

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

### FEDERAL TRADE COMMISSION

Aleksandr Kogan and Alexander Nix; Analysis to Aid Public Comment

84 FR 37645

September 3, 2019

---

The Electronic Privacy Information Center (“EPIC”) submits these comments in response to the Federal Trade Commission’s (“FTC”) proposed consent agreements and request for comments.<sup>1</sup> In the past, EPIC has routinely provided detailed comments to the FTC on proposed agreements in response to the request for comments.<sup>2</sup> In this instance, EPIC has chosen instead to explain how the FTC could have prevented the breach of the personal data of 87 million Facebook users if the agency had enforced the 2011 consent order, as EPIC repeatedly urged. We are also providing these comments on the Cambridge Analytica matter to the Chairs and Ranking Members of the Senate Commerce Committee and the House Energy and Commerce Committee.

The FTC was aware of the problems with Facebook business practices that led to Cambridge Analytica years before the breach. Complaints from EPIC and other consumer groups, the FTC’s

---

<sup>1</sup> Fed. Trade Comm’n., *Aleksandr Kogan and Alexander Nix; Analysis to Aid Public Comment*, 84 Fed. Reg. 37645 (Sept. 3, 2019), <https://www.federalregister.gov/documents/2019/08/01/2019-16372/aleksandr-kogan-and-alexander-nix-analysis-to-aid-public-comment>.

<sup>2</sup> See, e.g., Comments of EPIC, In the Matter of ReadyTech, Fed. Trade Comm’n., Docket No. 1823100 (August 1, 2018), <https://epic.org/apa/comments/EPIC-FTC-ReadyTech-Settlement.pdf>; Comments of EPIC, In the Matter of PayPal, Inc., Fed. Trade Comm’n., Docket No. 162-3102 (March 29, 2018), <https://epic.org/apa/comments/EPIC-FTC-PayPal-ConsentOrder.pdf>; Comments of EPIC, In the Matter of Uber Technologies, Inc., FTC File No. 152-3054, (Sep. 15, 2017), <https://epic.org/apa/comments/EPIC-FTC-Uber-Settlement.pdf>.

own complaint, and the independent assessor's report all indicate that the FTC should have enforced the 2011 Consent Order against Facebook. Our assessment is that the Cambridge Analytica breach, as well as a range of threats to consumer privacy and democratic institutions, could have been prevented if the Commission had enforced the Consent Order against Facebook years ago.<sup>3</sup>

### **EPIC and the 2011 Consent Order with Facebook**

The problems that led to Cambridge Analytica were well known, widely documented, and had produced a favorable legal judgement in 2011. From mid-2009 through 2011, EPIC and a coalition of consumer organizations pursued comprehensive accountability for the social media platform.<sup>4</sup> Our complaint alleged that Facebook had changed user privacy settings and disclosed the personal data of users to third parties without the consent of users.<sup>5</sup> EPIC and others had conducted extensive research and documented the instances of Facebook overriding the users' privacy settings to reveal personal information and to disclose, for commercial benefit, user data, and the personal

---

<sup>3</sup> See Marc Rotenberg, *How the FTC Could Have Prevented the Facebook Mess*, Techonomy (Mar. 22, 2018), <https://techonomy.com/2018/03/how-the-ftc-could-have-avoided-the-facebook-mess/>.

<sup>4</sup> There is a longer history of significant events concerning the efforts of Facebook users to establish democratic accountability for Facebook during the 2008-2009 period. The filing of the 2009 complaint came about after it became clear that Facebook would not uphold its commitments to the Statement of Right and Responsibilities it had established. It would also be worth reconstructing the history of the "Facebook Users Against the New Terms of Service" as Facebook destroyed the group and all records of its members and activities after the organizers helped lead a successful campaign against the company. Julius Harper was among the organizers of the campaign. A brief history was written by Ben Popken in 2009 for *The Consumerist*, "What Facebook's Users Want In The Next Terms Of Service," <https://consumerist.com/2009/02/23/what-facebooks-users-want-in-the-next-terms-of-service/>. In 2012, Julius said: "Most people on Facebook don't even know they can vote or even that a vote is going on. What is a democracy if you don't know where the polling place is? Or that a vote is even being held? How can you participate? Ignorance becomes a tool that can be used to disenfranchise people."; *Facebook upsets some by seeking to take away users' voting rights*, San Jose Mercury News, Nov. 30, 2012, <https://www.mercurynews.com/2012/11/30/facebook-upsets-some-by-seeking-to-take-away-users-voting-rights/>.

<sup>5</sup> *In re Facebook*, EPIC.org, <https://epic.org/privacy/inrefacebook/>.

data of friends and family members, to third parties without their knowledge or affirmative consent.<sup>6</sup> Based on EPIC's complaints, the FTC brought an action against Facebook in 2011 and entered into a consent decree in 2012.

