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Transcript of Conference Call to Discuss Law Review Article About Resurrecting the FTC Act's Penalty Offense Authority with Samuel Levine

On February 10, The Capitol Forum hosted a conference call with Samuel Levine to discuss a recent law review article he co-authored with FTC Commissioner Rohit Chopra entitled, "The Case for Resurrecting the FTC Act's Penalty Offense Authority." The full transcript, which has been modified slightly for accuracy, can be found below.

MR. VIKAS KUMAR: Thank you. Good morning, everyone. Thank you for joining us today on *The Capitol Forum's* Conference Call on the law review article entitled "The Case for Resurrecting the FTC's Penalty Offense Authority". I'm Vikas Kumar, Senior Editor at *The Capitol Forum*. And I'm joined today by Sam Levine, attorney advisor to FTC Commissioner Rohit Chopra. Sam coauthored the article with Commissioner Chopra. Just a point of clarification, Sam's statements today reflect his own views and not those of the FTC.

A quick note before we get underway, the first 20 minutes or so of the call will be an interview with Sam and then we'll move into a Q&A format where we will entertain questions from the audience. If you do have questions for us, please email them to editorial@thecapitolforum.com. That's editorial@thecapitolforum.com and Capitol is spelled with an "O". Sam, thanks for joining us. And let's dive right in.

MR. SAMUEL LEVINE: Thanks for having me.

MR. VIKAS KUMAR: Sure. So let's talk a little bit about your article. What exactly is the FTC's Penalty Offense Authority?

MR. SAMUEL LEVINE: So the Penalty Offense Authority is found in Section 5(m)(1)(B) of the FTC Act. It was added to the FTC Act in 1975. And I think the context here is really important. In the late sixties and early seventies, there was widespread criticism of the FTC for pursuing essentially no money cease and desist orders, which folks in Congress and at the agency recognized were not doing enough to deter law breaking and return money to consumers.

So one of the tools Congress gave the FTC in 1975 was the Penalty Offense Authority, Section 5(m)(1)(B). And what Section 5(m)(1)(B) states is that if the FTC finds that a practice is unfair or deceptive in a litigated administrative order, or in any order that's not a settlement, and then another party, a third party, engages in that same practice with knowledge that the FTC previously condemned it, that third party can face civil penalties.

Now, after the FTC got this authority in 1975, it was used quite widely. What the Commission did is send essentially warning letters—we called them a synopsis—to thousands of companies in various industries across the United States and warned them that the FTC had found business opportunity deception to be deceptive, that the FTC had found testimonial deception to be deceptive. And we initiated this nationwide program to curb some of these practices. And what we know from internal records is that FTC commissioners were very enthusiastic about this program. It seems to have been very successful. In fact, one Republican commissioner, Patricia Bailey, said that the authority had resulted in a high level of voluntary compliance achieved quickly and at a low cost. So the program was highly successful in the late 1970s, but it was largely abandoned in the 1980s. And it has been used extremely seldom in the decades since.

MR. VIKAS KUMAR: Do you want to talk a little bit about why it was abandoned in the eighties and what caused the FTC to shift away from the authority in the eighties?

MR. SAMUEL LEVINE: Sure. I think the exact motivation—I mean, many of the folks who were calling the shots at the time are still around and can be asked. But I think if you look at the historical record, I think a couple of things become clear. The first is that President Reagan appointed an FTC Chairman, Jim Miller, who was really committed to dismantling in some ways the administrative state and weakening the FTC. He supported devastating cuts to our headcount at the FTC. We're about half the size we were in 1980. He wanted to cut back on the FTC's unfairness authority. He wanted to cut back on rulemaking. And I think most importantly here, he wanted to cut back on challenges to major national companies, national advertisers, and toward a very heavy focus on hardcore fraud.

And as part of that effort where he was focusing more on sort of one-off scams, as opposed to market-wide problems, he moved away from using Section 5(m)(1)(B) Penalty Offense Authority, and toward another authority, which I know we're going to discuss, and that's Section 13(b). So I would see the abandonment of Section 5(m)(1)(B) as part of a broader effort to weaken the FTC.

