Office of Commissioner
Rohit Chopra

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

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In re Facebook, Inc.
Commission File No. 1823109

July 24, 2019

Executive Summary

- **Facebook's violations were a direct result of the company's behavioral advertising business model.** Facebook flagrantly violated the FTC's 2012 order by deceiving its users and allowing pay-for-play data harvesting by developers. The company's behavioral advertising business, which monetizes user behavior through mass surveillance, contributed to these violations. Cambridge Analytica's tactics of profiling and targeting users were a small-scale reflection of Facebook's own practices.

- **The proposed settlement does little to change the business model or practices that led to the recidivism.** The settlement imposes no meaningful changes to the company's structure or financial incentives, which led to these violations. Nor does it include any restrictions on the company's mass surveillance or advertising tactics. Instead, the order allows Facebook to decide for itself how much information it can harvest from users and what it can do with that information, as long as it creates a paper trail.

- **The $5 billion penalty is less than Facebook's exposure from its illegal conduct, given its financial gains.** These illegal data practices were tools to lock in and advance the company's digital advertising dominance. The FTC can seek civil penalties in addition to unjust gains. The Commissioners supporting this settlement do not cite any analysis of Facebook's unjust enrichment to justify the proposed $5 billion payment, and I believe the company's potential exposure is likely far greater. In the Commission's 2012 action against Google, the FTC obtained a penalty of more than five times the company's unjust gains. This is a departure from that approach.

- **The proposed settlement lets Facebook off the hook for unspecified violations.** The settlement gives Facebook a legal shield of unusual breadth, deviating from standard FTC practice. Given the many public reports of problems at Facebook, it is hard to know how wide the range of conduct left unaddressed in the proposed Complaint or settlement may be. This shield is good for Facebook, but leaves the public in the dark as to how the company violated the law, and what violations, if any, are not remedied.

- **The grant of immunity for Facebook's officers and directors is a giveaway.** Facebook's officers and directors were legally bound to ensure compliance with the 2012 order, yet the proposed settlement grants a gift of immunity for their failure to do so. The Commissioners supporting this settlement do not point to any documents or sworn testimony to justify this immunity.

- **The case against Facebook is about more than just privacy – it is also about the power to control and manipu (y)(n)2 (it)-10 (uif)3 (i)-26 (f)-1 (i)-6 ( )]TJ 0 -1--1 (a)4 (nd (t)-2 (e)4**

I. Introduction: Facebook and its Role in Society

In March 2018, news reports revealed that Cambridge Analytica, a political consulting firm, had harvested data from millions of Facebook users by baiting people with a personality quiz. The

The investigation also uncovered additional violations, including false assurances to users that they would need to opt in to facial recognition.[14] In addition, Facebook encouraged users to turn over their phone numbers for security purposes, but used those phone numbers to feed the company's surveillance and advertising business.[15]

Notably, these serious failures took place even as PriceWaterhouseCoopers, the "independent third party" retained pursuant to the 2012 order, was evaluating Facebook's privacy policies for compliance. While third-party assessments can provide valuable information, the incentives of these private, for-profit overseers may not always be well aligned.[16]

D. Order Enforcement

FTC orders are not suggestions. When the Commission believes that facts warrant formal enforcement action or an amendment to the existing order, it has a number of options at its disposal that are not limited to the Commission's chosen course in this matter.[17]

- Refunds to Consumers and Forfeiture of Ill-Gotten Gains. The Federal Trade Commission can seek equitable relief from a federal court under Section 13(b) of the FTC Act.[18] Equitable relief can take many forms. For example, if anything of value was taken from consumers, this value can be refunded or redressed. Similarly, if a company was able to generate revenue or profits through its illegal acts, the FTC can seek the forfeiture of these gains. Both remedies are commonly pursued and do not require the involvement of the Department of Justice ("DOJ").
- New Order with Tougher Restrictions. Commission Rule 3.72(b)[19] allows the Commission to issue an Order to Show Cause as to why a firm's current order should not be reopened and amended. Firms

III. Root Causes of Facebook's Order Violations

The FTC Act does not require a showing of ill intent to establish liability, but uncovering the motivations of individuals or firms believed to have broken the law is essential when crafting effective injunctive relief that protects the public from further harm.

