage does not equal responsible regulation.

B. Big Tech Data Collection—Beyond the Scope of HIPAA

Health information generated within a clinical entity is confined by HIPAA privacy provisions and treated differently than health information created outside of a traditional medical environment. Personal health data generated by Amazon customers, and by Big Tech users in general, falls outside the scope of HIPAA protection.⁵⁹ For example, when individuals use Amazon to purchase allergy medicine, pregnancy tests, or other health-related products, those interactions are not covered by HIPAA, and Amazon can use these data points to expand its business in the health services space.⁶⁰ In addition, Amazon’s access to this information provides insight into a customer’s demographic profile, which can influence how Amazon markets health products to customers.⁶¹ The type of data collected is health related but is customer generated and not created or provided within a clinical entity under HIPAA purview.⁶²

56. *Id.*

57. See *One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, *supra* note 2.

58. See 45 C.F.R. § 160.103 (2019); see also *Covered Entities and Business Associates*, *supra* note 53.

59. See Health Breach Notification Rule, 16 C.F.R. § 318 (2009), <https://www.ftc.gov/legal-library/browse/federal-register-notice/health-breach-notification-rule-final-rule> [<https://perma.cc/9HBR-458Q>] (“[Some] web-based entities that collect consumers’ health information . . . are not subject to the existing privacy and security requirements of the Health Insurance Portability and Accountability Act.”).

60. See Ryan Mueller, *Big Data, Big Gap: Working Towards a HIPAA Framework that Covers Big Data*, 97 IND. L. J., 1505, 1516-17 (2022).

61. Professor Barbara Kahn acknowledges the influence of customer insights acquired from data interactions and how those interactions influence “selling all types of different services and content” to customers. See *Is Amazon Getting Too Big?*, KNOWLEDGE AT WHARTON (May 20, 2019), <https://knowledge.wharton.upenn.edu/article/amazon-too-big/> [<https://perma.cc/K3W7-66ZZ>].

62. See Cohen, *supra* note 3.

C. Where HIPAA Falls Short, the FTC Act Steps in

Recognizing the gap in regulation over this type of user-generated health data, the HHS Office of Civil Rights, in conjunction with the FTC, issued a report in 2016 on the “gaps in oversight between HIPAA-covered entities that collect health data from individuals and those that are not regulated by HIPAA.”⁶³ As affirmed in the HHS report, the FTC Act is currently “the primary federal statute applicable to the privacy and security practices of businesses that collect health information where those entities are not covered by HIPAA.”⁶⁴ Thus, where HIPAA falls short, Section 5 of the FTC Act and the Health Breach Notification Rule provide gap fillers.⁶⁵ Section 5 of the FTC Act specifically prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.”⁶⁶ Thus, when tech companies issue privacy policies promising non-disclosure of sensitive health information but violate those policies, the FTC can step in and enforce their authority over these “deceptive acts or practices” under Section 5.

For example, the Federal Trade Commission recently issued a complaint against Flo Health, a reproductive health app, for the misuse of their users’ sensitive health information and for privacy misrepresentations.⁶⁷ The company had claimed since 2016 that sensitive user information would not be disclosed to third parties, and only certain tech companies (specifically, Facebook(now Meta), Google, and Fabric) would receive anonymized data.⁶⁸ Then in 2019, the Wall Street Journal published an article revealing how Flo Health shared its users’ *identifiable* information with Facebook “for its own research and development purposes.”⁶⁹ In January 2021, Flo Health came to a settlement with the FTC and agreed to notify users of the privacy breach; receive consent from all users prior to sharing their health information moving forward; and conduct a review of all internal privacy practices.⁷⁰

As evidenced above, Section 5 authority provides some regulation over misuse of sensitive health information for entities not covered by the HIPAA umbrella. One drawback to Section 5 authority, however, is timing.

63. Dr. Karen B. De Salvo & Jocelyn Samuels, *Examining Oversight of the Privacy & Security of Health Data Collected by Entities Not Regulated By HIPAA*, HEALTH IT BUZZ (June 19, 2016), <https://www.healthit.gov/buzz-blog/privacy-and-security-of-ehrs/examining-oversight-privacy-security-health-data-collected-entities-not-regulated-hipaa/> [<https://perma.cc/8SFB-LK6L>].