MR. VIKAS KUMAR: Got it. And so let's just go ahead and talk about 13(b). So that's the primary enforcement mechanism that the FTC relies on today.

MR. SAMUEL LEVINE: Exactly.

MR. VIKAS KUMAR: So what are, in your opinion, some of the limitations with 13(b)? Do you want to basically spell out what 13(b) allows and doesn't allow and then discuss some of the limitations with the approach of using 13(b)?

MR. SAMUEL LEVINE: Sure. So Section 13(b) allows the Commission to seek preliminary and permanent injunctions in federal court. And the way courts have interpreted that provision until pretty recently is that because courts can order permanent injunctions they also have the power to order what's called equitable relief. They can also order money to be returned to consumers, ill-gotten gains to be disgorged, asset freezes on hardcore fraud. Essentially, the authority allows courts to impose a variety of what are called equitable remedies on companies. And the FTC has relied on Section 13(b) very heavily for many years. If you look at some of the statistics about how many of our cases are brought in federal court, how many are brought under 13(b), the percentage is huge. It regularly exceeds 80, 85 percent.

Now, I think a lot of people know that the Supreme Court is currently entertaining challenges to Section 13(b), and challenges to the Commission's ability to recover money under that authority. I don't really want to get into that. The FTC put together a phenomenal brief. We had oral arguments last month. But the thing I want to say is that it is very important that the FTC prevail in the Supreme Court. But regardless of whether the FTC prevails in the Supreme Court, Commissioner Chopra and I argued in the paper that we need to move beyond 13(b) and diversify our toolkit. And here's why.

What I mentioned earlier is that 13(b) allows what's called equitable relief only. What does that mean in practice? If a thief—or I should say if a company – steals $100 from consumers, the most the FTC can recover in a 13(b) action is $100. So think about that. You have the FTC overseeing almost the entire economy. The vast majority of law breaking, of consumer protection abuses, are not going to be caught. And if you're sitting in a boardroom, if you're at a company, and you know that if you steal $100 that the worst consequence you will face, if you are caught, is $100, what are your incentives? And I think what most economists and others who would look at this problem would say is that $100 if you're caught for stealing $100 is not enough of a deterrent.

So because 13(b) does not allow us to recover more than the amount of money stolen or obtained unlawfully, Commissioner Chopra and I argued that we should, in more cases, seek what are called civil penalties. And the way civil penalties work – this is probably very familiar to non-lawyers – if you break the law, you have to pay a penalty. And our statute lays out sort of how those penalties should be calibrated, but they can be quite severe, up to $43,000 per violation.

So the argument that Commissioner Chopra and I made is that if we are going to actually deter wrongdoing, we need to recover more than companies earned from that wrongdoing. And if we're going to recover more than they earn from the wrongdoing, we can't only rely on 13(b). We need to turn to other authorities like Section 5(m)(1)(B).

MR. VIKAS KUMAR: So we're going to talk about the areas in which you think Section 5(m)(1)(B) could be particularly effective. But before we get there, let's talk about how in practice 5(m)(1)(B)'s Penalty Offense Authority works. How does something get elevated? And how do companies get put on notice that something is a potential penalty offense?

MR. SAMUEL LEVINE: Sure. So it's a unique statute and I will try my best to sort of talk through how that works. So the FTC can bring cases in federal court or in its in-house court, its administrative court. And if the FTC brings a case in its administrative court and the Commission itself makes a determination that a practice is unfair or deceptive, then if other companies engage in that same practice, knowing that the FTC made that determination that it's unlawful, they can face civil penalties.

So the obvious question arises, okay, how do you show that a company had actual knowledge that the FTC condemned a practice? Now, the reality is that in a lot of industries, there are a lot of industries that follow the FTC very closely and you may be able to impute knowledge. Well, the approach the FTC has taken when it has used this authority, is it prepares—and I think I mentioned this earlier—a synopsis of its relevant findings.

