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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

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JOHN KEAST, STAFF DIRECTOR
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October 10, 2019

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC. 20580

Dear Chairman Simons:

The July 23, 2019, Federal Trade Commission (“FTC” or “Commission”) stipulated order with Facebook, Inc. (“2019 Order”) has been criticized by a number of outside observers, and two of your fellow Commissioners, as insufficiently protective of consumers. Specifically, these parties have noted that this settlement may absolve Facebook from liability for past violations unknown at the time the FTC’s 2019 Order was released. Furthermore, the 2019 Order may serve as an ineffective deterrent against future privacy violations.

Recent news reports highlight these concerns. Mere weeks after the 2019 Order, we have learned that Facebook has been paying hundreds of outside contractors to transcribe clips of audio from users of its services potentially in violation of Facebook’s data use policy going as far back as 2015. This has raised substantial concern that the 2019 Order will limit the FTC’s ability to adequately address privacy violations by Facebook such as this one.

Specifically, in the 2019 Order, the Commission agreed to:

“[R]esolve any and all claims that [Facebook, Inc.], its officers, and directors, prior to June 12, 2019, violated the Commission’s Decision and Order in *In re Facebook, Inc.*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012). Furthermore, this Stipulated Order resolves all consumer-protection claims known by the FTC prior to June 12, 2019, that Defendant, its officers, and directors violated Section 5 of the FTC Act. The FTC and the United States specifically reserve all other claims.”

It appears that the deal struck by the Commission and Facebook resolves all claims that Facebook previously violated the Commission’s order imposed in 2012 (“2012 Order”)—including all known and *unknown* claims not addressed in the 2019 Order or the Department of Justice complaint filed in this matter (“DOJ Complaint”). The resolution of such *unknown* claims under the 2012 Order means that no matter what the Commission may learn about Facebook’s previous practices—such as human review of user-generated audio chats without

clear disclosures to consumers, and no matter how egregious a violation of the 2012 Order may have occurred—Facebook will not face another penalty by the Commission under the 2012 Order for such practices.

It is my further understanding that, pursuant to the 2019 Order, the Commission has waived its ability to bring “known” claims against Facebook for unfair or deceptive acts or practices under Section 5 of the Federal Trade Commission Act. Furthermore, the 2019 Order also specifically resolves all potential Section 5 claims against Facebook’s officers and directors for violating the 2012 Order, including unknown claims, even though Facebook’s officers and directors are not named as defendants in the DOJ Complaint.

The release of liability secured by Facebook and its officers and directors in the 2019 Order appears to be a departure from Commission standard practice when resolving consumer protection matters. Although the Commission’s July 24, 2019 public statement on this matter suggests that other Commission settlements have included similar releases of liability, that statement does not cite a prior Commission settlement that released a defendant from unknown claims or that released individuals who are not named in the complaint.

I am concerned that the settlement lets Facebook off the hook for unspecified violations, and given the many public reports of Facebook’s mishandling of consumer data, it is difficult to fully understand the impact of this provision of the settlement on the data privacy protection of the millions of U.S. consumers that have used and continue to use Facebook. Moreover, I am concerned that the release of Facebook and its officers from legal liability is far too broad and sets a dangerous precedent for future Commission actions.

Accordingly, in my capacity as Ranking Member of the U.S. Senate Committee on Commerce, Science, and Transportation, and to ensure that the public interest is protected, I request that you respond to the following questions:

Impact of Facebook’s Release from Liability

- 1) How many complaints has the Commission received regarding Facebook’s data privacy and security practices undertaken between the 2012 Order and 2019 Order? Is the Commission precluded from bringing an action against Facebook related to these practices for the period between the 2012 Order and 2019 Order?
- 2) Was the Commission staff aware of any allegations or complaints against Facebook for transcribing user audio potentially in violation of Facebook’s user data policy? Is this conduct by Facebook considered a “known claim” under the 2019 Order?

Release of Liability Precedent

- 3) Please provide a list of other settlements of Commission consumer protection actions that resulted in releasing *unknown* claims for violations not alleged in the Commission complaint.

- 4) Please provide the number of Commission consumer protection actions that did not result in releasing *unknown* claims for violations not alleged in the Commission complaint.
- 5) Please provide a list of other settlements of Commission consumer protection actions that resulted in releasing individuals who are not named in the Commission complaint.
- 6) Please provide the number of consumer protection actions that did not result in releasing individuals who are not named in the Commission complaint.

Scope of the Commission's Facebook Investigation

- 7) Did the Commission staff interview, question, depose, or provide interrogatories to any Facebook officers or directors prior to executing this settlement? If so, please detail the names of those officers or directors and the scope of the investigation related to such individuals.
- 8) Did the Commission staff choose not to interview, question, depose, or provide interrogatories to any Facebook officer or director who was involved in decision-making related to data practices subject to the 2012 Order? Please list such individuals and the reason for not including those individuals in the investigation.

Independent Oversight of Facebook

- 9) The 2019 Order mandates the creation of an "Independent Privacy Committee," comprised of "Independent Directors" from the Facebook Board.
 - a. What controls are in place to ensure that the "Independent Privacy Committee" will be truly independent from Facebook?
 - b. What steps will the Commission take to oversee the independence of the "Independent Privacy Committee" or demand removal of the Independent Privacy Committee's members?
- 10) The 2019 Order mandates "initial and biennial" assessments of the Facebook privacy program from "one or more qualified, objective, independent third-party professionals," referred to as the "Assessor." The 2019 Order also gives Facebook the authority, through a majority vote of the Independent Privacy Committee, to remove the Assessor. The 2019 Order, however, does not appear to grant that same authority to the Commission.
 - a. Please explain why the 2019 Order does not contain a parallel removal provision for the Associate Director of BCP's Division of Enforcement or the Commission.
 - b. Does the Commission have policies or procedures for gauging the objectivity, independence, or effectiveness of the Assessor? If so, please provide such policies or procedures.

Thank you in advance for your assistance with this request. I hope to receive answers to these questions as soon as possible, and in any event no later than October 30, 2019.

Sincerely,



MARIA CANTWELL
Ranking Member

cc: The Honorable Noah J. Phillips, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Rebecca Kelly Slaughter, Commissioner
The Honorable Christine S. Wilson, Commissioner