64. *Id.*

65. *Id.*; see also Health Breach Notification Rule, *supra* note 59.

66. 15 U.S.C. § 45 (2006).

67. See Complaint, In the Matter of Flo Health, Inc., FTC Docket No. C-4747 (June 17, 2021), https://www.ftc.gov/system/files/documents/cases/192_3133_flo_health_complaint.pdf [<https://perma.cc/984Z-NFR8>].

68. *Id.* at 3.

69. *Id.* at 5.

70. See Press Release, *FTC Finalizes Order with Flo Health, a Fertility-Tracking App that Shared Sensitive Health Data with Facebook, Google, and Others*, FED. TRADE COMM’N (June 22, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-finalizes-order-flo-health-fertility-tracking-app-shared-sensitive-health-data-facebook-google> [<https://perma.cc/6RZT-UNNG>].

Generally, Section 5 enforcement is reactive, coming after a violation. Section 5 authority provides a capable defense when an unfair or deceptive practice is uncovered. But what about the need for prophylactic measures? That is, can the FTC use its “extensive data protection enforcement authority” to implement a privacy regulation over sensitive health data acquired at the pre-merger stage?⁷¹ Given the FTC is currently the “established . . . U.S. data protection authority,” this Note contends the FTC should exercise its “enforcement powers” to fill this regulatory gap at the pre-merger stage, specifically for non-clinical entities acquiring sensitive health data from healthcare entities.⁷²

IV. U.S. PRIVACY LAW AND ANTITRUST LAW

The General Data Protection Regulation (GDPR) is the EU’s comprehensive data security and privacy law, but unlike the EU, the U.S. does not have a federal data privacy law in place.⁷³ Instead, there are privacy acts regulating various discrete types of information, a few being data housed within government agencies, personal financial information held by financial institutions, data collected from users under the age of thirteen, and as discussed *supra* Section III, health information used by healthcare and health insurance entities.⁷⁴ The amalgam of various privacy laws “leave[s] consumers vulnerable to privacy harms.”⁷⁵

Only three states have passed consumer privacy laws: California, Colorado, and Virginia, with California’s law being the most robust.⁷⁶ The California Consumer Privacy Act (CCPA) provides consumers with broad rights regarding the protection of their personal data, and imposes data security obligations on businesses.⁷⁷ The Virginia Consumer Data Protection Act (VCDPA) provides, “consumers the right to access their personal data and request that it be deleted by businesses.”⁷⁸ However, unlike the CCPA,

71. Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2246 (2015).

72. *Id.* at 2266; see also *Statement of Commissioner Alvaro M. Bedoya Joined by Commissioner Rebecca Kelly Slaughter Regarding Amazon.com, Inc.’s Acquisition of iLife Healthcare, Inc.*, *supra* note 41.

73. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES: WIRECUTTER (Sept. 6, 2021), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/> [https://perma.cc/T2NZ-5RP3].

74. See The Privacy Act of 1974, 5 U.S.C. § 552a; Gramm-Leach-Bliley Act, 15 U.S.C. 6801; Children’s Online Privacy Protection Rule, 15 U.S.C. §§ 6501-6505; Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (1996).

75. See Hartzog & Solove, *supra* note 71, at 2266.

76. See Klosowski, *supra* note 73.

77. See California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100-1798.199 (West 2023); see also Klosowski, *supra* note 73.

78. *What Is the Virginia Consumer Data Protection Act (VCDPA)?*, BLOOMBERG L. (Dec. 28, 2022), [https://pro.bloomberglaw.com/brief/what-is-the-vcdpa/#:~:text=CCPAVCDPA%20Ambiguities-What%20is%20the%20Virginia%20Consumer%20Data%20Protection%20Act%20\(VCDPA\)%3F,targeted%20advertising%20and%20sales%20purposes](https://pro.bloomberglaw.com/brief/what-is-the-vcdpa/#:~:text=CCPAVCDPA%20Ambiguities-What%20is%20the%20Virginia%20Consumer%20Data%20Protection%20Act%20(VCDPA)%3F,targeted%20advertising%20and%20sales%20purposes) [https://perma.cc/86U6-VAUG].

the VCDPA leans heavily towards placating the needs of large tech companies, and this is not by accident.⁷⁹ Despite differences in the two state privacy acts, they are examples of privacy regulation taking shape.

