

April 7, 2008

Senate Commerce Committee
508 Dirksen Senate Office Building
Washington, DC 20510

Dear Members of the Senate Commerce Committee,

We are writing to you regarding the April 8, 2008 Federal Trade Commission (the "FTC" or the "Commission") reauthorization hearing. We have particular concerns about the recent performance of the Commission as well as ethical issues arising in the Google-DoubleClick merger review. The Electronic Privacy Information Center ("EPIC") has played a significant role in the development of the FTC's authority to protect the privacy rights of consumers and Internet users and has a well established interest in ensuring that the Commission responds effectively to emerging privacy challenges to American consumers. In the past, Congressional staff has contacted EPIC regarding the scope of the Commission's authority to address consumer privacy issues.

We write to you to provide a brief summary of recent Commission activities in which EPIC has a particular interest. Moreover, we urge you to: 1) inquire as to why the Commission has not done enough to protect consumer privacy; 2) press the Commission regarding the troubling concerns raised by the role of the Jones Day law firm in the Commission's review of the Google-DoubleClick merger; and 3) encourage the FTC to take steps to better safeguard consumer privacy and support government transparency in the future.

In the last several years, the Commission has become increasingly aware of new risks to American consumers. The FTC's annual surveys repeatedly find that identity theft is the number one concern of American consumers.¹ But consumers have little understanding of how their personal information is collected, how it is used, or what they might do when problems arise. The reality is that the gap between the risks to consumer privacy and the protections for consumer privacy is growing.

¹ U.S. Federal Trade Commission, *FTC Releases List of Top Consumer Fraud Complaints in 2007*, Feb. 13, 2008, available at: <http://www.ftc.gov/opa/2008/02/fraud.shtm>.

The FTC has taken some innovative steps in the past to address this challenge. For example, in 2002, the Commission imposed conditions on Microsoft when it proposed to establish a single sign-on service for the Internet.² The Commission recognized that Microsoft's actions had implications not only for privacy and security, but also for competition.

However, by approving the Google-DoubleClick merger on December 20, 2007, EPIC believes that the Commission failed to fulfill its obligations to the public.³ As a result, it has placed the privacy interests of American consumers at grave risk. Further, the Commission's handling of Chairman Deborah Platt Majoras' apparent conflict of interest in the Google-DoubleClick merger review reflects poorly on the Commission's impartiality and commitment to transparency. EPIC believes that the Commission must do better.

The Commission's Google-DoubleClick Merger Review

On April 20, 2007, EPIC, the Center for Digital Democracy, and the U.S. Public Interest Research Group filed a detailed complaint⁴ asking the Commission to establish substantial privacy safeguards as a condition of approving the then-proposed merger of Google, Inc. and Doubleclick, Inc. As discussed in the April 20, 2007 Complaint, Google operates the Internet's largest search company and Doubleclick, Inc. operates the Internet's largest advertising company. The merger of these entities posed a unique and substantial threat to the privacy interests of Internet users around the world. The April 20, 2007 Complaint observed that the merged company would be under virtually no legal obligation to protect the privacy and security of the information that it collects. We urged the Commission to either block the deal or impose substantial privacy safeguards as conditions of merger approval. We wrote:

This complaint concerns the impact on consumer privacy of Internet advertising practices and the specific issues that arise in the proposed acquisition of DoubleClick, Inc. by Google, Inc. ... [T]he increasing collection of personal information of Internet users by Internet advertisers poses far-reaching privacy concerns that the Commission should address.

² U.S. Federal Trade Commission, *Microsoft Settles FTC Charges Alleging False Security and Privacy Promises*, Aug. 8, 2002, available at: <http://www.ftc.gov/opa/2002/08/microsoft.shtm>.

³ For additional detail regarding the FTC's review of the Google-DoubleClick merger, see EPIC, *Privacy? Proposed Google/DoubleClick Deal*, <http://www.epic.org/privacy/ftc/google/>.

⁴ EPIC, the Center for Digital Democracy, the U.S. Public Interest Research Group, *In the Matter of Google, Inc., and DoubleClick, Inc.: Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission* (Apr. 20, 2007) [hereinafter the "April 20, 2007 Complaint"], available at http://www.epic.org/privacy/ftc/google/epic_complaint.pdf.

