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FTC Policy: In Exclusive Interview, FTC Commissioner Rebecca Slaughter Calls for More Expansive Fining Authority, A Technologist Staffed on Each Case

Commissioner Rebecca Slaughter spoke to *The Capitol Forum* about the ongoing debate over whether the FTC needs to be more aggressive in its enforcement to actually affect business decisions, particularly when it comes to enforcement of consent violations. The FTC is currently investigating one such potential violation by Facebook (FB), and *The Capitol Forum* has previously written about the range of possible remedies and penalties.

It's incumbent on the FTC to examine whether its enforcement is keeping pace with technological and market developments, and if it is not, to identify in detail what the cause might be, said Commissioner Slaughter. The FTC "may need to be more aggressive in some cases, but it also needs more authority and more resources in order to make aggressive action effective," she said.

On greater authority, Slaughter pointed to a critical difference between the FTC and the European Commission. The EC can unilaterally impose fines (as well as remedies), which are then subject to appeal.

In contrast, the FTC has to either negotiate a mutually agreeable settlement with a defendant or sue in court, and its statutory fines are limited to a $40,000 maximum penalty per violation that only can be utilized after a company has already violated the law, been subject to a FTC order, and then violated that order. In Slaughter's view, the FTC should have penalty authority to "get money in the first instance for a violation," rather than only after the second instance.

To ensure that fines are not just a cost of doing business—a concern Commissioner Chopra has also expressed— the FTC should also have the authority to determine the financial penalty amount in each case, said Slaughter. Slaughter pointed out that even under its existing fining authority, the FTC "doesn't get $40,000 per violation," because that amount is a ceiling.

Under *US v. Reader's Digest*, Courts must look at the following factors to determine the penalty amount: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's 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. Only if those factors are maximally satisfied will Courts award the full penalty amount, said Slaughter.

Although insignificant fines can appear ineffective to stop repeat offenders, "enforcement dollars should not be discounted" in their importance, said Slaughter. Under the threat of substantial

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monetary penalties, the FTC may have leverage to negotiate with the defendant a consent order than includes a wide range of remedies, but "a company that doesn't agree can always say, 'Go ahead and sue me,'" said Slaughter.

"And, even if we got more injunctive relief, the enforcement teeth is what penalty they'd have to pay for violating the new injunctive order," she said. "The money matters."

In addition to more authority, the FTC also needs more resources, said Slaughter. Although the FTC "is always looking for ways to use existing resources more efficiently," it is also "generally under-resourced."

One area where Slaughter said the FTC could specifically benefit from more resources would be adding technological expertise, including putting a technologist on every case. "We put an economist on every case we have," she said, adding, "I'm trying to think of a case that doesn't involve technology or data, and I can't think of any."

Slaughter said she thinks the FTC should "push the envelope," on enforcement and noted that there "can be a benefit from bringing hard cases, even if doing so risks losing." At the same time, she said, "We have to recognize what is possible and what is not possible."

Commissioner Chopra calls for a tech sector investigation. In a speech at Silicon Flatirons on Sunday, Commissioner Chopra set forth "three threats and challenges posed by today's tech sector"—to fair economic competition, to civil rights, and to democracy.

First, Chopra called for investigation of how tech platforms may be threatening competition. "If we still believe in the promise of the digital economy, we need to ask ourselves whether certain business practices and merger activity are really promoting innovation or simply allowing corporate royalty to hold on to their reign," said Chopra.

Second, Chopra called for investigation into massive data collection and algorithmic bias. "Large technology companies are carefully connecting dots about each of our lives, creating detailed dossiers about all of us," said Chopra. "How these dossiers are used or misused is opaque and can be damaging."

Third, Chorpa called for greater understanding on tech platforms' effects on the marketplace of ideas, which he said is critical for democracy. He focused on the harm to this marketplace caused by tech platforms taking up the dollars that support news, journalism, and authors. "Since the data hoarder—not the content creator—is capturing a big slice of the pie, there's less to go around to those with ideas."

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Pointing to the FTC's history of conducting industry-wide studies, including recent studies on patent assertion entities and data brokers, Chopra said, "the law allows the Commission to issue orders that require companies to hand over data and reports about their business practices." He concluded his speech by emphasizing the cost of inaction and loss of innovation that occurs when a marketplace lacks competition.

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