

December 12, 2017

The Honorable Michael S. Lee, Chairman
The Honorable Amy Klobuchar, Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

We write to you regarding the hearing on “The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?”¹ We urge the Committee to consider consumer privacy and data security in its exploration of this topic.

The Electronic Privacy Information Center (“EPIC”) was founded in 1994 to focus attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values. As a leading advocate for consumer privacy, EPIC has a strong interest in how industry consolidation undermines consumer privacy and data security. EPIC previously wrote to this Committee urging it to explore the topics of data breach and algorithmic transparency with Maka Delrahim, nominee to be an Assistant Attorney General with the Antitrust Division of the Department of Justice.² EPIC also recently testified before Congress on the need to reform the credit reporting industry in the wake of the major Equifax data breach.³

The risks to consumer privacy and data security posed by mergers and acquisitions cannot be overstated. When companies merge, they combine not only their products, services, and finances, but also their vast troves of personal data. This increases the risk of cyberattacks and data breaches, especially when companies utilize one centralized database for consumer data, as was the case with Equifax. These privacy and security risks are particularly pronounced when a company that lacks adequate cybersecurity obtains access to other companies’ collections of personal data.

¹ *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt*, 115th Cong. (2017), S. Comm. on Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights, <https://www.judiciary.senate.gov/meetings/the-consumer-welfare-standard-in-antitrust-outdated-or-a-harbor-in-a-sea-of-doubt> (Nov. 15, 2017).

² EPIC, *Letter to S. Judiciary Comm.*, (May 9, 2017), <https://epic.org/testimony/congress/EPIC-SJC-DOJ-Antitrust-Nominee-May2017.pdf>.

³ *Consumer Data Security and the Credit Bureaus: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (2017), (statement of Marc Rotenberg, Exec. Dir., Electronic Privacy Information Center), <https://epic.org/privacy/testimony/EPIC-Testimony-SBC-10-17.pdf>.

The United States is experiencing an epidemic of security breaches, financial fraud and identity theft. The Department of Justice estimates that identity theft cost the U.S. economy \$15.4 billion in 2014.⁴ Inadequate data security by U.S. companies also undermines trade with Europe, where stronger cybersecurity regulations are in place. There is also a growing national security threat from data breaches. If lawmakers and regulators fail to take into account the privacy and data security implications of mergers and acquisitions, the effects of data breaches, financial fraud, and identity theft will most certainly get worse. Just as safeguards are put in place to ensure competition in the marketplace, safeguards must be implemented to protect consumer data.

Numerous high-profile mergers and acquisitions have underscored these consumer privacy risks. Nearly two decades ago, EPIC and a coalition of consumer organizations warned the FTC of the privacy implications of the Time Warner/AOL merger.⁵ That merger produced what were, at the time, likely “the most detailed records on consumers ever assembled.”⁶ Despite both companies’ records of non-compliance with privacy laws, the FTC approved the merger without addressing any of the consumer privacy or data security risks.⁷ As the coalition stated, “companies other than AOL-Time Warner who seek to operate under a higher privacy standard will be at a competitive disadvantage as they will be unable to compete against a larger entity that is able to make unrestricted use of the personal information it obtains.”⁸ Today, the proposed merger of Time Warner and AT&T would yet again combine massive databases of personal data and consumer profiles.⁹

In 2007, EPIC filed a complaint with the FTC contending that Google’s proposed acquisition of DoubleClick would enable Google to collect the personal information of billions of users and track their browsing activities across the web to deliver targeted advertisements.¹⁰ EPIC correctly warned that this acquisition would accelerate Google’s dominance of the online advertising industry. The FTC ultimately allowed the merger to go forward over the compelling dissent of Commissioner Pamela Jones Harbor.¹¹ EPIC testified on this merger before this Committee in 2007 and warned about other mergers that posed substantial risks for consumer

⁴ Erika Harrell, Bureau of Justice Statistics, *Victims of Identity Theft, 2014* (Sept. 27, 2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5408>.

⁵ TACD, *Statement on AOL-Time Warner Merger* (Feb. 2000), <https://ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

⁶ *Id.*

⁷ Press Release, *FTC Approves AOL/Time Warner Merger with Conditions*, Federal Trade Commission (Dec. 14, 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

⁸ *Id.*

⁹ Michael J. de la Merced, et al, *Justice Department Says Not So Fast to AT&T’s Time Warner Bid*, New York Times, (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html?_r=0.