U.S. laws governing the use of data belonging to most U.S. consumers provide inadequate protection and regulation. The current federal agency that is best positioned to be “the leading regulator of privacy” remains the FTC.⁸⁰ Established in 1914, the FTC’s purpose is to protect consumers from unfair methods of competition, unfair or deceptive acts or practices, and to prevent the concentration of power, thereby preserving competition in the markets.⁸¹ As discussed above, Section 5 of the FTC Act gives the FTC jurisdiction to pursue data security enforcement actions, and although “modest” in cases pursued, the FTC has established its authority as “being the U.S. data protection authority.”⁸²

A. Consider the Data

In addition to the FTC Act, the other principal antitrust laws are the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Hart-Scott-Rodino Act. The earliest U.S. antitrust law, the Sherman Act of 1890, prohibits contracts in restraint of trade and conduct by a single entity that unreasonably restrains competition by creating or maintaining monopoly power.⁸³ The Clayton Act, introduced in 1914, prohibits mergers and acquisitions where the effect of the merger may substantially lessen competition or tends to create a monopoly.⁸⁴ In 1936, the Robinson-Patman Act was enacted to prohibit price discrimination on the part of large buyers.⁸⁵

Then, in 1976, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) was passed to implement a “federal premerger notification program, which provides the FTC and the Department of Justice with

79. The “first cut” of the state privacy bill was presented to Virginia Senator David Marsden by a lobbyist for Amazon, and other major tech and financial institutions were eager “to have a hand in shaping the legislation” as well. It is not surprising Amazon, whose second headquarters are located in northern Virginia, wanted to assert its interests. However, drafting the text of state legislation once again demonstrates Amazon’s tendency to push boundaries. See Emily Birnbaum, *From Washington to Florida, Here Are Big Tech’s Biggest Threats from States*, PROTOCOL (Feb. 19, 2021), <https://www.protocol.com/policy/virginia-maryland-washington-big-tech> [<https://perma.cc/P5JU-QQ4C>].

80. Hartzog & Solove, *supra* note 71, at 2267.

81. See Federal Trade Commission Act, 15 U.S.C. § 45 (2012); see also Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 2-5 (2003).

82. See Hartzog & Solove, *supra* note 71, at 2266; see also FTC Data Security Actions Tracker, Practical Law Practice Note Overview W-027-3592, <https://us.practicallaw.thomsonreuters.com/w-027-3592> [<https://perma.cc/3SZR-F5UA>].

83. See Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7; see also U.S. Antitrust Laws: Overview, Practical Law Practice Note Overview 9-204-0472, <https://us.practicallaw.thomsonreuters.com/9-204-0472> [<https://perma.cc/4PZQ-QDGH>].

84. See Clayton Antitrust Act, 15 U.S.C. §§ 12-27; see also U.S. Antitrust Laws: Overview, *supra* note 83.

85. See Robinson-Patman-Act of 1936, 15 U.S.C. § 13(a)-(f); see also U.S. Antitrust Laws: Overview, *supra* note 83.

information about large mergers and acquisitions before they occur.”⁸⁶ The HSR Act has a three-part jurisdictional test,⁸⁷ and companies considering mergers that meet this test must notify the FTC and Antitrust Division of the Department of Justice (DOJ) of the proposed transaction prior to finalization or face civil penalties.⁸⁸ Often, “[t]rying to undo a merger which is ultimately declared illegal is frequently compared to attempting to unscramble an egg.”⁸⁹ Thus, pre-merger notification gives the relevant agencies time to identify potential antitrust violations that could result from the merger.⁹⁰ Agencies have a set waiting period during which they must conclude their review, or issue further requests for information which extends the clock.⁹¹

An amended version of the Hart-Scott-Rodino Act could serve to address the collection of personal data by major tech companies. The FTC’s Section 5 authority over unfair and deceptive practices makes it well-positioned to assess privacy practices for data-heavy business models and the potential harms generated by mergers between data-heavy companies. Section 5 is “intentionally broad” in its language,⁹² and it seems likely the FTC already considers data use in its merger reviews.⁹³

86. *Premerger Notification Program*, FED. TRADE COMM’N: ENF’T <https://www.ftc.gov/enforcement/premerger-notification-program> [<https://perma.cc/7RU4-X5ND>] (last visited Jan. 21, 2023).