So let's say in the context of for-profit colleges, which is one of the examples that we used in the article, the Commission could prepare a synopsis of FTC findings, basically write a letter, mail it to for-profit colleges. And it says, hey, just a reminder that the FTC has found that it is deceptive to mislead students about how much money they're going to earn when they graduate. It is deceptive to mislead students about the likelihood that they're going to get a good job. And what sending that letter does is put the companies on the hook for civil penalties of up to $43,000 per violation if they engage in the same practice. By sending that letter, the FTC can then show that these companies had actual knowledge that the practices they're engaging in are illegal.

MR. VIKAS KUMAR: And just so we're all clear, absent that actual knowledge and receipt of the synopsis, is the power that the FTC has limited to 13(b) and the other mechanisms, but limited in nature in terms of what can be recovered to equitable relief. So the tuition that was paid by the students as opposed to any profits that the for-profit education institution made as a result of that student?

MR. SAMUEL LEVINE: It's slightly more complicated than that. I mean, that's basically right. It's slightly more complicated in that there are other authorities the FTC can bring to bear. I also want to stress that there's no requirement in Section 5(m)(1)(B) that the FTC mail a synopsis. It's just the most practical way to show knowledge. But basically, what you said is correct. Without civil penalty Aathority, through 5(m)(1)(B)) or through another section of the FTC Act, all the FTC can recover is equitable relief.

MR. VIKAS KUMAR: And companies largely view that as maybe potentially just the cost of doing business, to pay a small fine or small penalty, technically not a penalty, but small fine.

MR. SAMUEL LEVINE: Exactly. Not even a penalty. They just have to return what they took unlawfully. And often, it's hard even to get that.

MR. VIKAS KUMAR: And I assume lawyers and companies would potentially raise due process concerns. So they have to receive actual knowledge. But what other due process protections do companies get on the 5(m)(1)(B) front? Do they get to challenge underlying Commission decisions? Or do they say the facts that you're saying that we or the practices we're engaged in aren't the same as the facts in the underlying case that you're using to elevate something to Penalty Authority?

MR. SAMUEL LEVINE: So the Penalty Offense Authority, if you run afoul of it, can come with a very high price tag in terms of civil penalties of up to $43,000 per violation. But along with that price tag comes very strong, unusually strong, due process protections for companies that have received, or that are the subject of penalty offense lawsuits. So what are those defenses or what are those protections? The most obvious is that, or I guess the threshold due process protection, is that a company can say we didn't know. We didn't know this was unlawful. We didn't get the synopsis, lost in the mail. They can say they were not aware that the Commission had condemned the practice. Now again, by sending a synopsis, I think we can deal with that problem and ensure companies are on notice.

The other defense companies can raise is that the conduct the FTC condemned in that last case is not the same conduct they're engaging in. They can look at the facts and say the Commission made a determination here. If you look at our facts, they're very different. That legal conclusion that the FTC made does not or should not apply to the conduct we engaged in. So that's sort of the second defense companies can raise.

The third defense companies can raise, which is also quite unusual in the FTC Act, is that they can challenge the FTC's prior determination. So not only can they say we didn't do what the FTC says we did, they can say the FTC was wrong to even say this practice was illegal. So they can bring de novo challenges to the FTC's previous determination.

So companies enjoy significant due process protections under this authority. And we're pretty confident that these protections can help ensure that the FTC uses this in a responsible way that curbs the worst form of law breaking, while ensuring that companies can benefit from adequate due process protections.

MR. VIKAS KUMAR: And there was a recent example, fairly recent example I should say, of the FTC's Penalty Offense Authority. Do you want to talk about the bamboo issue and maybe why the FTC used the offense authority in that, in that situation?

MR. SAMUEL LEVINE: Sure. And I don't want to get into the internal reasoning of the FTC. I also wasn't there at the time. It was about 10 or 11 years ago. And as you say, that's the last time we used it. What happened, as I understand it, is that a lot of consumers look for bamboo products because it's seen as more environmentally sustainable, but a lot of companies were marketing rayon products as bamboo. They were calling rayon products, bamboo.

The FTC entered some no money orders against—I can't remember how many, but a handful of companies telling them to stop making these false claims. But evidently, the practice continued. So what the FTC did is it engaged in a much broader campaign to send a synopsis of the FTC's findings on bamboo to some of the largest companies in retail. And we warned them that if you continue to market rayon as bamboo, you can face significant civil penalties. And the Commission actually was able to bring actions to recover civil penalties from a handful of companies that continued to engage in the practice. And the view of people inside the building is that this was a very successful effort and that you see much better compliance now than you did ten years ago.