Facebook is a large, sophisticated company under a formal agency order. I do not believe its serious violations of that order were merely inadvertent or technical in nature. Instead, the evidence suggests that these violations were clearly motivated by Facebook's financial incentives.

A. Facebook's Profit Model is Propelled by Surveillance and Manipulation

When we think of surveillance, we often think of debates regarding the appropriate limits of surveillance by the state, where proponents and opponents argue about safety and civil liberties. When the entity engaged in mass surveillance is a corporation, we face similar issues, but without public accountability. It is becoming increasingly clear that companies like Facebook also rely on mass surveillance of users. For a private, profit-maximizing firm, this raises serious concerns about incentives.

In 2018, Facebook had revenues of $55.8 billion, the bulk of which came from "advertisers" rather than paid services or software licensing. Facebook does not sell a traditional advertising product; it sells user behavior. Like other companies engaged in online behavioral advertising, Facebook monetizes the actions of users, in addition to passive observation of a display advertisement. Facebook makes more money when users engage in an action, such as clicking on specific content. To maximize the probability of inducing profitable user engagement, Facebook has a strong incentive to (a) increase the total time a user engages with the platform and (b) curate an environment that goads users into monetizable actions.

To accomplish both of these objectives, Facebook and other companies with a similar business model have developed an unquenchable thirst for more and more data. This data goes far beyond information that users believe they are providing, such as their alma mater, their friends, and entertainers they like. Facebook can develop a detailed, intimate portrait of each user that is constantly being updated in real time, including our viewing behavior, our reactions to certain types of content, and our activities across the digital sphere where Facebook's technology is embedded. The company can make more profit if it can manipulate us into constant engagement and specific actions aligned with its monetization goals.

As long as advertisers are willing to pay a high price for users to consume specific content, companies like Facebook have an incentive to curate content in ways that affect our psychological state and real-time preferences. For example, if Facebook's algorithms detect more engagement when users are sad or angry, then the company has an incentive to present content in ways that make users feel sad or angry. Even when companies like Facebook dispute that they are engaging in activities akin to mass surveillance or manipulation, their business incentives strongly motivate them to do so and their technology enables it, regardless of whether or not it is a deliberate business decision.

B. Facebook Needed to Show Progress to Wall Street on Mobile and Third-Party Developers

For years, Facebook and Mark Zuckerberg had eschewed making the move to becoming a publicly traded firm. Around the time that the FTC filed its initial complaint in 2011, news reports suggested that Facebook was approaching five hundred investors,[20] which triggers public financial reporting under the securities laws.

On February 1, 2012, Facebook filed its intent with the Securities and Exchange Commission to move forward with an initial public offering. As part of preparations to become a public company, Facebook and Zuckerberg conducted "roadshows" to potential investors, a common practice prior to an initial public offering. A core part of the pitch to investors was Facebook's plans to become a major player in the mobile environment.[21]

Soon after Facebook went public, it was reported that Mark Zuckerberg was frustrated with the company's mobile strategy, and a key plank of his turnaround plan was to attract app developers[22] – in part by ensuring they could monetize user engagement.[23] Finding ways to

potentially vast – academic studies suggest that as many as 75 percent of users were interested in further restricting their privacy settings.[27] If they had done so it would have significantly reduced the platform's attractiveness to developers, and the company's attractiveness to shareholders. Facebook and its CEO knew that many of its users were confused, but persisted with these practices long after promising to halt them.[28]

Breaking the law likely yielded other benefits for Facebook, too. Its selective enforcement of platform policies rewarded its most lucrative developers. Tricking users into turning over their phone numbers improved the company's ad targeting.[29] Deceiving users about its facial recognition practices made it harder for them to turn off surveillance.

Ultimately, Facebook abused the public's trust because advertisers and developers – not Facebook's users – are its core constituency. It is telling that even as Facebook marketed users' social graphs to third-party developers, the company did not allow users themselves to access the same information through the "Download my Data" feature, making it more difficult for users to leave the platform.[30] The public learned that games like Farmville and apps such as the one feeding Cambridge Analytica could see your social graph, but you could not access your own.

IV. Role of Officers and Directors in Facebook's Order Violations

"I started Facebook, I run it, and I'm responsible for what happens here."
- Mark Zuckerberg

Corporate executive officers and directors serving on corporate boards play a critical role in ensuring compliance with applicable law and regulation. This is particularly important when a corporation becomes subject to an administrative agency order.

