

January 24, 2019

Chairman Joe Simons  
Federal Trade Commission  
Washington DC

Dear Chairman Simons and Members of the Commission,

We write to you about a recent news report that the Commission is now finalizing a penalty against Facebook regarding violations of the 2011 consent order.<sup>1</sup>

This action is long overdue and the urgency of this matter cannot be overstated. Almost ten years have passed since many of our organizations first brought the Commission's attentions to Facebook's business practices that threaten privacy and are in fact "unfair and deceptive trade practices."<sup>2</sup> And eight years have passed since the Commission first announced the settlement with Facebook.<sup>3</sup> And now almost a year has passed since the Commission announced it was reopening the investigation following the Cambridge Analytica breach.<sup>4</sup>

Remarkably, the Commission has not imposed a single fine against Facebook, nor has the Commission suggested that additional authority was needed. In fact, four previous chairs of the FTC held out the Facebook consent order as an example of the agency's robust enforcement authority to Congressional committees and European officials.<sup>5</sup>

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<sup>1</sup> Tony Romm and Elizabeth Dwoskin, *U.S. regulators have met to discuss imposing a record-setting fine against Facebook for privacy violations*, Wash. Post (Jan. 18, 2019), <https://www.washingtonpost.com/technology/2019/01/18/us-regulators-have-met-discuss-imposing-record-setting-fine-against-facebook-some-its-privacy-violations/>.

<sup>2</sup> *In the Matter of Facebook, Complaint, Request for Investigation, Injunction, and Other Relief* (Dec. 17, 2009), <https://www.epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>

<sup>3</sup> Federal Trade Comm'n, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises* (Nov. 29, 2019), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

<sup>4</sup> Federal 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>.

<sup>5</sup> *See, e.g.*, According to the statement of the FTC Commissioners who testified before the Senate Commerce Committee in 2012:

Similar to the Google order, the Commission's consent order against Facebook prohibits the company from deceiving consumers with regard to privacy; requires it to obtain users' affirmative express consent before sharing their information in a way that exceeds their privacy settings; and requires it to implement a comprehensive privacy program and obtain outside audits. In addition, Facebook must ensure that it will stop providing access to a user's information after she deletes that information.

*The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission: Hearing Before the S. Comm on Commerce, Science and Transportation*, at 18, 112th Cong. (May 9, 2012) (statement of Fed. Trade Comm'n.), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-and/120509privacyprotections.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-and/120509privacyprotections.pdf); *see*

But the record of repeated violations of the consent order can no longer be ignored. The company's business practices have imposed enormous costs on the privacy and security of Americans, children and communities of color, and the health of democratic institutions in the United States and around the world.

And we appreciate the statements that members of the present Commission have made regarding the need for strong and effective enforcement. Chairman Simons told the Senate at his nomination hearing that the FTC would prioritize the consumer protection issues "where harm is the greatest," and that would garner the "biggest bang for taxpayer dollar,"<sup>6</sup> and in July he told the Senate that privacy and data security are now the top priority for the FTC.<sup>7</sup> As Commissioner Chopra has made clear, "FTC orders are not suggestions."<sup>8</sup>

We note, for example, that under Section 5(l) of the FTC Act, the agency has very robust authority in seeking remedial action – both large fines and equitable relief -- for violations of its prior orders. Given that Facebook's violations are so numerous in scale, severe in nature, impactful for such a large portion of the American public and central to the company's business model, and given the company's massive size and influence over American consumers, penalties and remedies that go far beyond the Commission's recent actions are called for.

#### 1) Impose Substantial Fines

Facebook has violated the consent order on numerous occasions, involving the personal data of millions, possibly billions, of users of its services. Based on the duration of the violations, the scope of the violations, and the number of users impacted by the violations, we would expect that the fine in this case would be at least two orders of magnitude greater than any previous fine.