87. If no exemptions apply to a proposed transaction, then HSR reportability requirements include a commerce test, size-of-person test, and size-of-transaction test. The first requirement, the commerce test, is met if the transacting parties engage in conduct affecting commerce—this is most often easily satisfied. The size-of-transaction test is met when “a transaction’s value exceeds \$111.4 million,” and the size-of-person test is triggered when the “size-of-transaction is greater than \$111.4 million and no more than \$445.5 million.” Transactions over \$445.5 million are automatically subject to review under the HSR Act. *See Determining Hart-Scott-Rodino Applicability*, Practical Law Practice Note 9-516-9560, <https://us.practicallaw.thomsonreuters.com/9-516-9560> [<https://perma.cc/C7L4-B97J>] (last visited Apr. 8, 2023).

88. *See What Is the Premerger Notification Program? An Overview*, FED. TRADE COMM’N: PREMERGER NOTIFICATION OFF. (last revised Mar. 2009), <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf> [<https://perma.cc/AJU7-6C67>]; *see also* U.S. v. Canon Inc., No. 1:19-cv-01680-TSC, 2019 WL 5793200, at *1 (D.D.C. Oct. 8, 2019) (finding defendants acted in violation of the HSR Act and were ordered to pay a \$5 million civil penalty and implement an internal HSR Act compliance program).

89. Earl W. Kintner, Joseph P. Griffin & David B. Goldston, *Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 12 (1977).

90. *See What Is the Premerger Notification Program? An Overview*, *supra* note 88, at 1.

91. *See* Lee Van Voorhis et al., *Hart-Scott-Rodino Act: Overview*, Practical Law Practice Note, [https://www.westlaw.com/9-383-6234?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/9-383-6234?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) [<https://perma.cc/2HJU-BCBC>] (last visited Jan. 27, 2023).

92. Hartzog & Solove, *supra* note 71, at 2246.

93. The FTC evaluating the use of data in mergers and acquisitions in their review for potential antitrust violations is evidenced in Senator Klobuchar’s letter to the FTC urging them to “consider the role of data” as they investigated the Amazon-One Medical proposed merger. *See Klobuchar Urges Federal Trade Commission to Investigate Amazon’s Proposed Acquisition of One Medical*, *supra* note 6. Further, after the transaction was completed, an FTC spokesperson stated the investigation of “Amazon’s acquisition of One Medical continues” due to the “possible harms to consumers that may result from Amazon’s control and use of sensitive consumer health information held by One Medical.” *See* Fung, *supra* note 25.

B. The CCPA Gives Consumers More Control

An existing law that is instructive for how sensitive health data should be regulated and protected is the California Consumer Privacy Act.⁹⁴ The CCPA partially went into effect on January 1, 2020, with full enforcement beginning six months later.⁹⁵ On November 3 of that same year, voters approved to expand the law's scope.⁹⁶ The CCPA "gives consumers more control over the personal information that businesses collect about them."⁹⁷ Specifically, the CCPA gives consumers:

The *right to know* about the personal information a business collects about them and how it is used and shared; the *right to delete* personal information collected from them (with some exceptions); the *right to opt-out* of the sale or sharing of their personal information; and the *right to non-discrimination* for exercising their CCPA rights.⁹⁸

In addition to these four codified consumer privacy rights, the passage of Proposition 24 gave California consumers the "right to correct" incorrect personal information held by a business and the "right to limit the use and disclosure of sensitive personal information."⁹⁹ These provisions have positioned California as the "nation's de facto . . . tech and data regulator."¹⁰⁰ One could argue that residents of California have far greater protection over their private data than those living in the other 49 states.

One Medical's privacy policy is an example of how sensitive data is regulated under the CCPA. The policy contains a section specifically for California residents and provides patients with a summary of the "[p]ersonal information collected, the sources of collection, the business/commercial purpose for collecting or 'sharing' personal information, and the categories of third parties to whom [One Medical] discloses Personal Information."¹⁰¹ In addition, the company makes both a "right to know" and "right to deletion" request form available to California patients as obligated under California

94. See Cal. Civ. Code § 1798.100 (West 2020).

95. See Maria Korolov, *California Consumer Privacy Act (CCPA): What You Need to Know to be Compliant*, CSO ONLINE (July 7, 2020), <https://www.csoonline.com/article/565923/california-consumer-privacy-act-what-you-need-to-know-to-be-compliant.html> [<https://perma.cc/9VLT-3VHD>].

