Insight

The Regulators are Coming…for the Tech Industry

SAM BATKINS, CAMERON MCCOSH | NOVEMBER 12, 2012

No, these regulators aren't the British on horseback. Led by the "Four Horsemen of the Acronym" — outgoing Federal Trade Commission (FTC) Chair Jon Leibowitz, Federal Communications Commission (FCC) Chair Julius Genachowski, Consumer Financial Protection Bureau (CFPB) Director Richard Cordray, and Commodity Futures Trading Commission (CFTC) Chair Gary Gensler — the Administration is erecting its own "regulatory cliff."

In 2012 alone, these four managed to publish more than $5.2 billion in regulatory burdens, and that's just a warm-up act for what could happen in 2013. The "War on Coal" made its way into the presidential debates, but the real regulatory war being waged is against the U.S. tech industry.

Focus on the record of FTC Chair Jon Leibowitz, the least-known of the Four Horsemen. During the past three years, his regulatory push has antagonized business, stifled U.S. competitiveness, and wasted millions of taxpayer dollars.

Proof? Ask Facebook (FB), Twitter, Apple (AAPL), and Google (GOOG) about their regulatory compliance costs, and their legal bills. Leibowitz is currently in month 15 of his ongoing showdown with Google, investigating why Americans continue to use its search engine when they could freely choose hundreds of possible rivals. His proof of actual consumer harm? He's still looking and the legal bills are piling up.

But it's not just the legal bills – it's also the impact of the government always looking over these companies' shoulders. The U.S. tech industry is a rare bright spot in our stagnant economy, and the products it creates – iPhones, Facebook, Google's new driverless cars – are the envy of the world. Even though consumers are happy with these services, President Obama's FTC believes it needs to "protect" consumers from those companies – and tweak their products to make them "better." I've yet to hear a consumer say that these great online services need more involvement from government.

Facebook and MySpace are also familiar with FTC's costly, paternalistic oversight. Both were forced to agree to 20 years of enhanced regulatory inspection (some would be surprised that MySpace even still exists). It took Facebook five months to complete its acquisition of Instagram, a company with little revenue or competitive clout.

The FTC is pursuing its investigation of the tech industry under expansive, some say almost limitless, "Section 5" powers. Last year Leibowitz noted that "one of the commission's priorities is to find a pure [FTC Act] Section 5 case under unfair methods of competition." It appears the government can't prove monopoly damage through traditional antitrust law, so they are reaching out to use Section 5 as a catchall.

Traditionally, Section 5 would not apply to a single firm so the government would make the case that a company violated the Sherman Antitrust Act and Section 5, but Leibowitz can't conjure any traditional per se violations. It looks like Leibowitz is on a fishing expedition, but fishing with dynamite guarantees collateral damage for the tech sector.

Google, Facebook, and Apple all mentioned enhanced regulatory oversight in their most recent statement to investors. According to Facebook, “The FTC [has] investigated and audited aspects of our products and practices, and we expect to continue to be the subject of regulatory investigations and audits in the future…” As a result, Facebook admitted “regulatory authorities could cause us to incur substantial costs or require us to change our business practices in a manner materially adverse to our business.”

No reasonable observer expects no oversight. But oversight comes with costs as well as benefits. The goal should be an oversight regime that matches the President’s commitment on technology: “Ensuring that the U.S. continues to lead the world in science and technology will be a central priority for my administration.”

The U.S. still leads the world in technology; the Internet alone accounts for 4.7% of our GDP growth. Google and Apple generate almost $150 billion in revenue, more than the GDP of New Zealand. Unfortunately, growth in the tech sector increasingly occurs despite the actions of the regulators.

President Obama has said the U.S. should “reward success instead of failure.” Agreed. If only his FTC showered successful companies with praise, rather than subpoenas and new regulations.

This article originally appeared on Fox Business.