UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER
In the Matter of FTC vs. Facebook
July 24, 2019

Introduction

For years, when Facebook asked you "who do you want to see your post?" and you chose to share your information only with your "friends," Facebook provided that data not only to your friends but also to any of the millions of third-party apps that those friends used.[1]

This was precisely the type of misleading conduct that the Federal Trade Commission's 2012 order sought to prevent. Yet evidence suggests that Facebook's practices violated the order early and often. In April 2014, Facebook's CEO and founder, Mark Zuckerberg, publicly assured Facebook users that third-party access to "friend" data would stop. It did not. One of the many beneficiaries of this continued access to third-party friend data for more than a year after Mr. Zuckerberg's announcement was the personality quiz app that funneled information to Cambridge Analytica.

The complaint filed today alleges continuous law violations by Facebook: deceptive privacy settings, failure to maintain safeguards over third-party access to data, serving ads by using phone numbers provided to Facebook for the purpose of account security, and lying to certain users that its facial recognition technology was off by default, when in fact it was on. The evidence the Commission amassed in its investigation more than justified initiating litigation against Facebook and Mr. Zuckerberg alleging violations of the Commission's order.

gross annual revenue increased from $5 billion to over $55 billion. Facebook's collection and use of personal data have grown in unprecedented, unchecked, and unseen ways.

Even though this settlement is historic, in order to support it I would have to be confident that its combined terms would effectively deter Facebook from engaging in future law violations and

wins on liability, the remedy imposed by the court might fall short of what could have been negotiated. Because litigation is resource-intensive, we must also be confident that going to court is an appropriate use of scarce agency resources and that such resources would not be better deployed to other enforcement efforts.

Even if the Commission is not ultimately successful through litigation in achieving a broader remedy than the defendant would accept in settlement negotiations, the process of public litigation and the potential of a finding of liability can help effectuate both specific and general deterrence.[6] Perhaps most importantly, as a steward of public dollars and the public trust, the government has an obligation to seek justice even if it is not guaranteed to achieve it.

In addition to these general principles, two additional factors are worth considering in how to resolve a civil penalty order violation case, such as this matter. First, the decision of whether to litigate is not left to the FTC alone under the law, because the agency does not have independent litigating authority for civil penalty cases. Second, it is difficult to estimate what relief a court is likely to grant because there is very little precedent for litigation of order violation allegations.

Specific Concerns in Civil Penalty Cases

The lack of independent litigating authority materially0la1 (d t)-2 (o)-10 (a)4 (a)sa (on of)3 (n de (m)

despite a long history of close collaboration on matters referred by the FTC,[11] the DOJ has the authority to pursue an outcome that departs from the FTC's recommendation, and the possibility of such a departure is an additional factor we must weigh. The Commission may understandably want to avoid the outcome in which we vote to pursue litigation but DOJ instead accepts a settlement on terms unacceptable to the FTC.

I appreciate this concern, but I do not believe the Commission should vote for an inadequate settlement because of a fear that our sister agency will take action we do not believe is in the public interest. We should endeavor to do the right thing even if our preferred course of action may be interrupted by the DOJ's doing the wrong thing.[12] We are accountable for our decisions, as DOJ is for theirs.

Specific Concerns in Order Violation Cases

get in court. We can escape this cycle by adhering to the principle that the Commission should not accept a settlement that does not adequately effectuate our goals even where a court might award less.

Individual Liability

In considering effective deterrence, the Commission grapples not only with whether to settle or litigate but also with the question of whether any individual executives at a firm should be assigned liability. As Commissioner Chopra and I wrote in a recent case, it is important for Commission investigations to gather evidence that will help us understand whether any individuals should be named in a complaint or settlement.[14]

Whether and when individual executives should be assigned liability in enforcement actions has been a topic of active debate in and around the Commission, including specifically with respect to the Facebook case. The Commission often names individual defendants in cases against small companies, but rarely—if ever—does so in the case of large, publicly traded companies.