96. *CCPA Releases New Modified Proposed CPRA Regulations*, HUNTON PRIV. BLOG (Nov. 7, 2022), <https://www.huntonprivacyblog.com/2022/11/07/cpa-releases-new-modified-proposed-cpra-regulations/> [<https://perma.cc/DZU2-BXLY>].

97. *California Consumer Privacy Act*, OFF. OF THE CAL. ATT'Y GEN. (last updated on Jan. 20, 2023), <https://oag.ca.gov/privacy/ccpa> [<https://perma.cc/T7QE-3QBG>].

98. *Id.* (emphasis added).

99. *Id.*

100. Natasha Singer, *Charting the "California Effect" on Tech Regulation*, N.Y. TIMES (Oct. 12, 2022), <https://www.nytimes.com/2022/10/12/us/california-tech-regulation.html> [<https://perma.cc/M52U-BVQC>].

101. *Life Healthcare Inc. Privacy Policy: Section XI*, ONE MEDICAL (last updated Sept. 13, 2023), <https://www.onemedical.com/privacy/> [<https://perma.cc/BUP9-3NKR>].

Civil Code Section 1798.120.¹⁰² Here, we see the CCPA at work: (1) patients are given an opportunity to know how their sensitive information is being handled and (2) are given the right to have that information deleted.¹⁰³ Boiled down, these are basic data privacy rights that should extend to all and not just to those who reside in the Golden State.¹⁰⁴

In short, the CCPA provides an appropriate blueprint to follow when thinking through the parameters for how consumers should be able to regulate the way in which their data, specifically sensitive data, is used. An FTC enforcement mechanism built with aspects of the CCPA in mind is one approach for engineering a regulatory structure around data acquired through Big Tech transactions that HIPAA does not cover. Specifically, an amendment to the HSR Act's reportability requirements could include a "sensitive data" test, which could implement the CCPA's four codified rights into the pre-merger process. Doing so would ensure consumers know that their data is being acquired and would give them more control over how it is used, if at all.

V. ANALYSIS AND RECOMMENDATION

A. *The Amazon Effect*

When major technology firms, such as Amazon, come into possession of sensitive health data via acquisition generated from the acquiree's consumer base, it is irresponsible for lawmakers and regulatory agencies to look the other way.¹⁰⁵ When transactions of this magnitude and sensitivity are proposed, consumers should, at the very least, be informed about how their data could be used and given the right to opt out of their data being used altogether. One approach for implementing good governance over the use of consumer data by major tech firms is to enact regulation at market entry.

Drawing upon the CCPA, the following section will broadly outline the elements this type of regulation would include and who would hold enforcement authority. Regulating sensitive data obtained through mergers and acquisitions under a revised HSR Act would put more boundaries around how technology companies use patient health data, with key aspects resembling basic procedural due process elements: notice and an opportunity to respond.

102. *1Life Healthcare Inc. Privacy Policy: Section XI(b), Exercising Your Rights*, ONE MEDICAL (last updated Sept. 13, 2023), <https://www.onemedical.com/privacy/> [<https://perma.cc/BUP9-3NKR>]; see Privacy Portal, ONE MEDICAL, <https://privacyportal-cdn.onetrust.com/dsarwebform/6f62a1b4-fb5e-4a72-bfc3-fd066b342a4a/3569fa78-512c-455d-8c53-2883ea88d733.html> [<https://perma.cc/TS3L-V76A>] (last visited Aug. 18, 2023).

103. See *1Life Healthcare Inc. Privacy Policy: Section XI*, *supra* note 101.

104. See Laura Hautala, *California's New Privacy Rights Could Come to Your State, Too*, CNET (Jan. 3, 2020, 10:04 AM), <https://www.cnet.com/news/privacy/californias-new-ccpa-privacy-rights-could-come-to-your-state-too/> [<https://perma.cc/CCR7-ZJ9M>].

105. See *The World's Most Valuable Resource Is No Longer Oil, but Data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> [<https://perma.cc/8E6N-A3KG>].