And I think what this illustrates, or part of what this illustrates is the power of this authority, to move beyond kind of Whac-A-Mole cases where we find a target, stop the practice, and then move on, to market-wide interventions that actually clean up whole markets. That's what we did for bamboo. And what Commissioner Chopra and I lay out in the article is how we can do this in other industries for other harms to consumers and fair competition.

MR. VIKAS KUMAR: Right. And I want to definitely talk about those areas. So let's go through and talk about the five areas in which you think the authority should be used and why you uniquely select those industries.

MR. SAMUEL LEVINE: Sure. So maybe I'll start by saying we chose five areas, but our vision for the agency long-term is that this becomes a regular part of the FTC's toolkit. So we by no means intended to limit the article to these five areas. And, in fact, we've gotten great feedback from people about other FTC orders, other FTC findings, that could be used in the same way to cure other market-wide problems. We've been really enthusiastic about that. But I'll go through the five areas we identified in the article.

The first I touched on briefly already, and that is the for-profit college industry. Commissioner Chopra and I both have a long history working in this space. That's actually how I got to know him

eight years ago. And what we have seen in this space year after year is that for-profit schools will mislead prospective students about how much money they can expect to earn, the likelihood they're going to get a job, their accreditation, transferability of credits -- really core misrepresentations, designed to lure students to quickly enroll.

These practices have devastating consequences that both of us have seen firsthand. When someone enrolls in a bad school, they don't just lose the money they put in. The consequences can be devastating. If they default on their loans, they can face wage garnishment and worse. They may never be able to go back to school. They may not be able to find a job that allows them to support their family. The consequences for these students are really devastating, but the consequences for the for-profit schools are that they just continue to take in federal student loan money year after year.

And this problem really is quite pervasive, or at least at it's been quite pervasive. The FTC has been bringing cases against deceptive practices by for-profit schools since the 1920s. It has been almost a hundred years of bringing cases against almost identical forms of misconduct, sometimes against the same schools. Yet, year after year, these practices recur.

So what we argue in the paper is that rather than using Section 13(b) to try and estimate, okay, how much did the school profit from the lies? How much did the consumers lose directly? We say we need to step up our deterrence in this area. It is clear that for-profits still have an incentive to lie. How do we change these incentives? We say use existing litigated FTC orders. Make sure large schools are on notice that it is illegal to lie about job placement and other key features and put them on the hook for stiff civil penalties that allow the government to try to wipe out their illegal profits and more, rather than letting them break even by deceiving students. So that's one area where we think we can really do a lot to help clean up that market.

Another area we talk about is privacy. Section 13(b) has been an especially poor fit for privacy cases because Section 13(b) requires the FTC to show much money a consumer lost, or how much money a company gained from lying about privacy. So what that means is that even in egregious cases, and we've brought a number, we sued Facebook as early as, I think, 2011 or 2012. We sued Google that same year. We entered these no money orders with companies that lied about privacy practices. And this is a good deal for the companies because those lies helped the companies quickly accumulate data, quickly accumulate consumer data, and it accelerated their march to dominance. But because of the limits of 13(b), and other reasons, the FTC was not actually able to make those orders stick and the companies were allowed to keep all of their profits from the practices.

So what we argue is to use Section 5(m)(1)(B) to trigger civil penalty liability for misrepresentations about privacy. This means that if you lie to consumers about how their data was going to be used, you could face penalties of up to $43,000 per violation rather than get a second bite of the apple.

A third area that we talked about, and is sort of related to privacy is targeted marketing. Many of you know that the Fair Credit Reporting Act has a whole set of prohibitions on the use of reports prepared about Americans. And one of the things Commissioner Chopra has talked about is how Facebook and other tech platforms increasingly resemble big credit bureaus in allowing third parties to target consumers based on certain characteristics. In the past, the FTC has made clear that it's unlawful to engage in certain types of targeted marketing, as it's not what's called a permissible purpose under the Fair Credit Reporting Act. And this gets pretty technical. And I won't get into the details here, but it's in the article. But the key finding we made is that the FTC's determination that targeted marketing is not a permissible purpose could be relevant to today's tech platforms and their business models in that they may face liability for using targeted marketing for that purpose.

