



July 25, 2014

Rep. Darrell E. Issa, Chairman  
 Committee on Oversight and Government Reform  
 U.S. House of Representatives  
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Dear Mr. Chairman and Members of the Committee:

We write to you regarding this week's hearing, "The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury." Several Members of the Committee suggest that the FTC's Section 5 authority is too broad. In our view, almost the opposite is true. While we appreciate your interest in the scope of the Commission's Section 5 authority, we urge you to consider three points: (1) the Commission rarely enforces its consent orders, (2) the Commission never modifies proposes consent orders to take account of public concerns, and (3) the Commission has failed to require companies that violate the privacy rights of American consumers to comply with the minimal requirements of the Consumer Privacy Bill of Rights.

The Electronic Privacy Information Center ("EPIC") is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.<sup>1</sup> EPIC has filed many notable complaints before the Federal Trade Commission in support of American consumers. A 2010 EPIC complaint provided the basis for the Commission's investigation and subsequent settlement with Google Buzz.<sup>2</sup>

<sup>1</sup> See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm'r Christine Varney (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), [http://epic.org/privacy/internet/ftc/ftc\\_letter.html](http://epic.org/privacy/internet/ftc/ftc_letter.html); DoubleClick, Inc., FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/internet/ftc/DCLK\\_complaint.pdf](http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf); Microsoft Corporation, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/consumer/MS\\_complaint.pdf](http://epic.org/privacy/consumer/MS_complaint.pdf); Choicepoint, Inc., FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcaltr12.16.04.html>.  
<sup>2</sup> Press Release, Federal Trade Comm'n, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> ("Google's data practices

The Commission's settlement with Facebook also followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organizations in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.<sup>3</sup> This year, EPIC filed Complaints regarding Facebook's acquisition of the messaging service WhatsApp; Google's acquisition of the smart thermostat Nest; and most recently, Facebook's emotional manipulation study.<sup>4</sup> We have relevant expertise concerning the agency's use of this authority.

*The Commission Rarely Enforces Its Consent Orders or Modifies Proposed Settlements to Reflect Public Comments*

First, it has been our experience pursuing FTC Complaints that even when the Commission reaches a consent agreement with a privacy-violating company, the Commission rarely enforces the consent Order's terms. For example, after an EPIC Complaint to the FTC resulted in a 2011 consent order prohibiting Google from combining user data without permission,<sup>5</sup> Google nevertheless collapsed the privacy policies of over sixty Google-owned services early in 2012.<sup>6</sup> Although this practice clearly violated Google's prohibition on combining user data, the Commission nevertheless failed to enforce the consent order.<sup>7</sup> In fact, EPIC filed a lawsuit in federal court – including a motion for a temporary restraining order –to compel the FTC to enforce its own order.<sup>8</sup> Google's consolidation also prompted objections from state

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in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

<sup>3</sup> In the Matter of Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; In the Matter of Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief), [https://epic.org/privacy/inrefacebook/EPIC\\_Facebook\\_Supp.pdf](https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf) [hereinafter EPIC 2009 Facebook Supplement]; In the Matter of Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), [https://epic.org/privacy/facebook/EPIC\\_FTC\\_FB\\_Complaint.pdf](https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf).

<sup>4</sup> In the Matter of WhatsApp, Inc., (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <http://epic.org/privacy/internet/ftc/whatsapp/WhatsApp-Complaint.pdf>; In the Matter of WhatsApp, Inc., (2014) (EPIC Supplemental Complaint, Request for Investigation, Injunction, and Other Relief), <http://epic.org/privacy/internet/ftc/whatsapp/WhatsApp-Nest-Supp.pdf>; In the Matter of Facebook, Inc. (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <http://epic.org/privacy/internet/ftc/facebook/psycho/Facebook-Study-Complaint.pdf>.

<sup>5</sup> In the Matter of Google, Inc.; FTC File No. 102 3136 (Oct. 13, 2011) (Decision and Order), <http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzdo.pdf>.

<sup>6</sup> Google Blog, *Updating our privacy policies and terms of service*, <http://googleblog.blogspot.com/2012/01/updating-our-privacy-policies-and-terms.html> (Posted Jan. 24, 2012).

<sup>7</sup> See EPIC, *EPIC v. FTC (Enforcement of the Google Consent Order)*, <http://epic.org/privacy/ftc/google/consent-order.html> (last accessed Jul. 23, 2014).

<sup>8</sup> *EPIC v. FTC*, Case No. 12-00206-JAB (D.D.C. filed Feb. 9, 2012).

attorneys general,<sup>9</sup> members of Congress,<sup>10</sup> and IT managers in the government and private sectors.<sup>11</sup>

Second, we have routinely urged the agency, when it requests public comments on proposed settlements, which it does pursuant to the agency's regulation, to incorporate changes that would help strengthen settlements. EPIC has, for example, recommended that companies that misrepresent their compliance with Safe Harbor should be subject to requirements beyond the prohibition against future misrepresentations.<sup>12</sup> Specifically, EPIC recommended that the companies should be required to publish the annual compliance reports required by their consent orders, and that certain companies notify consumers about the data exposure that resulted from their Safe Harbor compliance breach.<sup>13</sup> EPIC has also recommended that companies should be required to comply with the Consumer Privacy Bill of Rights.