Amazon has built its brand on convenience and efficiency, and the Amazon effect could, in fact, substantially improve the reorganization of healthcare delivery. This argument, however, could be made for every market Amazon enters, and it has already entered quite a few.¹⁰⁶ Knowing Amazon will continue to innovate, the relevant question is how to best govern a data-powered company as it enters the trusted space that is healthcare.¹⁰⁷ How can the objectives of Amazon, as well as those of other major tech firms likely to follow suit, align with the privacy concerns held by many consumers?

Amazon's attempt to streamline the healthcare experience may be welcome news to some, regardless of the company's data policies. Meanwhile, for others, the merger with One Medical pushes a privacy boundary perhaps a bit too far. The proposed recommendation aims to address the needs of a broad audience.

B. Elements of a Data Privacy Standard in the Age of Big Tech

One advantage Amazon has over other major tech firms is the fact that it “[hasn’t] violated consumer trust yet,”¹⁰⁸ or at least in ways comparable to how other firms have violated that trust.¹⁰⁹ Barbara Kahn, Professor of Marketing at The Wharton School, stated in an interview that even though current Amazon customers know the company has troves of their personal information, customers “haven’t seen [Amazon] do anything inappropriate with that information.”¹¹⁰ There is still the opportunity for error. Rather than passively anticipating potential harm, it is time to proactively implement substantive regulations to mitigate risks.

1. Privacy Regulation by Way of Pre-Merger Review

As mentioned *supra* Section II.C, one of the most concerning aspects of the Amazon-One Medical merger was the lack of notice to existing One Medical patients.¹¹¹ A One Medical member wrote in response to the proposed merger: “After a broadly positive experience with One Medical, I cancelled [my] membership today. I do not trust Amazon to *act in good faith* with my health data.”¹¹² Instead of trying to hide information from customers,

106. See *supra* Section II.A.

107. See *Is Amazon Getting Too Big?*, *supra* note 61.

108. *Id.*

109. See, e.g., the Cambridge Analytica scandal. See Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [<https://perma.cc/WX5A-YVLP>]; see also Douglas MacMillan & Robert McMillan, *Google Exposed User Data, Feared Repercussions of Disclosing to Public*, THE WALL ST. J. (Oct. 8, 2018), <https://www.wsj.com/articles/google-exposed-user-data-feared-repercussions-of-disclosing-to-public-1539017194> [<https://perma.cc/7KJ4-CT6B>].

110. See *Is Amazon Getting Too Big?*, *supra* note 61.

111. See Levy, *supra* note 37.

112. *Id.* (emphasis added).

best practice requires bringing customers into the fold.¹¹³ Companies should gain customer trust by practicing transparency and making their data use practices known. They should provide customers with the option to decide on how their data can or cannot be used, and to do this, Amazon and other companies could use a little boost from the FTC.

If data practices are not readily disclosed to customers or are deceptive, the FTC can step in to create a new norm *before* Section 5 authority is triggered. In *The FTC and The New Common Law of Privacy*, Professors Daniel J. Solove and Woodrow Hartzog acknowledge “[o]nce [data privacy] standards become well established, there is an expectation that companies follow them” and “[m]oreover, people begin to expect that these standards are followed, and a large part of privacy involves managing people’s expectations.”¹¹⁴ To get here, the FTC, by way of the HSR Act, can implement a data privacy standard through the pre-merger review process.

2. Data Integration Within the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Act, combined with aspects of Section 5 authority, can be the vehicle by which data regulation in the age of Big Tech gets traction. Apart from identifying mergers amounting to combinations in restraint of trade, the HSR Act pre-merger review process also aims to identify mergers that would cause harm to consumers.

Under the HSR Act, companies who satisfy specific criteria must report their plans to merge to “enforcement agencies before consummating the transaction.”¹¹⁵ HSR Act rules for reportability include a commerce test, size-of-transaction test, and size-of-person test.¹¹⁶ Integrating a “sensitive data” test as part of the reportability requirements in the HSR Act would be one way to shape data regulation early on, before more and more major tech firms enter markets where sensitive information is collected. Borrowing the CCPA’s codified right to know, right to delete, right to opt-out, and right to non-discrimination could be data privacy requirements companies must have in place or must make available to their customers upon completion of a merger.