[27] This is merely an estimate, but is one supported by a number of studies. In one study, 75% of posts from a sample of users had settings other than "public," while fewer than half of study participants had multiple privacy settings across posts. *See* Casey Fiesler et al., *What (or Who) Is Public? Privacy Se31hd [(of)25.7 (nV(ac)4 (Se)6 S(c)4 (t28t)6.9 ()1.6d -0.0*

Two individuals simultaneously serve as executive officers and members of Facebook's board of directors: Mark Zuckerberg and Sheryl Sandberg. Zuckerberg is the Founder, Chief Executive Officer, and Chairman of the Board of Directors of Facebook. Sandberg is the Chief Operating Officer and is a member of the Board of Directors of Facebook.

A. Officers and Directors Are Bound by Agency Orders and Can Be Liable for Order Violations

FTC orders bind both the named corporation and its officers and directors, regardless of whether they are named individually.[31] And officers and directors cannot avoid responsibility under these orders simply by burying their heads in the sand as their subordinates break the law. Instead, they are bound "… to take all reasonable steps to effect compliance."[32] Failure to do so can expose them to liability for wrongdoing.[33]

There are good reasons the law imposes this heightened obligation. Were it not to, "we woul8 Tw 8. EMC /S

quantity or nature of information that developers collect, so long as their lawyers can adequately state a justification.

The restrictions placed on new products, practices, and services are similarly narrow. The order essentially states that if a new product or service is deemed to pose a "material risk" to user privacy, the company must prepare a Privacy Review Statement describing a) what information is being collected and why; b) how users will be notified about the information collection; c) whether users will need to consent to the information collection; d) any risks to user information; e) how the company plans to mitigate those risks; and f) alternative ways to mitigate risks that the company is not pursuing.[41]

These requirements do not actually place any substantive limit on Facebook's collection, use, or sharing of personal information. For example, this subsection explicitly applies to "the sharing of Covered Information with a Facebook-owned affiliate." Given Facebook's intent to integrate Messenger, WhatsApp, and Instagram, the procedures required by the order are a good proxy for the extent to which the order constrains Facebook generally.

The order does not prohibit the integration of the platforms; it requires only that Facebook designate the integration as a potential user risk. It does not require users to consent to the integration; it requires only that Facebook describe its consent procedures, "if any." It does not limit what constitutes an acceptable level of risk to users; it requires only that the risks be documented. It does not require that Facebook eliminate or even minimize these risks; it requires only that it describe a process for mitigating them.

There are few limits on Facebook's discretion around these issues. While the order requires the designation of Compliance Officers[42] and the appointment of an Assessor[43] and an Independent Privacy Committee,[44] their power is largely limited to ensuring compliance with the narrow procedural requirements described above.

The Designated Compliance Officers design the Privacy Program, summarize Privacy Review Statements for the CEO, and sign certifications. But rather than charging the Officers with achieving any benchmarks – e.g. minimizing collection, minimizing sharing, or minimizing user risk – they are charged only with ensuring that paperwork has been completed.

Similarly, the Independent Assessor is charged with ensuring that the Privacy Program is effective, but is given no benchmarks for what constitutes effectiveness. While the Independent Assessor can potentially prod Facebook to make changes around disclosures or consent procedures, it is unlikely to be able to stop a major program change, such as the platform integration described above, so long as Facebook can adequately state a justification for the change.

[41] *Id.* Part VII.E.2.
[42] *Id.* Part VII.C.
[43] *Id.* Part VIII.
[44] *Id.* Part X.

The powers of the Independent Privacy Committee appear to be even more limited. The

the controlling shareholder, Zuckerberg, can essentially pick or vote not to retain, reducing their level of independence. Even if truly independent directors were chosen, they would be virtually powerless: the order gives them no authority to veto any management decision, and their fiduciary duty is to shareholders, not users.[49]

Ultimately, the Committee's only clear power is to ensure that the company has assembled the paperwork required by the order. Corporate plans to integrate platforms, change terms of service, or other key decisions will be beyond the reach of the Committee, even if its members were sufficiently independent to want to intervene.

Given the ongoing concerns expressed by shareholders regarding Facebook's governance,[50] it is unwise for the FTC to accept a settlement that binds shareholders to a revised governance structure that may not further the goals of independence and accountability.