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*also, The Need for Privacy Protections:*

*Perspectives from the Administration and the Federal Trade Commission, Hearing before the S. Comm. on Commerce, Science, and Transportation, 112th Cong. (May 19, 2012) (statement of Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n) ("We have also charged companies with failing to live up to their privacy promises, as in the highly publicized privacy cases against companies such as Google and Facebook, which together will protect the privacy of more than one billion users worldwide. As a Commissioner, I will urge continuation of this strong enforcement record."), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commissioner-maureen-k.ohlhausen/120509privacytestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120509privacytestimony.pdf). See also Letter from FTC Chairwoman Edith Ramirez to Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, European Comm'n, at 4-5 (Jul. 7, 2016), <https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004q0v>.*

<sup>6</sup> Hamza Shaban, *Nominee for FTC chairman signals scrutiny for tech giants*, Wash. Post., Feb. 14, 2018, <https://www.washingtonpost.com/news/the-switch/wp/2018/02/14/nominee-for-ftc-chairman-signals-scrutiny-for-tech-giants/>.

<sup>7</sup> Statement of Fed. Trade Comm'n, *Oversight of the Federal Trade Commission*, before the Comm. on Energy and Commerce, Subcomm. on Digital Commerce and Consumer Protection, House of Representatives (July 18, 2018), ("Year after year, privacy and data security top the list of consumer protection priorities at the Federal Trade Commission.") <https://docs.house.gov/meetings/IF/IF17/20180718/108560/HHRG-115-IF17-Wstate-SimonsJ-20180718.pdf>.

<sup>8</sup> Commissioner Rohit Chopra memo to Commission Staff and Commissioners, *Repeat Offenders* (May 18, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1378225/chopra\\_-\\_repeat\\_offenders\\_memo\\_5-14-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf).

Thus, if the agency fined Google \$22 million in the Safari hack, a significant matter but also a discrete violation of a preexisting order, we anticipate that the fine against Facebook would exceed \$2 billion. This would be a much larger fine than the FTC has issued in the past but not inconsistent with the fines that large firms often face when found guilty of far-reaching practices that violate the rights of consumers.<sup>9</sup>

Such a penalty level is well within the agency's scope of authority for violation of a consent decree. Under the Section 5(l) of the FTC Act, as modified by subsequent inflation-adjusting legislation, *each* violation of an order may result in a fine of more than \$41,000. Focusing exclusively on the Cambridge Analytica scandal, Facebook has acknowledged that more than 70 million Americans were likely affected.<sup>10</sup> Even generously assuming that each affected person was subject to only one violation of the order, a thousand dollar fine per violation would necessitate a \$70 billion fine. Our point is not to argue for a fine of this scale, but to underscore the authority the FTC possesses to impose consequential fines.

## 2) Establish Structural Remedies

The evidence is also clear that Facebook breached its commitments to the Commission regarding the protection of WhatsApp user data.<sup>11</sup> As this occurred after the initial consent order, the FTC should require Facebook to unwind the acquisition of both WhatsApp and Instagram.<sup>12</sup> The companies should be reestablished as independent entities and Facebook should be required to disgorge the personal data unlawfully acquired from those firms. This will also help restore competition and innovation for Internet messaging and photo app services, two important goals for the future of the Internet economy.

Facebook should also end the practice of collecting personal data from individuals who are not in fact users of the service.

## 3) Require Compliance with Fair Information Practices

We also urge the FTC to require Facebook to comply with Fair Information Practices for all future uses of personal data across all services for all companies.<sup>13</sup> We have previously recommended that the Commission require compliance with Fair Information Practices as a

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<sup>9</sup> See, e.g., NPR, *Wells Fargo Hit With \$1 Billion In Fines Over Home And Auto Loan Abuses* (Apr. 20, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/20/604279604/wells-fargo-hit-with-1-billion-in-fines-over-consumer-abuses>.

<sup>10</sup> Facebook, *An Update on Our Plans to Restrict Data Access on Facebook* (Apr. 4, 2018), <https://newsroom.fb.com/news/2018/04/restricting-data-access/>.

<sup>11</sup> FTC, *FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition* (Apr. 10, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed>; Sheera Frenkel and Cade Metz, *WhatsApp Co-Founder Leaving Facebook Amid User Data Disputes*, N.Y. Times (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/technology/whatsapp-facebook-jan-koum.html>.

<sup>12</sup> See Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 132-33 (2018) (discussing Facebook, WhatsApp, and Instagram, and the “clear dangers to democracy that stem from the manipulation of the Facebook conglomerate.”)

<sup>13</sup> *The Time is Now: A Framework for Comprehensive Privacy Protection and Digital Rights in the United States*, <https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf>.

condition of a privacy settlement.<sup>14</sup> FIP compliance must now be mandated Facebook should be subject to ongoing compliance through enhanced annual audits, public reporting, and routine inspection by the FTC.