Amending the HSR Act threshold requirements to include a “sensitive data” test would ensure that companies are aware their acquisition of sensitive data and their corresponding consumer protections (or lack thereof) for this type of data would undergo FTC review. Conversely, consumers could have

113. See Rebecca Pifer, *Why Regulators Didn’t Challenge Amazon-One Medical Deal, Despite Data Concerns*, HEALTHCARE DIVE (Mar. 1, 2023), <https://www.healthcaredive.com/news/why-regulators-didnt-challenge-amazon-one-medical-deal-data/643316/> [https://perma.cc/852L-SF9E].

114. Daniel J. Solove & Woodrow Hartzog, *The FTC and The New Common Law of Privacy*, 114 COLUM. L. REV. 583, 662 (2014).

115. See *What Is the Premerger Notification Program? An Overview*, *supra* note 88, at 2.

116. See *Determining Hart-Scott-Rodino Applicability*, *supra* note 87; see also *Steps for Determining Whether an HSR Filing is Required*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing> [https://perma.cc/8JAN-KXKK] (last visited Mar. 5, 2023).

some comfort in knowing the potential sharing of their sensitive data between firms looking to merge would not go unchecked.

3. Review of Existing Privacy Policies & Statements

In the 1965 case of *Atlantic Refining Co. v. Federal Trade Commission*, the Supreme Court praised Congress's "foresight" in keeping Section 5 authority broad so it could be nimble in responding to evolving "business ingenuity and legal gymnastics."¹¹⁷ In the instant case, the FTC should rely on its broad Section 5 authority to examine Amazon and One Medical's existing privacy policies and press statements for misleading privacy representations and the potential to misuse patient health information.

On February 22, 2023, with the merger completed, Amazon and One Medical released a statement hailing the partnership as a way to deliver "a more human health care experience."¹¹⁸ Remarkably, the language in one of their responses to a frequently asked question (FAQ) about the protection of private health information states HIPAA "governs what One Medical, Amazon, and others can do with Protected Health Information."¹¹⁹ However, in a previous blog post, the CEO of One Medical stated, "[o]nce the transaction closes, One Medical customers' HIPAA Protected Health Information will be handled *separately* from other Amazon business, as required by law."¹²⁰ Upon review, the threshold question is why Amazon is now included as an entity governed by HIPAA, whereas previously, One Medical implied Amazon would not have access to protected health information upon completion of the deal.¹²¹ The second question is who does "and others" include?

At first glance, the statements released by Amazon and One Medical are just that—statements—and they contradict one another. The response to the FAQ does not provide a link to an updated privacy policy that further elaborates on their response or even a placeholder stating an updated policy is forthcoming.¹²² The merger between the two companies was met with skepticism,¹²³ yet in the seven months between proposal and completion, it appears no action was taken to meaningfully address privacy concerns. Absent FTC review, the sharing and use of protected health information

117. *Atl. Refin. Co. v. Fed. Trade Comm'n*, 381 U.S. 357, 367 (1965).

118. *See One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, *supra* note 2.

119. *Id.* (emphasis added).

120. *See Rubin*, *supra* note 37 (emphasis added).

121. *Compare One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, *supra* note 2 (now including Amazon under HIPAA coverage along with One Medical) *with Rubin*, *supra* note 37 (emphasis added) (previously stating customer's protected PHI would be "handled separately from other Amazon business").

122. *See One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, *supra* note 2.

123. *See Fowler*, *supra* note 4; *Klobuchar Urges Federal Trade Commission to Investigate Amazon's Proposed Acquisition of One Medical*, *supra* note 6; *Levy*, *supra* note 37.

between the two companies is left unchecked.¹²⁴ Pursuant to Section 5 authority, the FTC should review existing privacy policies against statements made by Amazon and One Medical as they seem to be at odds with one another. The discrepancy could be an innocuous oversight; instead, it seems deceptive. The contradicting statements read as though, at the outset, the companies promised to keep sensitive health data siloed and have now relented on that promise.

