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Examity, Inc.
153 Needham Street
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Dear Counsel:

We write in regard to Examity's provision of online test proctoring services. We represent the Electronic Privacy Information Center ("EPIC"), a public interest research center located in Washington, D.C., focused on emerging privacy and civil liberties issues. EPIC is one of the leading consumer protection organizations in the country specializing in privacy and data protection. EPIC has a long history of promoting transparency and accountability for information technology.[1] Our members include experts in law, technology, and public policy.

This letter serves as notice that EPIC has filed a Complaint and Request for Investigation, Injunction, and Other Relief with the Office of the Attorney General for the District of Columbia regarding Examity's online proctoring tools. As we set forth in the Complaint, Examity's excessive and unjustified collection of students' personal information (including biometric data) and reliance on opaque, unproven AI analysis to flag purported instances of cheating constitute unfair or deceptive trade practices under the D.C. Consumer Protection Procedures Act ("DCCPPA") and the Federal Trade Commission Act ("FTC Act"). This letter also serves as notice of EPIC's intent to bring an action against Examity for violations of the DCCPPA if Examity fails to promptly cure its unlawful trade practices.

In response to the COVID-19 pandemic, many educational institutions have implemented online test proctoring services as part of their remote learning arrangements.[2] But this rapid growth has brought renewed attention to the invasive nature of online proctoring systems. In order to meet their academic obligations, students must increasingly agree to compulsory collection of biometric and other sensitive personal data; audio and video surveillance of their intimate spaces; and opaque AI analysis of their movements, facial expressions, and keystrokes.

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[1] *See* EPIC, *Algorithmic Transparency* (2020), https://www.epic.org/algorithmic-transparency/; EPIC, *Algorithms in the Criminal Justice System* (2020), https://www.epic.org/algorithmic-transparency/crim-justice/; Complaint of EPIC, *In re Airbnb* (Feb. 26, 2020); Petition of EPIC, *In re Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce* (Feb. 2020), https://epic.org/privacy/ftc/ai/epic-ai-rulemaking-petition/; Complaint of EPIC, *In re HireVue* (Nov. 6, 2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf; Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Fed. Trade Comm'n (Aug. 20, 2018), https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf.
[2] Drew Harwell, *Mass School Closures in the Wake of the Coronavirus Are Driving a New Wave of Student Surveillance*, Wash. Post (Apr. 1, 2020), https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/; *see also* Shea Swauger, *Software that Monitors Students During Tests Perpetuates Inequality and Violates Their Privacy*, MIT Tech. Rev. (Aug. 7, 2020), https://www.technology review.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics/.

We are aware of two different online test administration systems offered by Examity: "Automated Proctoring" and "Live Proctoring."[3] The Examity Automated Proctoring service appears to have two different options: Automated Standard, which takes an image of a student's official ID, creates a digital "signature" from a student's keystrokes, and produces recording of the exam with time-stamped comments; and Automated Premium, which provides the same services as Automated Standard but also includes a human audit of the authentication, exam, and AI-based findings.[4] Examity also appears to offer two Live Proctoring options: Live Standard, which combines the features of Automated Proctoring with human authentication and review (plus a required 360° camera sweep of the student's workspace); and Live Premium, which has the same capabilities as Live Standard but includes a live proctor throughout the duration of the exam.[5]

Examity states on its website that it "may collect" a biometric record from students, which it defines as "a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual, such as fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting."[6] Examity also states that its "flag system" analyzes behaviors, such as a student's "typing rhythm," to detect potential integrity issues.[7]

A student enrolled at an institution which uses Examity has no choice but to allow the collection of their personal information and to submit to video monitoring and AI analysis in order to complete their required examinations. Yet Examity has failed to establish a legitimate need for collecting such a vast array of personal data; Examity has failed to fully disclose to students the logic, factors, and determinations of its AI; and Examity has failed to identify any benefits to consumers or competition that would outweigh the privacy and other harms suffered by students.

The above-described business practices constitute violations of the DCCPPA, including but not limited to sections 28–3904 (unfair or deceptive trade practices generally), 28-3904(e) (misrepresentation as to a material fact), and 28-3904(f) (failure to state a material fact). Accordingly, EPIC and affected consumers are entitled to injunctive and monetary relief, in addition to any enforcement action taken against Examity by the Attorney General for the District of Columbia.[8] These practices also constitute violations of Section 5 of the FTC Act,[9] exposing Examity to potential FTC enforcement proceedings.

In order to avoid litigation between EPIC and Examity and to protect the privacy of Examity test-takers, EPIC hereby demands that Examity commit in writing to:

1. Strictly limit its collection of students' personal and biometric information;

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[3] *Flexible & Easy*, Examity (2020), https://www.examity.com/#.
[4] *Automated Proctoring*, Examity (2020), https://www.examity.com/auto-proctoring/.
[5] *Live Proctoring*, Examity (2020), https://www.examity.com/live-proctoring/.
[6] *Product Privacy Policy*, Examity (2020), https://www.examity.com/product-privacy-policy/.
[7] *Flag System*, Examity (2020), https://www.examity.com/flag-system.
[8] D.C. Code § 28–3905(i)(3)(B).
[9] 15 U.S.C. § 45(a).

2. Create, maintain, and publish a detailed log of what types of personal information Examity collects from test-takers, how Examity uses such data, and how long Examity retains such data;
3. Refrain from transferring or providing third parties access to personal data collected from test-takers, including images of students;
4. Provide students with access, correction, and deletion rights with respect to their own data;
5. Make available to students the factors, logic, and determinations of the AI system(s) used to produce assessments of test-takers;
6. Comply fully with the Organisation for Economic Co-operation and Development ("OECD") Principles on Artificial Intelligence[10] and Universal Guidelines for Artificial Intelligence;[11] and
7. Submit to an annual audit by an independent third party of Examity's privacy, data collection, and AI practices, the results of which shall be publicly reported.

If Examity does not comply with the requests set forth in this letter, EPIC reserves all rights and remedies, including legal action. Accordingly, EPIC requests that Examity takes steps to preserve all records, communications, and other evidence potentially relevant to such litigation, including but not limited to evidence concerning the collection, use, retention, and disclosure of Examity user data and the operation of its AI system(s) used to evaluate test-takers for signs of academic dishonesty.

EPIC would prefer to resolve this matter amicably, and we look forward to your response by December 18, 2020. This letter is not a recitation of all of the facts pertaining to this matter or all of EPIC's possible claims. Accordingly, EPIC is not waiving any of its rights and remedies, all of which EPIC expressly reserves.

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[10] *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.
[11] *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), https://thepublicvoice.org/ai-universal-guidelines/.