

July 17, 2018

The Honorable Robert Latta, Chairman
The Honorable Janice Schakowsky, Ranking Member
U.S. House Committee on Energy and Commerce
Subcommittee on Digital Commerce & Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Latta and Ranking Member Schakowsky:

We write to you regarding the hearing on “Oversight of the Federal Trade Commission.”¹ We appreciate your interest in the critical role of the FTC and consumer protection. We look forward to working with the new FTC Chairman and Commissioners. But the FTC must do more to address the growing threats to consumer privacy in the United States. Consumers today face unprecedented risks of identity theft, financial fraud, and data breaches. The FTC’s continued failure to act against the growing threats to consumer privacy and security could be catastrophic.

For many years, the Electronic Privacy Information Center (“EPIC”) has worked with the House Commerce Committee to help protect the privacy rights of Americans.² EPIC has also played a leading role at the Federal Trade Commission, helping to establish the Commission’s authority to safeguard American consumers, and bringing to the Commission’s attention emerging privacy and civil liberties.³ And EPIC is the group that filed the detailed complaint against Facebook with the

¹ *Oversight of the Federal Trade Commission*, 115th Cong. (2018), H. Comm. on Energy & Commerce, Subcomm. on Digital Commerce and Consumer Protection, <https://energycommerce.house.gov/hearings/oversight-of-the-federal-trade-commission-2018/> (Jul. 18, 2018).

² See, e.g. Marc Rotenberg, EPIC Executive Director, Testimony before the H. Comm. on Energy & Commerce, Subcomm. on Communications & Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (Nov. 13, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

³ Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry) available at http://epic.org/privacy/internet/ftc/ftc_letter.html; See also EPIC, *In the Matter of DoubleClick, Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Feb. 10, 2000), available at http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; EPIC, *In the Matter of Microsoft Corporation, Complaint and Request for Injunction, Request for Investigation and for Other Relief*, before the Federal Trade Commission (July 26, 2001), available at http://epic.org/privacy/consumer/MS_complaint.pdf; EPIC, *In the Matter of Choicepoint, (Complaint, Request for Investigation and for Other Relief)*, Dec. 16, 2004, available at <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

FTC in 2009, resulting in the Commission’s 2011 Consent Order with Facebook.⁴ EPIC is also the group that sued the FTC for its failure to enforce a similar order against Google.⁵

Why Does the FTC Fail to Enforce Its Own Consent Orders?

In 2011, the FTC entered into a Consent Order with Facebook, following an extensive investigation and complaint pursued by EPIC and several US consumer privacy organizations. The Consent Order prohibited Facebook from transferring personal data to third parties without user consent.⁶ As EPIC told Congress back in April, the transfer of personal data on 87 million Facebook users to Cambridge Analytica could have been prevented had the FTC enforced its 2011 Consent Order against Facebook.⁷ *The obvious question now is “why did the FTC fail to act?”*

In 2011, EPIC also obtained a significant judgment at the FTC against Google after the disastrous roll-out of Google “Buzz.”⁸ In that case, the FTC established a consent order after Google tried to enroll Gmail users into a social networking service without meaningful consent.⁹

But a problem we did not anticipate became apparent almost immediately: the FTC was unwilling to enforce its own consent orders. Almost immediately after the settlements, both Facebook and Google began to test the FTC’s willingness to stand behind its judgements. Dramatic changes in the two companies’ advertising models led to more invasive tracking of Internet users. Online and offline activities were increasingly becoming merged.

In March, the FTC finally announced that is investigating Facebook.¹⁰ Tom Pahl, Acting Director of the Federal Trade Commission’s Bureau of Consumer Protection, issued the following statement regarding reported concerns about Facebook’s privacy practices:

The FTC is firmly and fully committed to using all of its tools to protect the privacy of consumers. Foremost among these tools is enforcement action against

⁴ *In the Matter of Facebook, Inc.* (EPIC, Complaint, Request for Investigation, Injunction, and Other Relief) before the Federal Trade Commission, Washington, D.C. (filed Dec. 17, 2009), <http://www.epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>.