When executives at large companies exercise control over decisions, including decisions to break the law, they should be held accountable the same way executives at smaller companies are. I believe the deterrence value of naming an individual defendant where the facts support doing so can be significant; the risk of liability can motivate both a named individual defendant and other executives in the market into ensuring a culture of compliance.

The Facebook Resolution

I endeavored to apply these principles to the decision of whether to accept the proposed settlement with Facebook over allegations that it violated its 2012 consent decree. I will not recite the facts before the Commission, other than to note that we had extremely compelling evidence of a series of significant, substantial order violations and law violations. In addition to the evidence the Commission reviewed against Facebook, I believe there was sufficient evidence to name Mr. Zuckerberg in a lawsuit.[15] The question, then, was how to proceed.

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[14] Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter In the Matter of Musical.ly Inc. (now known as TikTok Inc.), Fed. Trade Comm'n (Feb. 27, 2019), https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19_0.pdf

[15] Mr. Zuckerberg co-founded Facebook in 2004 and is Facebook's Chairman and Chief Executive Officer. Unlike most publicly traded companies, he also controls a majority of the company's voting shares. In that way, Facebook resembles the closely held corporations against which the Commission frequently pursues indiwyk mo'soundeivo(n)12.1ro4

Merits of Litigation

I believe the Commission should have voted to refer a complaint against Facebook and Mr. Zuckerberg to the Department of Justice in order to initiate litigation. I understand the risk that the DOJ might have assumed responsibility for the case and possibly settled it on terms less favorable in both scope and magnitude.

The law requires us to evaluate civil penalties in terms relative to the particular defendant and case, not relative to prior awards in other cases or on the basis of the absolute dollar value. Specifically, the law requires balancing five factors to determine an appropriate civil penalty amount for an order violation: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC.[20] None of these factors includes a calibration to prior penalty awards.

I understand the argument that we have no guarantee that a court would award as much, or anywhere close to as much, in civil penalties at the end of litigation. That is partially because we rarely litigate order-violation cases and therefore have a limited basis to assess likelihood of success.[21] In the absence of more detailed precedent about how courts would view an appropriate civil penalty award, we must evaluate the statutory factors ourselves.

In this case, at a minimum, four of the five factors—the injury to the public, the defendant's ability to pay, the desire to eliminate the benefits derived from the violations, and the necessity of vindicating the FTC's authority—all drive the conclusion that $5 billion is an insufficient civil penalty.[22]

Injury to the public can be difficult to quantify in monetary terms in the case of privacy violations. That said, I regard the injury to the public and the risk to institutions of our democracy to be quite substantial. Facebook's conduct that the Commission alleges violated the order also facilitated Cambridge Analytica's expropriation of data and manipulation of voters.

According to the complaint against Cambridge Analytica that the Commission filed today, Cambridge Analytica partnered with a Facebook application, the GSRApp, to access the Facebook platform and collect Facebook users' profile data from approximately 250,000 Facebook users who directly accessed the app, as well as over 50 million of the direct users' Facebook "friends."[23] The FTC alleges that the GSRApp obtained the direct users' consent through false and deceptive means.[24] But the app was able to access the "friend" data only because it was one of the apps that enjoyed continued access to such data well after Mr. Zuckn(r)3 5,bMCID 31 >>Be to accesation (s)-8i(da)4 (-2 (he)4e (l)-6 (af)t)-(l)-6 es3.9 2 afala a a /5er

well.[25] According to the Cambridge Analytica complaint, the GSRApp harvested Facebook profile data from direct users and their friends during the summer of 2014, and the app developer, Aleksandr Kogan, agreed to match this data with U.S. voter records and provide personality scores for these users and their friends.[26] This information was used to micro-target voters in eleven states ahead of the 2014 election.[27] Ten of those states had competitive Senate elections that year; partisan control of six of them, as well as control of the Senate itself, changed hands.[28]

I note the outcome of these elections to highlight the impact that sophisticated, manipulative micro-targeting can potentially have on any election and the ensuing injury to the public. Of course, we do not know with certainty whether and to what degree the targeting of political advertisements by Cambridge Analytica changed votes or outcomes of the races in the targeted states ended up with very narrow margins of victory and some had wide margins. But because the integrity of our electoral system lies at the very heart of our democracy, I am deeply concerned about the manipulation of election outcomes based on illicitly acquired data, and the facilitation—even if unintentional—of that manipulation.[29] The public deserves protection from this profound injury.

