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The Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

<u>RE: *Investigation of Facebook's Changes to the Email Address Settings of Users*</u>

Dear Mr. Chairman and Members of the Commission:

The Electronic Privacy Information Center understands that the Commission is in the process of completing a Consent Order with Facebook that would settle "alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition."[1] As it prepares to set the final terms of the Consent Order, EPIC urges the Commission to consider Facebook's current business practices—most recently, Facebook's decision to override users' choice of which email address to display under the "Contact Info" section of their Facebook profiles.

Recently, Facebook decided to replace the email addresses that users had chosen to display on their profiles with the @facebook.com email address assigned to them by Facebook. Facebook did not notify users in advance of the change, nor did it obtain their consent. In introducing Facebook email addresses in 2010, Facebook said that "[w]e are also providing an @facebook.com email address to every person on Facebook who wants one,"[2] implying that users would have to express a desire for a Facebook email address before Facebook gave them one, and certainly before Facebook changed the default settings in their profile. Although the subsequent revision to Facebook's Data Use Policy stated that all users had Facebook email addresses, it did not explain that Facebook would be displaying these email addresses by default instead of the email addresses chosen by its users.[3]

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[1] Facebook, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 76 Fed. Reg. 75883 (proposed Dec. 5, 2011), http://www.ftc.gov/os/fedreg/2011/12/111205facebookfrn.pdf. The Consent Order with Facebook arises from a complaint filed by EPIC and a coalition of consumer and privacy organizations with the Commission in 2009. *See* FTC, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises* (Nov. 29, 2011), http://ftc.gov/opa/2011/11/privacysettlement.shtm.
[2] Joel Seligstein, *See the Messages that Matter*, THE FACEBOOK BLOG (Feb. 11, 2011), https://www.facebook.com/blog/blog.php?post=452288242130.
[3] *Data Use* Policy, FACEBOOK, https://www.facebook.com/full_data_use_policy (last visited June 27, 2012).

The Commission's Complaint against Facebook arose from Facebook's decision to change several privacy settings that users had previously selected and relied upon.[4] Facebook's most recent changes indicate that the company still believes that it can override users' preferences without informing them or obtaining their consent. Facebook's willingness to disregard user choice and the increased pressure to monetize user data[5] raise important questions about the company's ability to comply with the terms of the proposed Consent Order. In comments on the Order, EPIC noted other business practices that the Commission should evaluate, such as Facebook's creation of a facial recognition database and the tracking of users' browsing activity after they have logged off of Facebook.[6] As it finalizes the Order with Facebook, EPIC urges the Commission to review Facebook's current business practices, including the decision to override users' default email preferences.

Moreover, independent of the Consent Order, EPIC believes that Facebook has engaged in an unfair and deceptive trade practice, which the Commission may investigate under Section 5 of the FTC Act. Not only did the company falsely represent to users that they would be able to choose whether to adopt the @facebook.com email address as their default address, but substituting the company's own email address for the email address preferred by the user has the practical effect of directing email messages to Facebook's servers that would otherwise have been received through the email service chosen by the recipient.[7] This gives Facebook control over and access to the private communications of Facebook users. It is widely known that access to user email provides additional opportunities for commercialization of data.[8] And the collection of email necessarily creates new security risks for users.[9] Furthermore, the selection of a primary email address may reflect a user's political belief, e.g. @a<political-organization>.org, or an effort to promote a particular company or brand, e.g. @<company>.com. Facebook has

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[4] *See* Facebook, Inc., FTC File No. 092 3184 (2011) (Complaint), http://www.ftc.gov/os/caselist/0923184/111129facebookcmpt.pdf (describing the ways in which a number of prior user choices were overridden by Facebook).

[5] After becoming a publically-traded company, Facebook is likely to face pressure to meet increased revenue and profitability goals. For example, Facebook is now using personal information to target advertisements to users outside of Facebook. Josh Constine, *Private Facebook Data Powering Ads Outside Of Facebook — Is The World Ready?*, TECH CRUNCH (June 22, 2012), http://techcrunch.com/2012/06/22/we-are-not-afraid/.

[6] EPIC, Comments to the F.T.C. on Commission Public Notice, FTC File No. 092 3184 (December 27, 2011), *available at* https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf.

[7] A Facebook user who wishes to send an email message to a recipient and checks the Contact Info section of the recipient's profile will see an @facebook,com email address instead of the email address chosen by the recipient. If the user then chooses to send the email message to the @facebook.com address, the message will be sent to Facebook's servers. The recipient may never be notified that the message has been sent to the @facebook.com address instead of the intended email address. *See* Gervase Markham, *Facebook MITMed My Email*, HACKING FOR CHRIST (June 23, 2012), http://blog.gerv.net/2012/06/facebook-email-mitm/ ("The email instead goes to my Facebook inbox, and I don't get a notification email to say it's there. Which is, IMO, even worse - they don't just pass it through their servers on the way to where it would have gone, they keep it, and fail to send me a copy!").

[8] *See Ads in Gmail and Your Personal Data*, GOOGLE, https://support.google.com/mail/bin/answer.py?hl=en&answer=6603 (last visited June 27, 2012); *see also Gmail: Privacy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Gmail#Privacy (last visited June 27, 2012) ("Google automatically scans emails to add context-sensitive advertisements to them. . . . Allowing email content to be read, even by a computer, raises the risk that the expectation of privacy in email will be reduced. Furthermore, email that non-subscribers choose to send to Gmail accounts is scanned by Gmail as well, even though those senders never agreed to Gmail's terms of service or privacy policy.").

[9] *See* NAT'L INST. OF STANDARDS AND TECH., GUIDELINES ON ELECTRONIC MAIL SECURITY (2007), *available at* http://csrc.nist.gov/publications/nistpubs/800-45-version2/SP800-45v2.pdf.

overridden this key choice of Internet users through the substitution of its own domain name in the user's email address. And Facebook's contention that substituting the company's email service for the user's service does not have privacy implications is nonsensical.[10]

While EPIC does not object to Facebook offering an email service or to the informed choice of Facebook users to adopt the Facebook email service, where, as here, the company has tricked users into adopting the company's service, the Commission should investigate, either under the pending Consent Order or pursuant to the Commission's Section 5 authority.

Sincerely,

Marc Rotenberg
EPIC Executive Director

David Jacobs
EPIC Consumer Protection Fellow

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[10] *See, e.g.,* Nick Bilton, "On Facebook, the Semantics of Visibility vs. Privacy," N.Y Times, June 26, 2012, http://bits.blogs.nytimes.com/2012/06/26/for-facebook-visibility-is-not-privacy-while-others-disagree/