Neither Google nor DoubleClick have taken adequate steps to safeguard the personal data that is collected.⁵

EPIC's complaint in the Google-DoubleClick merger follows in a line of cases in which EPIC asked the Commission to intervene. In these cases, EPIC identified significant privacy interests and noted that the Commission had the authority to act.⁶ Our experience in these cases led us to file the April 20, 2007 Complaint. Our experience and analysis also led to the conclusion that only a consent decree would effectively protect consumers' privacy interests in the Google-DoubleClick merger. EPIC concluded:

Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google's plan to combine the search histories and web site visit records of Internet users.⁷

In the initial complaint and subsequent filings, we set out the case against the merger. We also proposed to the FTC a wide range of remedies that could be established by a consent decree that would address the privacy interests that we identified.⁸ In an October 26, 2007 letter to members of the U.S. House of Representatives Subcommittee on Financial Services and General Government, EPIC characterized the FTC's review of the Google-DoubleClick merger as "the single greatest test of the FTC's ability to safeguard consumer privacy in the Commission's history."⁹

We were not alone in our view that the Google-DoubleClick merger posed serious threats to consumer privacy. The New York State Consumer Protection Board sent a

⁵ *Id.* at 1.

⁶ See EPIC, *In the Matter of DoubleClick, Inc.: Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Feb. 10, 2000), available at: http://www.epic.org/privacy/internet/ftc/DCLK_complaint.pdf; EPIC, et al., *In the Matter of Microsoft Corp.: Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (July 26, 2001), available at: http://www.epic.org/privacy/consumer/MS_complaint.pdf; Letter from EPIC to Fed. Trade Comm'n (Dec. 16, 2004), available at: <http://www.epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

⁷ April 20, 2007 Complaint at 10.

⁸ For the complaint, its supplements, and more detail about the proposed merger, see EPIC, *Privacy? Proposed Google/DoubleClick Deal*, <http://www.epic.org/privacy/ftc/google/>.

⁹ Letter from EPIC to H. Subcomm. on Financial Services and General Government (Oct. 26, 2007), available at: http://www.epic.org/privacy/ftc/google/hfin_102607.pdf.

letter to the FTC endorsing EPIC's complaint regarding the privacy implications of the proposed Google-DoubleClick merger and recommending that the merger be halted pending the establishment of meaningful privacy safeguards. The Board stated, "[t]he combination of Doubleclick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of 'super-profiles,' which will make up the world's single largest repository of both personally and non-personally identifiable information."¹⁰ Senator Patrick Leahy, Chairman of the Judiciary Committee, also expressed concern regarding the merger's privacy implications. He observed:

The potential for accumulation of vast amounts of personal viewing data by online advertising providers raises significant privacy concerns. Most online users are unaware of how and when information about their online activity is being used. Although data is often accumulated anonymously, tracking a user's actions on the web can build profiles that may be linked with personally identifiable information.

Americans consumers value privacy and want personal information protected. Companies that do collect and aggregate a significant amount of personal data about consumers' online behavior have an obligation to safeguard such data. And when there is no longer a legitimate use for it, personally identifiable information should be deleted.¹¹

Senator Herbert Kohl, Chairman of the Judiciary Committee's Subcommittee on Antitrust, Competition Policy & Consumer Rights, supported the Commission's review of the merger's effects on privacy, stating:

Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy, and merely be content to limit their review to traditional questions of effects on advertising rates. We disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers' pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital

¹⁰ Letter from Mindy Bockstein, Chair and Exec. Dir., State of New York, State Consumer Prot. Bd., to Deborah Platt Majoras, Chair, Fed. Trade Comm'n (May 1, 2007) (regarding "DoubleClick Inc. and Google. Inc. Merger"), available at: <http://www.epic.org/privacy/ftc/google/CPB.pdf>.