My colleagues in the majority note that civil penalties have exceeded $5 billion only in instances of serious environmental disaster or widespread financial fraud. I believe that the injury to the public from damaging the integrity of our elections is as serious if not more serious than environmental and financial harms because it threatens the very systems that stand to protect Americans from those harms. Concern over this fact pattern should be bipartisan; the manipulative tactics weaponized in favor of a particular party in one election can just as easily be turned against it in the next.

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[25] See, e.g. 9.1 bivoith [7(m)1 (e.[(b)4 (x)-8 (t.)]T4 411 1 Tf 0.25344 0.e f EMC BT 2nP <</MCID 6 >>BDC

Cambridge Analytica does not represent the entirety of the injury to the public that flowed from Facebook's order violations; we do not even know if it represents the majority of it. It is merely one specific and significant beneficiary of Facebook's violations. When we consider how many others might be out there, we should be even more concerned about public injury.

The next factor to consider is ability to pay, a question that comes up frequently with defendants who have limited assets. There is no question that Facebook has the assets to pay $5 billion. The

certain data with third parties; I believe that they should also apply to the sharing of all data between Facebook and owned affiliates, including Instagram and WhatsApp.

Finally, the order also fails to impose any substantive restrictions on Facebook's collection and use of data from or about users (and non-users). This failure, in addition to allowing Facebook to aggregate rich data stores across its platform unfettered, may exacerbate competition as well as privacy concerns. We should strive to ensure that all our enforcement efforts are cognizant of, and not inconsistent with, both our consumer protection and competition missions.

In sum, many of the problems identified in our investigation and in the related Cambridge Analytica investigation arose from the use of data beyond consumers' expectations or permissions to enhance Facebook's partnerships and therefore its bottom line. I believe that it is important and appropriate for the order to apply stringent limitations to how Facebook collects, uses, and shares data.

Transparency

Another important element that is missing from the order is public transparency. While the majority highlights the order provisions that provide Facebook management, its third-party assessor, and the Commission with greater insight into Facebook's privacy practices, the public remains entirely in the dark. Facebook should be required to publicly disclose: all categories of information that it collects about consumers and how it collects such information; the purpose and use for each collected category; how long each category is stored; and how consumers can access and delete their information. To help shine a light on how Facebook's data practices affect the market and to empower the millions of consumers who have been subject to those practices, increased transparency over Facebook's collection and use of data is critical.

The order should also require public disclosure of Facebook's biennial privacy assessments as well as information about its data privacy incident reports. The biennial privacy assessments will be provided to the Commission and are subject to release under the Freedom of Information Act. As in the Uber matter the Commission resolved last year, we can reasonably expect that these assessments will indeed be the subject of multiple FOIA requests, so it seems sensible to me that we proactively require their public release.[33] Of course, as I noted with respect to Uber, these assessments will provide only a partial picture of order compliance, but a partial picture is better than total opacity.

In addition to its privacy assessments, Facebook should be required to publicly disclose a summary of its privacy incident reports for each reporting period. There may be good reasons not to disclose each Covered Incident Report mandated under Part IX, but it is important for there to be some transparency around the number and type of Covered Incidents Facebook experiences. This summary should include how many Covered Incidents occurred, how many users were affected, what type of information was accessed, and how the company responded. Transparency serves an invaluable role in keeping companies accountable to their users and the public. There is a profound asymmetry with respect to Facebook's data collection: Facebook

[33] See Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Uber Technologies, Inc., Fed. Trade Comm'n (Oct. 26, 2018), https://www.ftc.gov/public-statements/2018/10/statement-commissioner-rebecca-kelly-slaughter-matter-uber-technologies.

knows almost everything about its users and their data, but users know very little about what Facebook does with that data. Users deserve to know more.