The fourth area that we talked about using the Penalty Offense Authority is business opportunities, in particular MLMs, Multilevel Marketers, gig economy, and in some cases franchises too. The one we kind of focus on in the article is multilevel marketing, and I'll just share a little bit about the FTC's current enforcement approach. Under the status quo, we bring cases against multilevel marketers that we allege are operating as illegal pyramids. But it's important to stress again that we can only recover how much these companies earn, and only after lengthy litigation. By which time their assets may be dissipated and by which time a lot of the harm has already been done.

So Commissioner Chopra and I proposed with respect to multilevel marketers that are operating as illegal pyramids or multilevel marketers generally is to target some of the worst practices in the industry around misleading prospective recruits about how much they expect to earn. The FTC has repeatedly found in administrative orders, that it's a deceptive practice to promise someone, "join my MLM and you're going to be able to retire by the end of the year." Yet, we see practices like this year after year after year, especially during economic downturns like we're going through right now.

What we argue is that we should protect consumers more proactively and earlier by targeting those income misrepresentations and ensuring companies have to pay a real penalty if they continue to engage in them. If we want to bring a full-blown litigation about whether an MLM constitutes a pyramid scheme, we can do so. But what the Penalty Offense Authority allows us to do is move quickly to shut down some of the most pernicious practices in this industry.

And the last area where we think the Penalty Offense Authority is really needed is around fake reviews and online misinformation. We know that all over the world, online misinformation in the commercial sphere – obviously, it's a big problem in politics, but it's also a huge problem in the commercial sphere. Last year, the FTC, or two years ago now, the FTC settled a case with Sunda Riley, a skincare manufacturer, a skincare seller, that was allegedly generating for years fake reviews to boost its own profitability and harm its competitors. The FTC's response, the FTC's settlement, ordered the company to not do it again. That was it.

Now, here's what we know about this market, and other regulators know this too. The vast majority of fake reviews and other forms of online misinformation are not detected. So Commissioner Chopra and I argue that for those who are detected, we need strong penalties so that everyone in the market understands that polluting e-commerce with misinformation carries real consequences and not just a slap on the wrist. And because the FTC has already, in fact, we determined decades ago, that processes like fake reviews are deceptive under the FTC Act, we can act now to ensure that companies that engage in fake reviews and similar practices can face stiff civil penalties rather than no money orders like we saw in Sunda Riley.

MR. VIKAS KUMAR: Thanks. That was incredibly helpful. The last question I have, and then I'm going to turn it over to audience questions, is what has the reception to your article been? I know you mentioned that you've gotten feedback from industry about other areas in which prior FTC orders can be used to deter bad conduct. But what about the defense bar, lawyers that represent companies themselves, I guess, that may be at risk of having an action taken against them under this authority?

MR. SAMUEL LEVINE: Yeah, we've been really pleased by the reception. We released the article in October. We've gotten a lot of feedback. I've had a lot of conversations since. We've actually engaged directly with industry that's reached out to talk about the article. It's clearly generated a lot of interest. And by the way, I think I already mentioned this, but it's also generated a lot of interest among advocates who have, some of them, have been frustrated with the FTC and what they perceive as lax enforcement. And a lot of advocates are coming to us to say, this could really reset the narrative and restore the FTC's credibility. So we've gotten a lot of good feedback.

We also see, and what I think is especially interesting, is how this article is both kind of provoking, but also becoming a part of a broader discussion of the FTC's remedial authorities and how the FTC can restore its credibility as an effective 21st century digital regulator and regulator generally.

There are a lot of people around the FTC who frankly are very invested in the status quo. We saw an ABA report, the ABA Antitrust Section, for example, released a report last week for President Biden on FTC transition. And they actually argued that the Penalty Offense Authority is overly

punitive. They said that Section 13(b) should actually be further restricted by Congress to cover only a narrower subset of conduct. And they defended the FTC's reliance on no money orders, saying these no money orders are appropriate.

