

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

In the Matter of Snapchat, Inc.

FTC File No. 132 3078

June 9, 2014

By notice published on May 14, 2014, the Federal Trade Commission (“FTC” or “Commission”) has proposed a consent agreement with Snapchat, Inc. that would settle “alleged violations of federal law prohibiting unfair or deceptive acts or practices.”¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to ensure that the final order adequately protects the privacy of Snapchat users.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.² In fact, the current Snapchat settlement arises from an FTC Complaint that EPIC filed in May 2013.³ Additionally, EPIC’s 2010 complaint concerning

¹ Snapchat, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 79 Fed. Reg. 27,611 (May 14, 2014).

² See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm’r Christine Varney (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

³ In the Matter of Snapchat, Inc., (2013) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), available at <http://epic.org/privacy/ftc/EPIC-Snapchat-Complaint.pdf> [hereinafter EPIC Snapchat Complaint].

Google Buzz provided the basis for the Commission’s investigation and October 24, 2011 subsequent settlement concerning the social networking service.⁴ In that case, the Commission found that Google “used deceptive tactics and violated its own privacy promises to consumers when it launched [Buzz].”⁵ The Commission’s settlement with Facebook also followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organization in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.⁶

EPIC has also submitted comments to the Commission on numerous proposed orders that implicate the privacy interests of consumers. However, to date the Commission has adopted these consent orders without any modification.⁷ While we appreciate the thoughtful commentary that we have often received from the Commission regarding its decisions not to incorporate our recommendations,⁸ we believe the FTC’s failure to make any changes to proposed settlements based on comments it has explicitly requested is: (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;⁹ (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade

⁴ Press Release, Fed. Trade Comm’n, FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁵ *Id.*

⁶ In the Matter of Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; In the Matter of Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for

Injunction, Request for Investigation and for Other Relief), https://epic.org/privacy/infacebook/EPIC_Facebook_Supp.pdf [hereinafter EPIC 2009 Facebook Supplement]; In the Matter of Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf [hereinafter EPIC 2010 Facebook Complaint].

⁷ Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

⁸ *See, e.g.*, Letter from Federal Trade Commission to EPIC (Apr. 15, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwareltrepic_2.pdf.

⁹ Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

practices;¹⁰ and (3) contrary to the interests of American consumers. In fact, it is becoming unclear what purpose is served by the Commission's request for public comments on a proposed settlement if the agency is unwilling to make any modifications. Nonetheless, EPIC offers these recommendations to strengthen the proposed settlement and to protect the interests of consumers.

Section I of these comments details EPIC's Snapchat complaint and the procedural history of the investigation that gave rise to the Consent Order. Section II describes the FTC Complaint. Section III discusses the proposed FTC Consent Order. Sections IV and V set out EPIC's comments and recommendations that would strengthen privacy protections and more effectively address the issues raised in the Complaint.

EPIC supports the findings in the FTC Complaint and supports the directives contained in the Consent Order. The Order makes clear that companies should not engage in unfair and deceptive trade practices, particularly in the collection and use of personal data. EPIC, however, urges the Commission to: (1) strengthen the Order by requiring Snapchat to implement the Consumer Privacy Bill of Rights; and (2) make Snapchat's independent privacy assessments publicly available.

I. EPIC's Complaint Concerning Snapchat's Business Practices

Snapchat is a widely used mobile application that allows consumers to send and receive photos, videos, and messages.¹¹ Before sending a photo or video message, Snapchat requires senders to "designate a period of time that the recipient will be allowed to view the [picture or video], up to ten seconds."¹² Snapchat represented to consumers that once the timer expired, the

¹⁰ Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

¹¹ Snapchat, <https://www.snapchat.com/> (last visited June 9, 2014).