4. Notice and Customer Response

The lack of transparency around the Amazon-One Medical merger suggests the companies were trying to downplay the merger and, thereby, potentially not acting in good faith. Companies have valid reasons to conduct transactions behind closed doors, but this transaction dealt with individuals' personal and private health information.¹²⁵ The lack of direct notice to existing One Medical patients about who might take over ownership of their doctor's office is a significant violation of their patients' trust.¹²⁶ Had One Medical directly notified existing patients about the proposed transaction, patients might have been less alarmed and skeptical about the merger. To regain and keep their patients' trust, Amazon and One Medical needed to communicate their intentions and spell out how exactly sensitive health information would be used and protected within the Amazon-One Medical ecosystem.¹²⁷

To fill this notice gap, under an amended HSR review process, the FTC could implement a default pre-merger rule requiring companies involved in sharing sensitive health data to notify existing patients, giving them the opportunity to decide how they want their data used, if at all. As discussed *supra* Section IV.B, One Medical provides members in California with the option of knowing how their data is used.¹²⁸ The notice and response practice is already in place. Extending these fundamental rights—notice and opportunity to consent—to existing members outside of California and those who become members under the Amazon-One Medical deal would address data misuse concerns.¹²⁹

As a baseline, a default rule—inspired by the CCPA—would mandate merging companies to build into their privacy practices three foundational rights: a consumer's right to know, the right to opt-out, and the right to data

124. See *Statement of Commissioner Alvaro M. Bedoya Joined by Commissioner Rebecca Kelly Slaughter Regarding Amazon.com, Inc.'s Acquisition of 1Life Healthcare, Inc.*, *supra* note 41.

125. See Fowler, *supra* note 4.

126. See Levy, *supra* note 37 (“The company said nothing to provide One Medical customers with any comfort, and there was no conference call discussing the acquisition, as is customary with many large transactions.”).

127. See Pifer, *supra* note 113, at 19.

128. See *1Life Healthcare Inc. Privacy Policy: Section XI*, *supra* note 101.

129. See Pifer, *supra* note 113 (noting Amazon can “mitigate” data misuse concerns by “communicating privacy policies or consent for data use in clear language”).

deletion.¹³⁰ These rights are borne out of procedural due process.¹³¹ A notice requirement, especially in the context of clinical entities merging with non-clinical entities, is of heightened importance. Consumers should be given appropriate notice about how their data is being used and afforded the opportunity to opt out of personal data collection or have the option of deleting their data altogether.

5. Additional Enforcement Actions

A final recommendation for an amended pre-merger review process would involve incorporating the FTC's existing Health Breach Notification Rule.¹³² Under the current rule, "vendors of personal health records and related entities [must] notify consumers following a breach involving unsecured information."¹³³ In the Flo Health example discussed *supra* Section II.C, one of the agreed upon remedies required the company to notify customers of the data breach and the subsequent disclosure of user's sensitive health data.¹³⁴ Incorporating this rule into an amended HSR Act review process would link the breach notice requirement to data-intensive transactions between major tech firms.

In summary, the tools for safeguarding and regulating sensitive health data exist but need to be actively employed. The FTC holds substantial enforcement authority and is well-positioned "to take . . . bolder steps toward developing . . . a meaningful, and broad approach to regulating privacy in the United States."¹³⁵ The CCPA is one example of an articulate state privacy law. Including the CCPA's privacy rights in an amended HSR Act is one approach to regulate sensitive health data acquired by major tech firms entering the health services sector prior to a merger.

VI. CONCLUSION

As consumers, we enter e-commerce spaces and navigate mobile apps with the expectation that our data is collected; we place our trust in the privacy policies we click on and agree to.¹³⁶ But agreeing to have our most sensitive form of data—personal health data—shared between a clinical entity and a massive tech company is unsettling for some. The Amazon-One Medical merger is likely the start of many similar transactions, ones where Big Tech moves into spaces it has not previously occupied. As major tech firms move

130. See Cal. Civ. Code § 1798.100 (West 2020).

131. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) (finding "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money").

132. See Health Breach Notification Rule, 16 C.F.R. § 318.1 (2009).

133. *Id.*

134. See *FTC Finalizes Order with Flo Health, a Fertility-Tracking App that Shared Sensitive Health Data with Facebook, Google, and Others*, *supra* note 70 ("As part of the settlement, Flo Health must notify affected users about the disclosure of their health information and instruct any third party that received users' health information to destroy that data.").

135. See Solove & Hartzog, *supra* note 114, at 676.

136. *Id.* at 667.

to consolidate services, consumer data must be handled responsibly. Companies must work to build systems consumers can trust, where they know their data is collected and managed ethically, and where transparent privacy practices are in place. Likewise, lawmakers must hold companies responsible for their use of data and work to create substantive regulations to prevent firms from falling short.