Speaking for myself, I think this is the exact wrong direction for the FTC to move in. If anything, we think, I think, that the FTC needs to be more rigorous in analyzing whether cases are having a deterring effect. We need to be more proactive in targeting market wide harms rather than playing Whack-A-Mole against scams. And we need to move away from a framework that allows companies to pocket their ill-gotten gains with impunity.

That's the direction we think the FTC needs to move in. And I personally feel very good that this is the direction that the FTC is going to be moving in over the next few years. And we fully expect that the Penalty Offense Authority is going to become a key weapon in our arsenal.

MR. VIKAS KUMAR: That's great. Thanks so much. I have some questions that we received from the audience. So I'm going to go ahead and ask those. The first question is when you crack down on market-wide fraud and abuse, is there a coalition of good businesses and good actors that applaud what you're doing so that they can compete fairly and honestly? For example, were the actual bamboo companies happy? And did they reach out and comment and participate? And unfortunately, I know that was before your time. But when you mentioned that you've received feedback from industry in areas in which the rule can be enforced. Any thoughts on that?

MR. SAMUEL LEVINE: Yes, that's an excellent question. And it's worth underscoring, and I think that was sort of the gist of this question, that one of the other things Commissioner Chopra has really tried to do, and we also tried to do in the article, is to underscore the fact that deception against consumers also harms fair competition. In fact, for decades, the FTC alleged that deceptive practices and double pleaded them as also unfair methods of competition. And actually, it's in our deception policy statement that deceptive practices also harm competition. So it's such an important point to remember, especially when we evaluate the effectiveness of these no money orders, that these practices that harm consumers are also harming the businesses that play by the rules.

So to more directly answer the question, yes. I don't want to share the particular industry that reached out, but we had – I'm thinking in particular of a conversation we had with a trade association that recognized there were widespread problems in their industry, and said, look FTC or look, Sam, we have a lot of honest players too. And we want to make sure that they can compete and not suffer because others aren't playing by the rules.

So I think their perspective, and I don't want to speak for them, is that if the FTC could be targeted in rooting out the bad practices, yeah, that would be bad for the bad actors, but that's also going to

be really good for the players, who sometimes at the expense of their growth, at the expense of shareholders' demands, are actually playing by the rules. So, we think there is a pathway for industry to be—for honest businesses to really benefit from this new approach.

MR. VIKAS KUMAR: Got it. The next question is does the FTC have enough litigated administrative orders to pursue all the enforcement initiatives that you've outlined? Aren't many of the administrative orders from decades ago? And will that raise due process issues and result in a lot of litigation rather than quick civil penalty judges?

MR. SAMUEL LEVINE: Right. So it's a complicated question. So I'll answer it in a couple of parts. So the short answer is yes, for all of the practices we identified in the article, we also identified litigated orders where the Commission made findings about those practices. The second part of the question was, well, aren't those orders too old? Well, this was actually tested in the courts in the—I can't remember, the early eighties or the late seventies, but this was tested in the courts. And the question then was whether FTC orders that predated 1975, when the Commission got 5(m)(1)(B), could still be used to trigger civil penalties. And the court found that clearly they could, clearly they could. So I don't think there's any dispute about that. And I'm very confident based on the text of the statute, that the age of the orders itself does not make a difference.

Now, the third part of the question was, well, aren't these orders so old, presenting due process problems, it's harder to be applicable? I think the FTC needs to be very judicious in which orders that it uses to trigger this liability. But let's be clear about the practices that Commissioner Chopra and I laid out in our article. These are evergreen. You know, the FTC started cracking down on deceptive testimonials and fake reviews as early as the 1950s, when cigarette companies were doing it. If you look at our endorsement guides where we lay out our legal position on the use of testimonials and reviews to promote a product, I mean, obviously there's a bunch in there about online commerce, but you would have seen exactly, I suspect, exactly the same legal analysis in the 1950s when we were suing Winston-Salem. Misinformation, yes, it's moved online. But the underlying practice of, for example, testimonials by people who are, you know, fake testimonials and fake reviews really has been a feature of American markets for decades.