#### 4) Reform Hiring and Management Practices

Part of the problem with the company arises also from its failure to hire and maintain a diverse work force. The algorithmic bias of the news feed reflects a predominantly Anglo, male world view. “The lack of language skills and cultural insensitivity have blinded Facebook to the ways in which its platform can be used to harm defenseless minorities. This has already played out with deadly outcomes in Sri Lanka and Myanmar.”<sup>15</sup>

Facebook could do far more to establish a company and a leadership team that reflects the broad diversity of its user base. And there should be independent directors who represent the interests of users and also examine the civil rights impacts of Facebook’s products and policies. If the company wishes “to connect the world,” it must also be prepared to reflect the world in all of its decision-making.

#### 5) Restore Democratic Governance

The original complaint against Facebook grew out of the company’s failure to uphold its commitments to democratic governance.<sup>16</sup> After agreeing not to make changes to user privacy settings and other significant policy changes, the company ended user input and shut down news groups that provided users with the opportunity to discuss the company’s business practices.<sup>17</sup> We have lived with the consequences.

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<sup>14</sup> See, e.g., EPIC, Comments to the FTC, *In the Matter of Snapchat, Inc.*, FTC File No. 132 3078 (June 9, 2014) (“The Commission Should Require Snapchat to Implement the Fair Information Practices Outlined in the Consumer Privacy Bill of Rights,”) <https://epic.org/privacy/ftc/FTC-Snapchat-Cmts.pdf>; See also Comments on EPIC to the FTC, *In the Matter of Facebook, Inc.* “FTC File No. 092 3184” (Dec. 27, 2011), <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>.

<sup>15</sup> Roger McNamee, *I Mentored Mark Zuckerberg. I Loved Facebook. But I Can't Stay Silent About What's Happening* (Jan. 17, 2019), <http://time.com/5505441/mark-zuckerberg-mentor-facebook-downfall/>

<sup>16</sup> There is a longer history of significant events concerning the efforts of Facebook users to establish democratic accountability for Facebook during the 2008-2009 period. The filing of the 2009 complaint came about after it became clear that Facebook would not uphold its commitments to the Statement of Right and Responsibilities it had established. It would also be worth reconstructing the history of the “Facebook Users Against the New Terms of Service” as Facebook destroyed the group and all records of its members and activities after the organizers helped lead a successful campaign against the company. Julius Harper was among the organizers of the campaign. A brief history was written by Ben Popken in 2009 for *The Consumerist*, “What Facebook's Users Want In The Next Terms Of Service,” <https://consumerist.com/2009/02/23/what-facebooks-users-want-in-the-next-terms-of-service/>. Julius said this in 2012: “Most people on Facebook don’t even know they can vote or even that a vote is going on. What is a democracy if you don’t know where the polling place is? Or that a vote is even being held? How can you participate? Ignorance becomes a tool that can be used to disenfranchise people.” *Facebook upsets some by seeking to take away users’ voting rights*, San Jose Mercury News, Nov. 30, 2012, <https://www.mercurynews.com/2012/11/30/facebook-upsets-some-by-seeking-to-take-away-users-voting-rights/>.

<sup>17</sup> Brad Stone and Brian Stetler, *Facebook Withdraws Changes in Data Use*, N.Y. Times (Feb. 18, 2009), <https://www.nytimes.com/2009/02/19/technology/internet/19facebook.html>,

We urge the Commission to either restore the right of Facebook users to have meaningful input into the company's decisions or to recommend to Congress that Facebook be regulated as a public utility.

Facebook has operated for too long with too little democratic accountability. That should now end. At issue are not only the rights of consumers but also those of citizens. It should be for users of the services and for democratic institutions to determine the future of Facebook.

We look forward to your final determination in the Facebook matter.

Sincerely,

Electronic Privacy Information Center  
Color of Change  
Common Sense Media  
Constitutional Alliance  
Government Accountability Project  
Open Market Institute  
Privacy Times  
Patient Privacy Rights  
Stop Online Violence Against Women

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*Facebook takes a Democratic Turn*, USA Today (Feb. 27, 2009) at 1B  
<https://www.pressreader.com/usa/usa-today-us-edition/20090227/281887294213804>.