The FTC complaint highlighted significant privacy violations by Facebook, including the level of access Facebook granted to third-party applications. The complaint alleged that “a Platform Application could access profile information that was unrelated to the Application’s purpose or unnecessary to its operation. For example, a Platform Application with a narrow purpose, such as a quiz regarding a television show, in many instances could access a user’s Relationship Status, as well as the URL for every photo and video that the user had uploaded to Facebook’s web site, despite the lack of relevance of this information to the Application.”<sup>7</sup> *This example is almost identical to Cambridge Analytica’s GSRApp, except instead of a television quiz the application developed by Aleksandr Kogan and Alexander Nix was a personality quiz.*

Yet despite the FTC’s recognition in 2011 that “Facebook has provided Platform Applications unrestricted access to user profile information that such Applications have not needed to operate”<sup>8</sup> and the consent agreement intended to prevent this behavior in the future, the FTC did not prevent Cambridge Analytica’s privacy violations.

In 2011 the FTC’s proposed settlement with Facebook was widely viewed as a major step forward for the protection of consumer privacy in the United States. EPIC expressed support for the Consent Order but also believed it could be improved.<sup>9</sup> The Chairman of the FTC stated, “Facebook is obligated to keep the promises about privacy that it makes to its hundreds of millions of users.

---

<sup>6</sup> *FTC Facebook Settlement*, EPIC.org, <https://epic.org/privacy/ftc/facebook/>.

<sup>7</sup> Fed. Trade Comm’n, *In the Matter of Facebook, Inc.*, Docket No. C-4365 (Aug. 10, 2012), at ¶31, <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmpt.pdf>.

<sup>8</sup> *Id.* at ¶33.

<sup>9</sup> Comments of EPIC, *In the Matter of Facebook, Inc.*, FTC File No. 092 3184, (Dec. 27, 2011), <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>.

Facebook's innovation does not have to come at the expense of consumer privacy. The FTC action will ensure it will not.”

Commissioners and staff of the FTC later testified before Congress, citing the Facebook Consent Order as a major accomplishment for the Commission.<sup>10</sup> And U.S. policymakers held out the FTC’s work in discussions with trading partners for the proposition that the U.S. could provide privacy protections to those users of U.S.-based services.<sup>11</sup>

But there was an additional problem that no one could have anticipated: the Federal Trade Commission was unwilling to enforce its own consent order. Almost immediately after the settlement was finalized, Facebook began to test the FTC’s willingness to stand behind its

---

<sup>10</sup> According to the statement of the FTC Commissioners who testified before the Senate Commerce Committee in 2012:

Similar to the Google order, the Commission’s consent order against Facebook prohibits the company from deceiving consumers with regard to privacy; requires it to obtain users’ affirmative express consent before sharing their information in a way that exceeds their privacy settings; and requires it to implement a comprehensive privacy program and obtain outside audits. In addition, Facebook must ensure that it will stop providing access to a user’s information after she deletes that information.

*The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission: Hearing Before the S. Comm on Commerce, Science and Transportation*, at 18, 112th Cong. (May 9, 2012) (statement of Fed. Trade Comm’n.),

[https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-and/120509privacyprotections.pdf)

[and/120509privacyprotections.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-and/120509privacyprotections.pdf); see also, *The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission, Hearing before the S. Comm. on Commerce, Science, and Transportation, 112th Cong. (May 19, 2012)* (statement of Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n) (“We have also charged companies with failing to live up to their privacy promises, as in the highly publicized privacy cases against companies such as Google and Facebook, which together will protect the privacy of more than one billion users worldwide. As a Commissioner, I will urge continuation of this strong enforcement record.”),

[https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commissioner-maureen-k.ohlhausen/120509privacystatement.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120509privacystatement.pdf).

<sup>11</sup> Letter from FTC Chairwoman Edith Ramirez to Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, European Commission, at 4-5 (Jul. 7, 2016), <https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004q0v>.

judgements. Dramatic changes in the company’s advertising model led to more invasive tracking of Internet users. Online and offline activities were increasingly becoming merged.

To EPIC and many others, these changes violated the terms of the Consent Order. We urged the FTC to establish a process to review these changes and publish its findings so that the public could at least evaluate whether the companies were complying with the original orders. But the Commission remained silent, even as it defended its enforcement model in Congress and elsewhere. Meanwhile, Facebook’s lax privacy practices allowed a personality quiz to gain access to 87 million user records to manipulate the outcomes of national elections. The FTC’s reluctance to enforce the Consent Order for several years sent a message to the company that privacy violations would be tolerated.