Take another example, for-profit schools. It's true a lot of these schools have moved online. The business model has not changed, but sadly—excuse me, the business model has changed. But sadly, one thing that has not changed is that we continue to see year after year schools making, for example, job placement misrepresentations. In 2016, the FTC sued DeVry for making allegedly false claims about how many of its graduates could get jobs. Interestingly, we sued the same company, the parent company, Bell & Howell, 35 years earlier for the exact same practice. So I don't think there's anything old or out of date about FTC findings, whenever they were made, that you can't lie to students about their likelihood of getting jobs.

So I could march through each of these examples, but the basic point I want to stress is that, yes, of course, there are old FTC orders that no longer have applicability in the modern world. But for a lot of the deceptions that the FTC targets—and I would encourage people to look through some of our synopses from the 1970s, look through the FTC docket—these are frauds the FTC has been battling for decades. And just because they're made online instead of door to door or in person doesn't mean they're not deceptive under the FTC Act. And it means that these orders, whenever they were issued, remain highly relevant.

MR. VIKAS KUMAR: The next question is in response to the ABA report. Do you think the ABA is taking its position in opposition to your paper on behalf of dishonest or fraudulent industries? And with this type of position, does the ABA risk losing influence and credibility with decisionmakers in the Biden administration?

MR. SAMUEL LEVINE: Well, I don't want to say that. I don't want to ascribe any motives to them. I think there is a status quo bias among some people, especially who have been at the FTC, who like the way things have gone. I will say that every time there's legislation around privacy or, ten years ago, around financial services, companies always want to be under FTC jurisdiction. The auto dealers fought ten years ago to not be under CFPB jurisdiction and to remain under the FTC. Facebook, Google, the other tech companies, are currently fighting to have any privacy legislation preempt state laws and remain under FTC jurisdiction.

So I do think there's a sense that the FTC doesn't have the same bite as other enforcers, and that we've not been as aggressive. So again, I don't want to ascribe any motivations to the ABA, but my view, and I know Commissioner Chopra's view, is that the FTC needs to step up and actually think about deterrence and think about market-wide impact, if we're going to continue to be a strong digital regulator for the 21st century.

And if I could add just one thing. So the ABA did not actually oppose the use of the Penalty Offense Authority. They warned that it could be too punitive and said that it should only be used in cases of clear lawbreaking. I agree that it should only be used in cases of clear law breaking. And I think the examples we cite in the article would clearly meet that standard.

MR. VIKAS KUMAR: And the next question is what are some of the advantages of the penalty offense authority over things like agency rulemaking? Do they both get at the same thing, which is broader enforcement of entire industries?

MR. SAMUEL LEVINE: That's an excellent question. Commissioner Chopra has separately argued that the Commission should also undertake what we've called restatement rulemaking.

Restatement rulemaking simply codifies into rules long-standing Commission precedent. For example, we're currently undertaking—we've proposed a Made in USA rule. And all it says, it doesn't change the law at all. It doesn't impose any burden on market participants. It just says if you lie about your products being made in USA, you can face civil penalties in addition to the equitable relief you can already face under the status quo.

So we think rulemaking, especially restatement rulemaking that imposes no burden on honest companies, because it simply restates the existing law, is a necessary complement to the Penalty Offense Authority. So we see these working in tandem. We could go through case-by-case where rulemaking versus Penalty Offense Authority is more appropriate. But I think the gist of it is that we have to think about resurrecting both tools as the FTC not only prepares to deal with whatever happens with 13(b), but also as the FTC reorients itself to be more focused on challenging market-wide harms and delivering results for consumers and honest competitors.

MR. VIKAS KUMAR: The next question is basically if providing them notice is not that complicated, providing the synopses are not that complicated, and it doesn't require that much effort by the FTC, why has the FTC not done this already to at least potentially have the option of using the authority if it wants to?

