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Remarks at the Global Antitrust Institute
FTC vs. Facebook

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¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commission. Many thanks to my Attorney Advisor, Robin Rosen Specter, assisting in the preparation of these remarks.

me came down to this: How can we most effectively lay the foundation for a culture of compliance at Facebook and best protect the public in the future?

I have counseled hundreds of clients in numerous different industries during my legal career. Unlike my fellow commissioners, I have also served as in-house counsel, an experience that gives me even greater insight into the complexities of compliance initiatives. My clients have ranged from small, privately held companies to publicly traded Fortune 10 companies. They have made products and offered services as widely varied as prescription drugs and air travel. Each one has had unique and distinctive goals and corporate imperatives.

In my decades of practice, though, I have discovered one universal phenomenon that transcends all of these apparent differences: A culture of compliance must begin with the top executives, or it will fail. I have learned through experience, sometimes hard won, that it is not enough for a general counsel to urge his business counterparts to follow the law. A truly compliant company arises because the CEO or the President tells his or her employees that each person in the company will follow the law in all that he or she does – and then devotes the resources and the time to achieving that goal. In other words, the message needs to come from the very top, that the company will both talk the talk and walk the walk.

Today, my goal is to explain why I believe the FTC settlement with Facebook was the most effective way to ensure that Facebook takes its privacy obligations seriously and adopts a culture of compliance. My discussion today will cover three topics. First, I will explain how Facebook violated the law and how staff recommended that we address the violations. Second, I will explain why I voted to accept the settlement. Third, I will discuss why the early signs validate this choice and why this settlement is an appropriate exercise of the Commission's authority

Importantly, as we allege, Facebook knew that apps were gaining access to vast amounts of data. As our complaint explains, when Facebook conducted an audit of its apps it found that over a 30-day period, the apps were making hundreds of millions of requests for friend data. One app made 450 million requests in 30 day period! These requests were 33 times the number of this app's monthly active users.

After news of Cambridge Analytica broke, the FTC immediately began investigating and made the rare decision to confirm the investigation. We uncovered these misrepresentations about data sharing as well as numerous other violations that showed a pattern of misrepresentations and a culture of putting profits before privacy.

For example, our complaint alleges that in April 2015, Facebook announced publicly at a conference that it was terminating third party apps' ability to access friend data. Despite this announcement, Facebook maintained private arrangements with dozens of companies – which it called “White Listed Apps.” These arrangements gave these apps continued access to the friend data. Our complaint alleges that Facebook awarded White List status based on considerations of advertising and other revenues.

In another example challenged in our complaint, Facebook told consumers they would collect their phone numbers only for security purposes. Contrary to its representations, Facebook also used the phone numbers for advertising purposes.

Similarly, in April 2018, our complaint alleges that Facebook told users they must opt-in to use facial recognition for user-uploaded photos or videos. But tens of millions of users actually had to opt-out to disable the facial recognition.

Our investigation also found that Facebook did not screen or vet apps adequately to assess and address privacy risks posed by the apps on Facebook. Given the vast amounts of data Facebook was allowing apps to access, the privacy risks were significant.

As this investigation proceeded, my fellow Commissioners and I received regular

those directed at minors. Designated Compliance Officers (DCOs), appointed by an independent

The order's corporate governance requirements were designed to incentivize compliance and institutionalize accountability. For example, the certification provisions are modeled after Sarbanes-Oxley. I observed first hand while in private practice that when an executive must sign a certification it focuses the mind. This phenomenon is widely acknowledged in testimony describing the impact of the Sarbanes-Oxley Act in driving compliance with the new regime. The Securities and Exchange Commission has stated that "the certification provisions have perhaps had the greatest immediate impact." Rational executives in the shoes of Mr. Zuckerberg and the Facebook Chief Privacy Officer will be incentivized to focus very carefully on the substance of their obligations.

The order also takes into account the fact that a board needs both independence and a flow of information to exercise effective oversight. The governance provisions in this Facebook order include both. The privacy committee receives reports and updates from management meets quarterly to discuss privacy issues and with the independent assessor without management present. The members of the Board, as in any publicly traded company, have fiduciary obligations to the shareholders and potential liability for failing to live up to their obligations.

While the privacy provisions constitute the heart of the order, the settlement also includes a record civil penalty of \$5 billion. This penalty dwarfs all previous privacy fines both

for phone numbers, and facial recognition. This is the only FTC order to require both a comprehensive privacy program and comprehensive data security program. The order also includes requirements for data breaches and requires that Facebook delete the data from users who terminate their accounts.