¹¹ The Honorable Patrick J. Leahy, Chairman, S. Judiciary Comm., *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 27, 2007), available at: http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=2629.

privacy interests of our citizens so essential to our democracy. (emphasis added)¹²

Despite the serious consumer privacy threats raised by the Google-DoubleClick merger, the Commission approved the \$3.1b deal in a 4-1 opinion,¹³ and did not impose any conditions to protect consumers' privacy. The FTC's decision failed to heed the warnings of Commissioner Harbour, who dissented from the unconditional approval, stating that "[i]f the Commission closes its investigation at this time, without imposing any conditions on the merger, neither the competition nor the privacy interests of consumers will have been adequately addressed."¹⁴ Simply stated, the Commission had reason to act and authority to act, and failed to do so.

Apparent Conflict of Interest Regarding the Google-DoubleClick Merger

We remain troubled by the role of the Jones Day law firm in the FTC's Google-DoubleClick merger review. During the Commission's review of the merger, Jones Day publicly stated that it represented Doubleclick regarding the merger.¹⁵ EPIC learned that then-FTC Chairman Deborah Platt Majoras' spouse, John M. Majoras, is a Jones Day partner, and sought Chairman Majoras' recusal from the merger review.¹⁶ Jones Day then deleted a web page detailing the firm's representation of Doubleclick from the Jones Day web site. The web page has not been reposted.

In the EPIC recusal petition, we noted that Chairman Majoras had previously recused herself in other matters involving apparent conflicts of interest with the Jones Day firm.¹⁷ John Majoras is Jones Day's "global coordinator of competition law

¹² The Honorable Herbert Kohl, Chairman, S. Subcomm. on Antitrust, Competition Policy & Consumer Rights, *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 27, 2007), available at: http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=470.

¹³ U.S Federal Trade Commission, *Statement of Federal Trade Commission Concerning Google/DoubleClick*, Dec. 20, 2007, available at: <http://ftc.gov/os/caselist/0710170/071220statement.pdf>.

¹⁴ U.S Federal Trade Commission, *Dissenting Statement of Commissioner Pamela Jones Harbour*, December 20, 2007, available at: <http://ftc.gov/os/caselist/0710170/071220harbour.pdf>.

¹⁵ Jones Day, *Experience Details*, December 12, 2007, available at: http://epic.org/privacy/ftc/google/JonesDay_Google_Page.pdf.

¹⁶ EPIC, *Complaint Requesting Recusal of the Federal Trade Commission Chairman From the Pending Review of the Proposed Google-DoubleClick Merger*, December 12, 2007, available at: http://www.epic.org/privacy/ftc/google/recusal_121207.pdf.

¹⁷ *Id.* at 3.

litigation” – the very practice area implicated by the Google-DoubleClick merger.¹⁸ However, Chairman Majoras declined to recuse herself, continued to participate in the Google-DoubleClick review, and voted to approve the merger without conditions.¹⁹

In an effort to ascertain facts regarding Jones Day’s involvement in the FTC’s Google-DoubleClick review, EPIC filed two brief, narrowly targeted requests for Commission records under the Freedom of Information Act (“FOIA”) on December 14, 2007²⁰ and December 17, 2007.²¹ One of the documents requested by EPIC is the “conflict of interest analysis” which the Commission stated was prepared by the “FTC’s Ethics Official.”²² EPIC asked the Commission to expedite the processing of its requests based on the substantial public interest in the matter. The Commission did not respond to EPIC’s requests or subsequent administrative appeal by the statutorily-prescribed deadlines. The Commission has not disclosed a single document in response to EPIC’s FOIA requests through the date of this letter. On March 14, 2008, we filed a lawsuit to compel the FTC to disclose the documents.²³ Through the date of this letter, the Commission has not answered EPIC’s lawsuit.

Chairman Majoras’ apparent conflict of interest raises troubling concerns about the Commission’s review of the Google-DoubleClick merger. Also troubling is what appears to be cavalier treatment of FOIA requests by the Commission. The FTC has failed to disclose documents regarding an alleged conflict of interest that may have effected its review of a \$3.1b merger. The FTC’s failure to even respond to EPIC’s FOIA requests calls into question its dedication to transparency and openness, as well as its commitment to complying with the FOIA.

Recommendations

In its opinion concerning the Google-DoubleClick merger, the Commission expressed reluctance to impose conditions to safeguard consumer privacy.²⁴ The

¹⁸ Jones Day, *Professional Biography – Profile, John M. Majoras*, <http://www.jonesday.com/jmmajoras/> (last visited April 7, 2008).