¹² See *supra* note 1, at 27,612.

photo or video disappeared.¹³ Snapchat also claimed that if a photo or video message recipient took a screenshot of the video or photo, Snapchat would notify the sender.¹⁴

On May 16, 2013, EPIC filed a complaint with the FTC urging the Commission to investigate Snapchat, require Snapchat to cure any deceptive statements, require Snapchat to ensure that photos and videos are deleted to the greatest extent possible, and provide other relief that the Commission finds necessary.¹⁵ In its complaint, EPIC alleged that Snapchat failed to delete messages after the viewing time expired, and that these misrepresentations constituted deceptive trade practices.¹⁶ EPIC alleged that Snapchat images are stored on Snapchat users' phones and that Snapchat "simply change[d] the file extension to .NOMEDIA."¹⁷ EPIC alleged that Snapchat images became viewable by removing the .NOMEDIA extension.¹⁸

On May 8, 2014, the FTC reached a proposed settlement agreement with Snapchat over the company's unfair and deceptive business practices.¹⁹ The FTC identified six distinct counts, including false or misleading statements that Snapchat messages disappear forever, false or misleading statements that photo senders would be notified if recipients took screenshots, and false or misleading representations that Snapchat did not collect user location.²⁰

II. FTC Complaint Allegations

The Commission's 6-count Complaint addresses Snapchat's various misrepresentations. Count 1 discusses Snapchat's "false or misleading" representation that Snapchat messages

¹³ *Id.*

¹⁴ *Id.*

¹⁵ EPIC Snapchat Complaint at 7-8.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 4.

¹⁹ Press Release, Fed. Trade Comm'n, Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False (May 8, 2014), <http://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were>. See also *In the Matter of Snapchat, Inc.*, FTC File No. 132 3078 (2014) (Agreement Containing Consent Order), available at <http://www.ftc.gov/system/files/documents/cases/140508snapchatorder.pdf>.

²⁰ *In the Matter of Snapchat, Inc.*, FTC File No. 132 3078 (2014) (Complaint), available at <http://www.ftc.gov/system/files/documents/cases/140508snapchatcmt.pdf>.

disappear forever.²¹ Count 2 explains that, contrary to Snapchat representations, senders were not notified if Snapchat photo recipients took screenshots of Snapchat pictures.²² Count 3 alleges that Snapchat collected user location, despite company representations that it did “not ask for, track, or access any location-specific information . . .”²³ In Count 4, the FTC alleges that Snapchat misrepresented that user mobile numbers were the only personal information Snapchat collected to find user friends on Snapchat; in fact, Snapchat “collected the names and phone numbers of all contacts in the user’s mobile device address book.”²⁴ Count 5 alleges that Snapchat misrepresented the personal information that it collected in its Find Friends feature.²⁵ Finally, in Count 6, the FTC alleges that Snapchat “failed to securely design its Find Friends feature” by not “employ[ing] reasonable security measures to protect personal information from misuse and unauthorized disclosure.”²⁶

III. The Commission’s Proposed Snapchat Consent Order

Part I of the Order bars Snapchat from misrepresenting “in any manner, expressly or by implication, in or affecting commerce, the extent to which [Snapchat] or its products or services maintain and protect the privacy, security, or confidentiality of any covered information . . .”²⁷ The prohibition on misrepresentation includes, but is not limited to: “(1) the extent to which a message is deleted after being viewed by the recipient; (2) the extent to which responded or its products or services are capable of detecting or notifying the sender when a recipient has captured a screenshot of, or otherwise saved, a message; (3) the categories of covered

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.* at 5.

²⁴ *Id.* at 5-6.

²⁵ *Id.* at 7.

²⁶ *Id.* at 7-8.

²⁷ *In the Matter of Snapchat, Inc.*, FTC File No. 132 3078 (2014) (Agreement Containing Consent Order), 3.

information collected; or (4) the steps taken to protect against misuses or unauthorized disclosure of covered information.”²⁸

Part II requires Snapchat to implement a “comprehensive privacy program that is reasonably designed to: “(1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of covered information, whether collected by [Snapchat] or input into, stored on, captured with, or accessed through a computer using [Snapchat’s] products or services.”²⁹ The program must be “documented in writing” and appropriate to Snapchat’s “size and complexity, nature and scope of activities, and the sensitivity of the covered information.”³⁰