⁵ *EPIC v. FTC*, 844 F. Supp. 2d 98 (D.D.C. 2012), <https://epic.org/privacy/ftc/google/EPICvFTCCtMemo.pdf>.

⁶ Fed. Trade Comm’n., *In re Facebook*, Decision and Order, FTC File No. 092 3184 (Jul. 27, 2012) (Hereinafter “Facebook Consent Order”), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

⁷ See, Letter from EPIC to S. Comm. on the Judiciary and S. Comm on Commerce, Science and Transportation, (Apr. 9, 2018), <https://epic.org/testimony/congress/EPIC-SJC-Facebook-Apr2018.pdf>.

⁸ *In the Matter of Google, Inc.*, EPIC Complaint, Request for Investigation, Injunction, and Other Relief, before the Federal Trade Commission, Washington, D.C. (filed Feb. 16, 2010), https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

⁹ Fed. Trade Comm’n., *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data*, Press Release, (Mar. 30, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz>.

¹⁰ Fed. Trade Comm’n., *Statement by the Acting Director of FTC’s Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices* (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

companies that fail to honor their privacy promises, including to comply with Privacy Shield, or that engage in unfair acts that cause substantial injury to consumers in violation of the FTC Act. Companies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements. Accordingly, the FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook. Today, the FTC is confirming that it has an open non-public investigation into these practices.¹¹

It is critical that the FTC conclude the Facebook matter, issue a significant fine, and ensure that the company uphold its privacy commitments to users. The U.K. Information Commissioner's Office recently fined Facebook the maximum allowable fine under U.K. law as the result of the Cambridge Analytica breach, charging the company with "failing to safeguard people's information [and] failing to be transparent about how people's data was harvested by others and why they might be targeted by a political party or campaign."¹² Given the current focus on Privacy Shield, it is vital that the FTC not lag behind other countries in enforcement.

Four months have now passed since the new Commission announced it was reopening its investigation of Facebook, but still there is no judgment. As Chairman Simons has stated, a "first priority for the Commission" will be "vigorous enforcement."¹³ FTC Commissioner Rohit Chopra recently stated that "FTC orders are not suggestions."¹⁴ EPIC strongly agrees, and we hope that this sentiment will translate into concrete action by the FTC. EPIC has repeatedly urged the FTC to enforce its consent orders. Its failure to do so has had devastating consequences for American consumers.

The Committee should ask the FTC Chairman and the Commissioners: When will there be a final determination in the Facebook investigation? What other steps can the FTC take to assure the American public that the Commission will enforce its legal orders?

Why Has the FTC Failed to Stop Mergers that Threaten Consumer Privacy?

The FTC must also address the serious threats to consumer privacy posed by increasing consolidation among the dominant technology firms in the United States. The FTC's failure to take these threats into account in its merger review process is one of the main reasons that consumer privacy has diminished and the secretive tracking and profiling of consumers has proliferated.

¹¹ *Id.*

¹² Information Commissioner's Office, *Investigation Into the Use of Data Analytics In Political Campaigns*, (Jul. 10, 2018), <https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf>.

¹³ *Nomination Hearing*, 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (Joseph Simons, Chairman, Fed. Trade Comm'n. at 59:40), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

¹⁴ Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioners, Fed. Trade Comm'n, (May 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

In 2007, EPIC warned the FTC that Google’s acquisition of DoubleClick would lead to Google tracking consumers across the web, accelerating its dominance of the online advertising industry.¹⁵ The FTC ultimately allowed the merger to go forward over the compelling dissent of Pamela Jones Harbour.¹⁶ Not surprisingly, Google today accounts for 90 percent of all Internet searches and, together with Facebook, absorbs 73 percent of all digital advertising revenue in the U.S.¹⁷

In 2014, the FTC failed to impose privacy safeguards for Facebook’s acquisition of WhatsApp, a text-messaging service that attracted users specifically because of its privacy protections.¹⁸ The FTC allowed the merger to go through based on assurances by both companies that they would honor WhatsApp users’ privacy.¹⁹ But in 2016, WhatsApp announced that it would begin disclosing its users’ personal information to Facebook.²⁰ The U.K. ICO blocked WhatsApp’s transfer of data to Facebook,²¹ and the European Commission fined Facebook \$122 million for misleading European authorities about the data transfer.²² But the FTC again failed to take action.