C. The Proposed $5 Billion Penalty May be Less than Facebook's Gains from Violating the Order

The Commissioners supporting the proposed settlement place great emphasis on the "record-breaking penalty." However, the Commissioners' analysis of the penalty is not empirically well grounded.

As noted above, when a company violates a Commission order, the agency can seek two distinct categories of monetary relief. First, the Commission can obtain equitable relief, including forfeiture of unjust gains (revenues and profits stemming from the violations) and refunds to consumers. This relief is not intended to be punitive; it is designed to reverse the effects of lawbreaking. Second, the Commission can seek civil penalties, which can be sought *in addition to* equitable relief. Civil penalties should send an unambiguous message that "FTC orders should not be disregarded with impunity."[51]

The Commissioners supporting the proposed penalty do not cite any methodology or analysis on Facebook's unjust enrichment from violating the Commission's order. In my view, a rigorous analysis of unjust enrichment alone – which, notably, the Commission can seek without the assistance of the Attorney General – would likely yield a figure well above $5 billion. As described earlier, Facebook's lawbreaking contributed directly to its drive for dominance and

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the CEO, Mark Zuckerberg, controls more voting rights than his actual equity participation in the firm. He has such substantial rights that his vote is determinative with respect to the election of board directors and other matters subject to a shareholder vote.

[49] The proposed order requires the support of two-thirds of the voting power of outstanding shares to remove any committee member, but midterm removal of directors is highly unusual, and is unlikely to be necessary given the Committee's limited authority to restrain management. In any event, Mark Zuckerberg controls nearly 60% of the voting shares.

[50] *See, e.g.*, Michael Hiltzik, *Column: Facebook Shareholders are Getting Fed Up with Zuckerberg but Can't Do Anything about Him*, L.A. TIMES: BUSINESS (Apr. 16, 2019, 11:17 AM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-mark-zuckerberg-facebook-20190416-story.html.

[51] *U.S. v. Bos. Sci. Corp.*, 253 F. Supp. 2d 85, 101 (D. Mass. 2003) (awarding more than $7 million in civil penalties based on antitrust order violations).

profits, especially in the mobile space. The gains it realized from this lawbreaking were likely massive, especially given the large number of users who may have opted out of sharing had they known how. This would have significantly affected Facebook's value proposition to developers and shareholders.

But even if $5 billion were a reasonable estimate of Facebook's unjust gains, it would be inadequate as a civil penalty. A civil penalty should *exceed* unjust gains – otherwise we are allowing a defendant to break even or even profit by breaking the law. This approach is both common sense and grounded in Commission precedent: in the FTC's 2012 order enforcement against Google, we obtained a penalty that was more than five times the company's estimated unjust gains.[52]

Comparing the $5 billion figure in absolute terms to other FTC privacy settlements says little about this matter, in which Facebook is charged with an unprecedented assault on user privacy over many years.[53] My colleagues do not assert, as our predecessors did in *Google*, that the penalty proposed today exceeds Facebook's unjust gains five times over, which is a far more rigorous measure than absolute comparisons alone.

Were we to litigate, then, we would surely face risks – but so would Facebook. Eliminating unjust gains is only one of the five factors courts consider in imposing civil penalties: also considered are injury to the public, the defendant's ability to pay, the defendant's good or bad faith, and the necessity of vindicating the authority of the FTC.[54] In my view, each of these factors would support a penalty beyond the disgorgement of ill-gotten gains.

First, the harm to the public is substantial – Facebook's deceit affected tens of millions of Americans, and ultimately posed dangers to the democratic process

because they are seen as lacking viability. The public interest weighs strongly in favor of transparency, rather than secret immunity deals.

Also concerning is the Commission's proposed release of any and all order violations. As detailed above, the Commission's 2012 order barred Facebook from deceiving the public about its privacy policies, and required the company to create and maintain a reasonable privacy program subject to outside assessments. Over the course of this investigation, the Commission uncovered serious and repeated violations of this order. But even thorough investigations miss problems, and even well-counseled companies fail to disclose (or even conceal) violations. Allowing blanket immunity for unknown claims effectively rewards Facebook for not proactively disclosing i.00c-3.9 ( )-10co i mt eotf0hsncctihh(c)4l (1 (an0.0044s)-1 (c)4522.7)4 (t)-4.-1 (o)2 (a-4