MR. SAMUEL LEVINE: I expect that we are going to start using it. That's my expectation. I mean, again, I'm not revealing any non-public information, but that is my expectation. Because I think the Penalty Offense Authority has clear advantages and I think people are starting to recognize that. You know, there's a lot of attachment to the status quo—I mentioned this—to the status quo approach at the FTC. There's a view among many that the Supreme Court could just uphold 13(b). Congress could just codify our ability to get restitution and disgorgement under 13(b). That that would solve the FTC's problems.

And what Commissioner Chopra and I argue in the article is that, of course, there are some who would hold that view, but we really think that the FTC, regardless of what happens to 13(b), needs to rethink its approach. We are a national regulator. We are a national law enforcer. Every case we bring requires taxpayer resources and should have an impact on achieving market-wide compliance. And if we're going to move into that framework where we're working to achieve market-wide compliance, instead of individual resolutions in cases, it's going to require a more diverse toolkit, including restatement rulemaking and including Penalty Offense Authority.

MR. VIKAS KUMAR: One question I had that just popped up as a result of what you're saying is to the extent the FTC relies more on sending the synopses out, does that happen behind closed doors? Or is that going to be a public thing where the FTC will disclose we've sent out synopses to

this particular industry and these companies? Or is that something that the companies will have to disclose if they feel that it's material?

MR. SAMUEL LEVINE: That's a good question. There is not a requirement that the FTC post a synopsis publicly. I generally err on the side of transparency and on the side of being public. I think that sends a positive message. And in fact, when we do publicize Penalty Offense warnings, that actually extends the number of people who have knowledge of the determination. It's another matter of whether we could go and prove that. But the point is it's an opportunity for the FTC to remind the market of its determinations.

Now, there may be cases where it does not make sense to do it publicly, and I don't want to prejudge that. But it's an excellent question. I would say my instinct could be toward transparency being better. But I think that would be a great discussion to have on a case-by-case. Or I should say on an industry-by-industry basis.

MR. VIKAS KUMAR: The last question is if the Supreme Court rules unfavorably against any—you've touched on this, but if the Supreme Court rules unfavorably against the FTC regarding its ability to seek monetary relief, does that inevitably push the FTC to rely on the Penalty Offense Authority in conjunction with 13(b), which may be only limited to being able to seek injunctions?

MR. SAMUEL LEVINE: Yeah. Well, I don't want to be a broken record here, but it's really important the FTC prevail in the Supreme Court. It's really important we hold onto our 13(b) power. But regardless of what happens, we really believe the Commission should get going on using this authority, for all the reasons I have said. So, of course, we'll see what happens in the Supreme Court. But given all the limitations I've laid out about 13(b), I think we should use this moment of crisis for the Commission as an opportunity to step back and assess what are all the authorities Congress gave us? Why did Congress give us these authorities? And what can we achieve? What can we deliver for consumers and for honest competitors using these authorities that may be more effective than our status quo approach? So I hope this a moment of reflection for us. And I'm confident that upon that reflection, we'll get going on using our Penalty Offense Authority.

MR. VIKAS KUMAR: I have one more question. So I know you may not be able to discuss anything at the CFPB, but if you feel comfortable answering this question, please do because it's touched on in the article about the Fair Credit Reporting Act. Last month, Commissioner Chopra wrote a dissent in a consumer reporting matter AppFolio that asked whether the data supplier CoreLogic might have been giving faulty data to the consumer reporting firm. Does the Fair Credit Reporting Act to leave room for an agency like the CFPB to investigate and even sanction a data supplier? Could that reach extend to social networks or even search engines?

MR. SAMUEL LEVINE: I don't want to get into that at this point.

MR. VIKAS KUMAR: Okay, that's fine. That's all the questions from the audience. Thank you so much. It's been a very informative call.

MR. SAMUEL LEVINE: Well, thanks for having this discussion. And I'm so glad. I think all of us should be invested in a vigorous, effective FTC that protects consumers and protects honest businesses. So I really appreciate people's interest in the article. I'm more than happy to talk about it offline with anyone interested. My email I'm sure can be made available. I'm happy to have further discussions about this because we're really excited about how this authority can be deployed to step up the FTC's effectiveness.

MR. VIKAS KUMAR: Great, yeah. Thank you so much.

MR. SAMUEL LEVINE: Thank you. Take care, everyone.