Chairman Joseph Simons stated during his nomination hearing that, “the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it.”²³ Chairman Simons has recently announced a substantial review of competition policy which EPIC supports.²⁴ However, we must ensure that the Commission uses its current authorities to the fullest extent possible. For example, the Commission could “unwind” the Facebook-WhatsApp deal because of

¹⁵ *In the Matter of Google Inc. and DoubleClick Inc.*, (EPIC Complaint, Request for Injunction, Investigation, and Other Relief), (Apr. 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

¹⁶ *In the Matter of Google/DoubleClick*, FTC File No. 070-0170 (2007) (Harbor, C., dissenting), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

¹⁷ Editorial, *Break Up Google*, Boston Globe (Jun. 14, 2018), <https://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/>.

¹⁸ *In the Matter of WhatsApp, Inc.*, (EPIC and Center for Digital Democracy Complaint, Request for Investigation, Injunction, and Other Relief), (Mar. 6, 2014), <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

¹⁹ See, Fed. Trade Comm’n., *Letter to Facebook and WhatsApp from Jessica L. Rich, Director, Bureau of Consumer Prot.*, (Apr. 10, 2014), available at, <https://epic.org/privacy/internet/ftc/whatsapp/FTC-facebook-whatsapp-ltr.pdf> (concerning the companies’ pledge to honor WhatsApp’s privacy promises).

²⁰ WHATSAPP, *Looking Ahead for WhatsApp*, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

²¹ Information Commissioner’s Office, *WhatsApp, Inc.*, (Mar. 12, 2018), <https://ico.org.uk/media/action-weve-taken/undertakings/2258376/whatsapp-undertaking-20180312.pdf>.

²² European Commission, *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover*, Press Release, (May 18, 2017), http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

²³ *Nomination Hearing*, 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm’n.), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

²⁴ Press Release, Fed Trade Comm’n, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

Facebook's failure to uphold its commitments to users.²⁵ Even the founders of WhatsApp have acknowledged that Facebook broke its commitments. How can it be that the FTC does not act in such circumstances?

The Committee should ask the FTC Chairman and the Commissioners: Will the FTC unwind the Facebook-WhatsApp deal? What further steps is the FTC going to take to protect consumer privacy in its merger review process?

Recommendations

There is a lot of work ahead to safeguard the personal data of Americans. Here are a few preliminary recommendations:

- *Improve oversight of the Federal Trade Commission.* The FTC has failed to protect the privacy interests of American consumer and the Commission's inaction contributed directly to the Cambridge Analytica breach, and possibly the Brexit vote and the outcome of the 2016 Presidential election. Oversight of the Commission's failure to enforce the 2011 consent order is critical, particularly for the House Commerce Committee which also bears some responsibility for this outcome.
- *Update US privacy laws.* It goes without saying (though obviously it still needs to be said) that U.S. privacy law is out of date. There has always been a gap between changes in technology and business practices and the development of new privacy protections. But the gap today in the United States is the greatest at any time since the emergence of modern privacy law in the 1960s. The current approach is also unnecessarily inefficient, complex, and ineffective. And many of the current proposals, e.g. better privacy notices, would do little to protect privacy or address the problems arising from recent data breaches.
- *Establish a federal privacy agency in the United States.* The U.S. is one of the few developed countries in the world without a data protection agency. The practical consequence is that the U.S consumers experience the highest levels of data breach, financial fraud, and identity theft in the world. And U.S. businesses, with their vast collections of personal data, remain the target of cyber attack by criminals and foreign adversaries. The longer the U.S. continues on this course, the greater will be the threats to consumer privacy, democratic institutions, and national security.

Conclusion

The credibility of the FTC as the US agency responsible for consumer protection turns on its willingness to enforce its Consent Orders. If the Commission fails to enforce its orders, Americans will face ever greater risks and Europeans will be unwilling to send their personal data to the United States. There is an urgent need for the FTC to act.

²⁵ Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, Techonomy (May 4, 2018), <https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation/>

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

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/s/ Caitriona Fitzgerald

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