¹⁹ U.S. Federal Trade Commission, *Statement of Chairman Deborah Platt Majoras concerning Petition Seeking My Recusal from Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick Inc.) by Google, Inc.*, December 14, 2007, available at: <http://ftc.gov/opa/2007/12/google.shtm>.

²⁰ EPIC, *Freedom of Information Act Request*, December 14, 2007, available at: http://www.democraticmedia.org/files/EPIC_FTC_FOIA.pdf.

²¹ EPIC, *Freedom of Information Act Request*, December 17, 2007, available at: http://epic.org/privacy/ftc/google/FTC_FOIA2.pdf.

²² EPIC, *Freedom of Information Act Request*, December 14, 2007, at 3, available at: http://www.democraticmedia.org/files/EPIC_FTC_FOIA.pdf.

²³ Complaint for Injunctive Relief, *EPIC v. U.S. Federal Trade Commission*, Case: 1:08-cv-00448 (D.D.C. filed Mar. 14, 2008), available at: http://epic.org/privacy/ftc/google/FTC_Complaint031408.pdf.

²⁴ U.S. Federal Trade Commission, *Statement of Federal Trade Commission Concerning*

Commission based this reluctance, in part, on the Commission's alleged lack of "legal authority to require conditions to this merger that do not relate to antitrust."²⁵ Consumer privacy threats are legitimate and necessary components of the Commission's antitrust review authority. As Senator Kohl has stated: "[n]o one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy."²⁶ The FTC should unequivocally state that it will investigate consumer privacy implications as a component of all future merger reviews.

The principle of government transparency is vital to the fair and democratic operation of all government bodies. Transparency is particularly important to entities like the Commission, whose decisions directly and powerfully effect consumers. The FTC's handling of Chairman Majoras' apparent conflict of interest in the Google-DoubleClick review was not transparent, and did not inspire public confidence in the impartiality of the Commission's review. Further, the FTC's subsequent failure to comply with the FOIA – the statute that most embodies the federal government's commitment to transparency – casts doubt on the Commission's commitment to open government.

The Commission's secrecy surrounding the Google-DoubleClick merger review contrasts sharply with EPIC's previous experience in FOIA matters before the FTC. In other, and far more extensive requests, the Commission provided the documents we requested.²⁷

The Commission should make public, as a matter of course, the conflict of interest analysis sought in this matter and all future conflict of interest analyses performed by its Ethics Official. This would enhance transparency, and relieve the FTC's FOIA officers from the burden of responding to requests relating to conflict of interest analyses. In addition, the Commission should commit to improving its responsiveness to FOIA requests. At a minimum, the Commission should respond to every FOIA request within the statutorily-prescribed time periods, and shorten the time that it takes to disclose records in response to FOIA requests. Ideally, the Commission should fully comply with the FOIA, and disclose all records by the statutory deadlines.

Google/DoubleClick, Dec. 20, 2007, at 2-3 available at:
<http://ftc.gov/os/caselist/0710170/071220statement.pdf>.

²⁵ *Id.* at 2.

²⁶ The Honorable Herbert Kohl, Chairman, S. Subcomm. on Antitrust, Competition Policy & Consumer Rights, *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 27, 2007), available at: http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=470.

²⁷ EPIC has previously requested under the FOIA – and the Commission has provided – records of meetings of Commissioners with lobbyists and records concerning the processing of consumer privacy complaints.

If the Commission fails to provide expeditiously the documents sought by EPIC in the Google-DoubleClick merger review, we would recommend that the authorizing committee reduce the agency's budget by 5%. There is little point in granting a federal agency more funding or more statutory authority if it acts in disregard of its open government obligations.

Thank you for your attention to this issue. We would be pleased to provide any other information the Committee may require.

Sincerely,

Marc Rotenberg
EPIC Executive Director

Melissa Ngo
EPIC Senior Counsel

John Verdi
EPIC Staff Counsel

cc: Chairman William E. Kovacic, Federal Trade Commission
Commissioner Pamela Jones Harbour, Federal Trade Commission
Commissioner Jon Leibowitz, Federal Trade Commission
Commissioner J. Thomas Rosch, Federal Trade Commission