To date, the Commission has never modified a settlement in response to proposals submitted in request for public comment.<sup>14</sup> It is clear that the Commission is capable of reading and responding to each comment submitted.<sup>15</sup> The FTC's failure to make any changes to proposed settlements based on comments it has explicitly requested is (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;<sup>16</sup> (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;<sup>17</sup> and (3) contrary to the interests of American consumers.

### *The Commission Routinely Fails to Require Compliance with the CPBR*

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<sup>9</sup> Letter from Nat'l Ass'n of Attys. General to Larry Page, Google CEO (Feb. 22, 2012) (requesting that Google meet with the Association to discuss the privacy risks of consolidation), <http://epic.org/privacy/google/20120222-Google-Privacy-Policy-Final.pdf>.

<sup>10</sup> Letter from the Congressional Bi-Partisan Privacy Caucus to Jon Leibowitz, FTC Chairman (Feb. 17, 2012), *available at* <http://epic.org/privacy/ftc/google/Congress-Ltr-FTC-Google-2-17-12.pdf>.

<sup>11</sup> Karen Evans and Jeff Gould, *Google's New Privacy Policy Is Unacceptable and Jeopardizes Government Information in the Cloud*, Safegov.org (Jan. 25, 2012), <http://safegov.org/2012/1/25/google%E2%80%99s-new-privacy-policy-is-unacceptable-and-jeopardizes-government-information-in-the-cloud>.

<sup>12</sup> In the Matter of Apperian, Inc., *et al.*, Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 142 3017 (Feb. 20, 2014), *available at* <http://epic.org/privacy/ftc/EPIC-FTC-Safe-Harbor-Comments.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* [https://epic.org/privacy/ftc/googlebuzz/EPIC\\_Comments\\_to\\_FTC\\_Google\\_Buzz.pdf](https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf).

<sup>15</sup> *See, e.g.*, Letter from Federal Trade Commission to EPIC (Apr. 15, 2013), [http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwareltrepic\\_2.pdf](http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwareltrepic_2.pdf)

<sup>16</sup> Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

<sup>17</sup> Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

Third, the Commission has repeatedly failed to require privacy-violating companies to comply with the Consumer Privacy Bill of Rights (CPBR),<sup>18</sup> which is based on the widely known Fair Information Practices (“FIPs”).<sup>19</sup> FIPs appear in various privacy laws and frameworks, including the Privacy Act of 1974, which limits the misuse of personal information by the federal government.<sup>20</sup> Several of these principles are also highlighted in the Commission’s recent report.<sup>21</sup>

The CPBR is one particularly significant formulation of the FIPS for the FTC. The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.<sup>22</sup> By requiring compliance with the CPBR, the Commission could ensure that the personal data of consumers is protected throughout the data lifecycle. More importantly, the Commission would be able to put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers.

### *Conclusion*

We urge Congress to consider the Commission’s use of Section 5 authority in the context of the greater American legal landscape. Because the United States lacks a comprehensive privacy law or an agency dedicated to privacy protection, there are very few legal constraints on business practices that impact the privacy of Americans. The FTC’s already modest Section 5 authority helps to deter and penalize the abuse of data.

The protection of privacy remains one of the top concerns of American consumers. It is estimated that 823 million records were exposed in 2013, including credit card numbers, email addresses, log in credentials, social security numbers and

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<sup>18</sup> See WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 2012, <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf> [hereinafter “CPBR”].

<sup>19</sup> EPIC has made the same recommendation to the FTC in other similar settlement proceeding where the FTC has asked for public comment. See, e.g., Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (Jul. 11, 2012), available at <https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), available at <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (May 11, 2012), available at <https://epic.org/privacy/ftc/EPIC-FTC-Ad-Disclosures-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), available at <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), available at [https://epic.org/privacy/ftc/googlebuzz/EPIC\\_Comments\\_to\\_FTC\\_Google\\_Buzz.pdf](https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf).

<sup>20</sup> Privacy Act of 1974, 5 USC § 552a.

<sup>21</sup> FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

<sup>22</sup> *Id.*

other related personal information.<sup>23</sup> The Pew Research Center found that Americans strongly oppose the misuse of their personal information by companies and strongly favor updating privacy laws.<sup>24</sup>

An effort to limit the Commission's authority coupled with Congress' failure to update America's privacy laws is almost a direct assault on hundreds of millions of Americans who have become increasingly concerned about the loss of privacy.

Respectfully Submitted,

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<sup>23</sup> Online Trust Alliance, 2014 Data Protection and Breach Readiness Guide (Apr. 7, 2014), <https://otalliance.org/system/files/files/best-practices/documents/2014otadatabreachguide4.pdf>.

<sup>24</sup> See Pew Research Center, *More online Americans say they've experienced a personal data breach* (Apr. 14, 2014), <http://www.pewresearch.org/fact-tank/2014/04/14/more-online-americans-say-theyve-experienced-a-personal-data-breach>. See also Jeff Fox, *85% of online consumers oppose Internet ad tracking*, *Consumer Reports finds*, CONSUMER REPORTS (May 27, 2014), available at <http://www.consumerreports.org/cro/news/2014/05/most-consumers-oppose-internet-ad-tracking/index.htm>.