The program must identify “reasonably foreseeable, material risks” to privacy and describe the controls and procedures that Snapchat will take to address those risks.³¹ Snapchat must also use reasonable steps to ensure that service providers are capable of protecting the privacy of covered information that they receive from Snapchat.³² Finally, Snapchat must evaluate and adjust the privacy program.³³

Under Part III, Snapchat must obtain initial and biennial assessments from a “qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession.”³⁴ This person must have at least three years of experience in the field of privacy and data protection, and must be approved by the FTC.³⁵ The first report is due 180 days after the order takes effect; subsequent assessments are due every two years for the next 20

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

years.³⁶ The assessments must explain the privacy controls implemented and how they are appropriate to meet the requirements imposed by the Order.³⁷

Pursuant to Part IV, Snapchat must make available to the FTC copies of: (1) widely disseminated statements that describe Snapchat’s privacy protections; (2) all consumer complaints directed at Snapchat, for a period of 5 years from the date received; (3) documents that call into question Snapchat’s compliance with the Order; and (4) materials relied upon to prepare the privacy assessments.³⁸

Parts V through VIII contain various procedural details and requirements, such as the requirement that Snapchat deliver a copy of the Order to officers and directors who have responsibilities relating to the subject matter of the Order, and the provision that terminates the Order twenty years from the date of issuance, or twenty years from the most recent FTC complaint alleging a violation of the Order, whichever comes later.³⁹

Overall, EPIC supports the findings in the FTC Complaint and supports the directives contained in the Consent Order. The Order makes clear that companies should not engage in unfair and deceptive trade practices, particularly in the collection and use of personal data. To better protect the interests of Snapchat users, however, the Commission should revise its proposed Consent Order to fulfill the Commission’s statutory obligation to act in the public interest,⁴⁰ EPIC urges the Commission to strengthen the Order in the manner detailed below.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 5.

³⁹ *Id.* at 6-7.

⁴⁰ The Federal Trade Commission Act directs that enforcement actions be commenced against unfair and deceptive trade practices “if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.” 15 U.S.C. § 45(b) (2010); *see also FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (noting that “the Commission is charged by the broad delegation of power to it to eliminate unfair or deceptive business practices in the public interest”); *Scientific Mfg. Co. v. Fed. Trade Comm’n*, 124 F.2d 640, 643-44 (3d Cir. 1941) (“The change effected by the amendment lay in the fact that the Commission could thenceforth prevent unfair or deceptive acts or practices in commerce which injuriously affected

IV. The Commission Should Require Snapchat to Implement the Fair Information Practices Outlined in the Consumer Privacy Bill of Rights

In 2012, the President set out a comprehensive framework for privacy protection– the Consumer Privacy Bill of Rights (“CPBR”) – that provides substantive privacy protections for users.⁴¹ The CPBR enumerates seven principles: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.⁴² These principles are central to the right of privacy, and appear in numerous frameworks, such as the Organization for Economic Cooperation and Development (“OECD”) Privacy Guidelines⁴³ and the Privacy Act of 1974.⁴⁴ Several of these principles, like privacy by design, choice, and transparency, are also highlighted in a 2012 Commission report.⁴⁵

These principles would impose certain requirements on the collection and use of personal information in the social networking context. For example, Individual Control and Respect for Context would require that users consent to new uses or disclosures of their information, such as disclosure to a third-party advertiser. And Transparency and Access and Control would require that users be able to access all of the data that Snapchat keeps about them. The right to access increases awareness by giving users the ability to see the full extent of the data collected by a company. The right to access increases users’ control by placing the locus of ownership closer to

the public interest alone, while under the original Act the Commission's power to safeguard the public against unfair trade practices depended upon whether the objectionable acts or practices affected competition.”); *Rothschild v. Federal Trade Comm’n*, 200 F.2d 39, 42 (7th Cir. 1952) (“One of the purposes of the Act has been the protection of the public, and public interest may exist even though the practice deemed to be unfair does not violate any private right.”).

⁴¹ See EXEC. OFFICE OF THE PRESIDENT, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012) [hereinafter “White House CPBR”].

⁴² *Id.* at 10.

⁴³ OECD, OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1980), available at <http://www.oecd.org/internet/interneteconomy/oecdguidelinesonthe protectionofprivacyandtransborderflows ofperson aldata.htm#part2>.