II. My Review

When presented with the draft settlement, I considered very carefully whether it was the most effective way to prompt Facebook to confront its failings and adopt a constructive approach to consumer data. I could not vote for a settlement unless it met my goal of fostering a culture of compliance. I reviewed the staff's recommended settlement through that lens. I pored over every detail of the proposed order and worked closely with staff to extract additional important relief. The civil penalty amount was not determinative. Although I believe the penalty will serve as a deterrent for both Facebook and other companies that handle consumer data, the conduct relief was my primary focus.

I worked with staff, my colleagues, and Facebook to refine the order provisions until I was convinced that the order provided the structure necessary to incentivize compliance. As modified following additional negotiations, I believe that the robust and layered privacy program this order imposes represents a sea change in the way Facebook must conduct its privacy and data security program. The settlement also provides strong and certain relief for consumers immediately, and establishes a roadmap for other companies regarding the FTC's expectations with respect to how consumer data should be handled. While I understand the benefits of litigation that my dissenting colleagues sought, including transparency, the remarkable package

⁴ Facebook is obligated to create incident reports that it must deliver to the Commission that describe how the breach was remediated and must continue providing reports every 30 days until the incident is fully investigated and resolved.

of relief we obtained in its settlement is clearly superior to the potential benefits of litigation that we might have obtained in the future

III. Order Has and Will Have an Impact and Is An Appropriate Use of FTC Authority

Early signs validate that adopting this settlement as the best way to advance the public interest. First, the settlement has had immediate effects on Facebook. When we announced the settlement, Mark Zuckerberg stated “[w]e've agreed to pay a historic fine, but even more important, we're going to make some major structural changes to how we build products and run this company. . . . We expect it will take hundreds of engineers and more than a thousand people across our company to do this important work.” Although the judge has not yet entered the order, Facebook has started implementing it.

In November, Facebook’s Chief Privacy Officer stated that the settlement has been a “catalyst for new systems of accountability.” Our enforcement division has been receiving regular updates from Facebook that indicate an appropriate trajectory. Facebook is implementing a substantially strengthened, time and resource-intensive privacy review process for all new products and features (including any changes to existing products and features) prior to launch. A thorough retrospective review has uncovered unauthorized data access by apps, leading Facebook to announce that it suspended tens of thousands of apps in addition to reviewing data risks, Facebook is embedding restrictions on the sharing of user data within its programming. Facebook has undertaken a comprehensive review of its code to reshape and

⁵ Mark Zuckerberg Statement (July 24, 2019), <https://www.facebook.com/zuck/posts/10108276550917411>.

⁶ Chon, Gina, Cost of business breaking views Nov. 22, 2019, <https://www.breakingviews.com/considered-view/facebook-should-keep-the-confessions-coming/>.

⁷ Facebook Blog Post: An Update on Our App Developer Investigation (Sept. 20, 2019), <https://about.fb.com/news/2019/09/update-on-our-app-developer-investigation/>.

control how information is flowing through its systems and tightening controls to ensure that Facebook is not solely relying on written policies and annual review to catch issues. Facebook also has launched features for consumers to see the data that businesses have compiled about them and allow them to delete or disassociate that data. While I cannot vouch for the representations that Facebook has made, I can say that the company appears to be appropriately focused on fulfilling its obligations under the order.

Second, the industry has taken notice. FTC privacy orders set the standards for industry and this order in particular is reverberating through the industry. Approximately a month after the FTC announced the Facebook settlement, I was on the West Coast for a privacy conference and met with Silicon Valley executives. They peppered me with questions about the obligations imposed on Facebook pursuant to the order and what the record with best practices for their companies should consider building in various governance safeguards. To be clear, my answer was "it depends." The structure of Facebook, the types of data it collects, and the fact that the settlement was a resolution of order violations contributed to the relief granted. These types of processes and governance measure might not be necessary for every company to be in compliance with the law.

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Facebook (and Equifax) settlements include the “

program has evolved and developed considerably since the relief in thi

America.¹⁶ Recognizing the limits of the FTC's authority, we understand that decisions about what data can be collected and how it can be used are not automated appropriately fall within the purview of Congress.

To address these issues, we need baseline federal privacy legislation. I was extremely pleased to see that last week, the Senate Commerce Committee held a hearing on privacy legislation. Senators Wicker and Cantwell have both introduced privacy bills and I appreciate their leadership on this important issue. I do hope that, even in this tumultuous period, Congress is able to reach a consensus and act on this important issue. In the interim, the FTC will use its current authority vigorously to protect consumer privacy. The Facebook settlement is an excellent example of how the FTC has deployed that authority appropriately and responsibly to impose relief that will have a profound impact on not only Facebook but all companies that collect consumer data. I am confident that my decision to vote to accept the settlement was correct.

Thank you again to Professor Wright and GAI for hosting this event. I am happy to take questions now.

¹⁶ See, e.g., J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157, 2159 (2015) (quoting Jean Carper, The Backlash at the FTC, Wash. Post, Feb. 6, 1977, C4).