Liability Release

My discussion thus far has focused on what more could or should be added to the settlement; I turn now to what should be removed.

By far my biggest concern with the terms of the settlement is the release of liability, in particular the commitment that the order resolves "any and all claims that Defendant, its officers, and directors, prior to June 12, 2019, violated the Commission's July 27, 2012 order."[34] I am also uncomfortable with the inclusion of "officers and directors" in the release from "any [Section 5] claim known by the FTC."[35]

I would have preferred to name Mr. Zuckerberg in the complaint and in the order. I disagree with the decision to omit him now, and I strenuously object to the choice to release him and all other executives from any potential liability for their roles to date.

I am concerned that a release of this scope is unjustified by our investigation and unsupported by either precedent or sound public policy. To the contrary, in every recent major federal settlement, if there was a liability release, it was cabined to the offenses described in the complaint.[36]

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[34] Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 12, United States v. Facebook.

[35] Id.

[36] See, e.g.

1. Deepwater Horizon – The consent decree releases liability only for corporate entities and cabins the release to claims "arising from the Deepwater Horizon Incident," while reserving other claims, including those based on discharge of oil "outside the definition of Deepwater Horizon Incident." Consent Decree ¶¶ 61, 64, In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. filed Oct. 5, 2015), https://www.epa.gov/sites/production/files/2016-02/documents/deepwaterhorizon_cd.pdf.
2. Wells Fargo – The settlement limits release of liability only to conduct relating to "single-family residential FHA loans." See Stipulation and Order of Settlement and Dismissal with Prejudice at 3, ¶ 7, Attach. A ¶ 2, United States v. Wells Fargo Bank, No. 1:12-cv-07527-JMF (S.D.N.Y. filed Apr. 8, 2016), https://www.justice.gov/opa/file/839796/download.
3. CitiMortgage – The release of liability in the settlement is only with respect to "Covered Conduct" specified in the government's complaint, but expressly reserves liability "for conduct other than the Covered Conduct." Stipulation and Order of Settlement and Dismissal at 3, ¶¶ 6, 10, United States ex rel. [illegible]

Furthermore, many of those releases were accompanied by admissions of civil or criminal liability, which is entirely different from a settlement that explicitly disclaims liability.[37] Accordingly, in addition to being concerned about the appropriateness of the release in this case, I am very concerned about the precedent it will set for the agency.

Facebook's course of conduct also strongly counsels against this expansive release. Hardly a week passes without a news story revealing potentially illegal conduct by Facebook. To wait to resolve this case until we were aware of the entire universe of potential violations would be to wait forever. To be sure, not all news stories bear out violations upon further investigation. But I do not believe it is appropriate for the Commission to foreclose the possibility of that investigation.

It would be dramatically better and better grounded in precedent to release only the company itself and only with respect to liability under the order and Section 5 for the behavior described in the complaint.

Conclusion

Having walked through my analysis in detail, I return to where I began: The Commission should not have accepted this settlement and should instead have voted to litigate.

I understand the majority's argument in favor of the terms of the settlement, and I recognize the settlement's historic nature. But I do not share my colleagues' confidence that the order or the monetary penalty will effectively deter Facebook from engaging in future law violations, and thus I fear it leaves the American public vulnerable.

Facebook's privacy and data practices affect all Americans, whether they are users or not. Because of this, public interest in this investigation and its potential outcome has been higher than perhaps any other Commission investigation in recent memory. Much of the public commentary generated by this interest has demanded outcomes that far exceed the FTC's power or legal authority. But the FTC can and should demand settlement terms that send a clear message to wrongdoers and the public alike that violating a Commission order is to be avoided at all costs.