⁴⁴ Privacy Act of 1974, 5 USC § 552a.

⁴⁵ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

the user, who gains the ability to inspect data and take steps to correct errors. Transparency also would require the Commission to make Snapchat's privacy audits publicly available to the greatest extent possible.

The proposed Order promotes some of the CPBR's principles. For example, the Order encourages Accountability to the FTC and consumers by requiring initial and biennial privacy audits on Snapchat's data collection, retention, and disclosure.⁴⁶ The Order should, however, further advance Fair Information Practices by requiring compliance with all of the principles set out by the President in the Consumer Privacy Bill of Rights. Specifically, Part I should be revised so consumers can exercise individual control over which types of information Snapchat intends to collect and disclose. Although the Order requires Snapchat inform consumers of the categories of information Snapchat collects, the Order should permit Snapchat consumers to select which data Snapchat will collect and for what purposes Snapchat can disclose consumer data. As the Order is currently written, Snapchat simply informs consumers of the type of information it will collect; it does not permit consumers to decide which information Snapchat collects.⁴⁷ And the Order also does not grant consumers a right to access and ensure accuracy of the data that Snapchat maintains.

By granting Snapchat consumers control over their data, along with the rights to access and amend their personal information, the Order can more fully comply with CPBR's principals. The FTC should modify the proposed settlement to achieve this outcome.

V. The Commission Should Make Snapchat's Privacy Audits Publicly Available to the Greatest Extent Possible

The Commission has emphasized its commitment to transparency and oversight when adopting similar consent orders in the past. After finalizing a consent order with Google that

⁴⁶ Snapchat Proposed Consent Order at 4.

⁴⁷ *Id.* at 3.

required similar independent assessments, the Commission wrote to EPIC and stated that “[t]o the extent permissible under law, the public may have access to the submissions required pursuant to the order.”⁴⁸ Similarly, regarding Facebook’s privacy audits, the Commission said that “If the FTC determines that the assessments have been frequently requested or are likely to be frequently requested because of their subject matter, the agency will post such portions as may be released to the public on the FTC’s website.”⁴⁹

Although companies may exempt trade secrets or confidential commercial information, similar audits containing extensive technical details have been released in their entirety, all without identifiable competitive harm. In 2009, Canadian Privacy Commissioner conducted an investigation of Facebook’s privacy policies and released a 113-page report that described in detail the findings of the investigation and the office’s recommendations.⁵⁰ The Irish Data Protection Commissioner’s investigation into Facebook produced a 150-page report and 77 pages of “technical analysis” that were made publicly available.⁵¹ Furthermore, the initial compliance self-assessment should be made available without redactions, as was the case with Google’s initial compliance report.⁵² Thus, to facilitate public education and the transparency of the audit process, the Commission should make Snapchat's privacy audits publicly available.

⁴⁸ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Oct. 13, 2011), <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzepic.pdf>.

⁴⁹ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Commenters, 44 (July 27, 2012), <http://www.ftc.gov/os/caselist/0923184/120810facebookcmltr.pdf>.

⁵⁰ OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, REPORT OF FINDINGS INTO THE COMPLAINT FILED BY THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC) AGAINST FACEBOOK INC. (2009), http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm#complaint.

⁵¹ See DATA PROTECTION COMM’R, REPORT OF AUDIT (2011), <http://dataprotection.ie/documents/facebook%20report/report.pdf/report.pdf>.

⁵² Letter from Sarah Mathias, Associate General Counsel, Fed. Trade Comm’n, to Ginger McCall, Director, EPIC Open Gov’t Program (Feb. 15, 2012), available at <https://epic.org/privacy/ftc/google/EPIC-FTC-Google-Compliance-Reply-02-17-12.pdf>.

Conclusion

EPIC supports consent order in this case. However, consumers' privacy would be better protected by modifying the order to require Snapchat to implement the Consumer Privacy Bill of Rights and to ensure that the reports are publicly available. EPIC therefore urges the Commission to adopt the changes to the proposed orders set out above.

Respectfully Submitted,

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