### **Facebook’s 2013 Privacy Assessment**

Under the terms of the 2012 Consent Order, Facebook was obligated to obtain independent assessments of their privacy practices on a biennial basis and submit those audits to the FTC for review. The independent assessor, PricewaterhouseCoopers (“PwC”), flagged a critical issue in the very first Facebook assessment—that Facebook didn’t assess service providers’ compliance with the company’s Data Use Policies. As PwC noted, “[t]here is limited evidence retained to demonstrate that Facebook monitored or assessed the service provider’s compliance with Facebook’s Data Use Policies. Lack of comprehensive monitoring makes it more difficult to detect inappropriately implemented privacy settings within these third-party developed applications.”<sup>12</sup> That finding was redacted in the version of the assessment EPIC obtained through a Freedom of Information Act

---

<sup>12</sup> Kevin Martin, Vice President, U.S. Public Policy, Facebook, *Letter to Senator Ron Wyden* (Oct. 10, 2018), <https://www.wyden.senate.gov/imo/media/doc/Untitled.pdf>.

request.<sup>13</sup> Yet the FTC took no action to address Facebook’s lax privacy practices after reviewing the assessment.

Therefore, not only had the FTC been aware of Facebook’s lax data security practices with third-party applications before the Order, but the independent assessor hired to flag issues for the FTC had alerted the Commission that the problem continued after Order went into effect. *The FTC was on notice that Facebook had insufficient monitoring for third parties in violation of the Order as early as 2013.* But the FTC did nothing to address the problem. PwC’s assessment control “required Facebook to perform a Mobile Application Certification process for Facebook Experience applications, which process included Facebook Experience application developers validating that they were in compliance with Facebook’s data policies and procedures.”<sup>14</sup> And rather than change their business practices, Facebook changed the standard for their future “independent” assessments to avoid PwC flagging the issue.<sup>15</sup> The FTC did not investigate the problem PwC reported in 2013, and did not prevent Facebook from changing the assessment standard so the problem would not be reported in later assessments.

The secrecy of the agency has contributed to the lack of oversight at the FTC that led to the Cambridge Analytica fiasco. EPIC advocated for the public release of the privacy assessments since the Consent Order was first announced in 2011. In our comments on the proposed Consent Order,

---

<sup>13</sup> PricewaterhouseCoopers, *Independent Assessor’s Report on Facebook’s Privacy Program: Initial Assessment Report for the Period Aug. 15, 2012 to Feb. 11, 2013*, (reprocessed version released June 26, 2018), <https://epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20180626-FB-Assessment-2013.pdf>.

<sup>14</sup> Kevin Martin, Vice President, U.S. Public Policy, Facebook, *Letter to Senator Ron Wyden* (Oct. 10, 2018), <https://www.wyden.senate.gov/imo/media/doc/Untitled.pdf>.

<sup>15</sup> Nicholas Confessore, Michael LaForgia and Gabriel J.X. Dance, *Facebook Failed to Police How Its Partners Handled User Data*, N.Y. Times (Nov. 12, 2018), <https://www.nytimes.com/2018/11/12/technology/facebook-data-privacy-users.html>. Facebook changed this control to simply require developers to agree to Facebook’s policies.

we recommended “[i]n order to fulfill the Order’s emphasis on awareness and commitment to the independence of the assessments, the Commission should require the results of the assessments to be made public to the greatest extent possible under existing law.”<sup>16</sup> EPIC is currently litigating to obtain public release of the unredacted Facebook assessments, reports, and related records.<sup>17</sup>

## **Conclusion**

There is no excuse for the FTC’s failure to protect user privacy. EPIC and other consumer groups informed the FTC of the problem, the FTC acknowledged the problem in its complaint, and the independent assessor flagged the issue in its first biennial assessment of Facebook’s privacy practices. The FTC was aware that Facebook gave third party applications unrestricted access user information and did not act to stop it.

The transfer of 87 million user records to Cambridge Analytica could have been avoided if the FTC had done its job. The 2011 Consent Order against Facebook was issued to protect the privacy of user data. If it had been enforced, there would be no need for these consent agreements with Aleksandr Kogan and Alexander Nix.

Sincerely,

/s/ Marc Rotenberg  
Marc Rotenberg  
EPIC President

/s/ Christine Bannan  
Christine Bannan  
EPIC Consumer Protection Counsel

---

<sup>16</sup> Comments of EPIC to the Fed. Trade Comm’n, *In the Matter of Facebook, Inc.*, FTC File No. 092 3184 (Dec. 27, 2011) at 21, <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>.

<sup>17</sup> EPIC v. FTC (Facebook Assessments), <https://epic.org/foia/ftc/facebook/>.