¹⁰ *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.

¹¹ *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.

privacy and competition.¹² In 2011, EPIC warned the FTC that Google’s dominance in the search algorithm marketplace was allowing it to preference its own content in search results.¹³

Companies that once protected user privacy are being absorbed by companies that do not protect privacy. WhatsApp, a text-messaging service that attracted users specifically because of its privacy commitments, was purchased by Facebook in 2014.¹⁴ WhatsApp’s founder stated in 2012 that, “[w]e have not, we do not and we will not ever sell your personal information to anyone.”¹⁵ EPIC and the Center for Digital Democracy filed a complaint with the FTC urging the Commission to mandate privacy safeguards for WhatsApp user data before approving the sale.¹⁶ The FTC ultimately approved Facebook’s acquisition of WhatsApp after the companies promised not to make any changes to WhatsApp users’ privacy settings.¹⁷ However, in 2016 WhatsApp announced that it would begin disclosing the personal information of its users to Facebook, including their phone numbers, directly contradicting their previous promises to honor user privacy.¹⁸ EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further action.¹⁹

The merger of Facebook and WhatsApp has prompted countries in Europe to update their competition laws.²⁰ But the FTC has repeatedly failed to even consider consumer privacy and data security in its merger review process.²¹ EPIC emphasized the consequences of this failure in comments to the FTC in 2015, stating, “[i]n every instance, it was clear that the practical consequence of the merger would be to reduce the privacy protections for consumers and expose individuals to enhanced tracking and profiling. The failure of the FTC to take this into account

¹² *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before the S.Comm. on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. (2007), (statement of Marc Rotenberg, Exec. Dir., Electronic Privacy Information Center), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

¹³ Letter from EPIC to the Federal Trade Commission on Google’s search preferences in YouTube (Sept. 8, 2011), available at https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

¹⁴ EPIC, *In re: WhatsApp*, <https://epic.org/privacy/internet/ftc/whatsapp/>.

¹⁵ WHATSAPP, *Why We Don’t Sell Ads*, WhatsApp Blog, (Jun. 18, 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads>.

¹⁶ *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>.

¹⁷ 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).

¹⁸ WHATSAPP, *Looking Ahead for WhatsApp*, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

¹⁹ *In the Matter of WhatsApp, Inc.*, (EPIC and Center for Digital Democracy Complaint, Request for Investigation, Injunction, and Other Relief), (Aug. 29, 2016), <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf>.

²⁰ *Fuel of the Future: Data is Giving Rise to A New Economy*, *The Economist*, May 6, 2017, <http://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy>.

²¹ Nathan Newman, *15 Years of FTC Failure to Factor Privacy Into Merger Reviews*, *Huffington Post*, (Mar. 19, 2015), https://www.huffingtonpost.com/nathan-newman/15-years-of-ftc-failure-t_b_6901670.html.

during merger review is one of the main reasons consumer privacy in the United States has diminished significantly over the last 15 years.”²²

Finally, we urge the Committee to make “algorithmic transparency” a priority for merger review. When companies combine vast amounts of consumer data, it not only creates the risk of data breach, but allows companies to use that data in increasingly opaque ways. Consumers face a “black box” of automated scoring systems that impact every aspect of their lives.²³ Algorithms often make determinations about consumers based on inaccurate, outdated or incomplete information, and those determinations can serve as the basis for denying a consumer a job, a home loan, or a scholarship.²⁴ Consumers have no control over which companies have access their personal data and how those companies use that data. Companies that collect personal information should not be allowed to merge large sets of consumer data without oversight, accountability, and transparency.

We ask that this letter from EPIC be entered in the hearing record. EPIC looks forward to working with the Committee on these and other issues impacting the privacy and security of American consumers.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Sam Lester
Sam Lester
EPIC Consumer Privacy Fellow

²² EPIC, *Comments of the Electronic Privacy Information Center: Assessing the FTC’s Prior Actions on Merger Review and Consumer Privacy*, FTC File No. P143100, (Mar. 17, 2015), <https://epic.org/privacy/internet/ftc/Merger-Remedy-3-17.pdf>.

²³ See, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014); Frank Pasquale, *The Black Box Society*, 8 (2015).

²⁴ *Id.*