

FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
WhatsApp, Inc.)
)
_____)

Complaint, Request for Investigation, Injunction, and Other Relief

Submitted by

The Electronic Privacy Information Center (EPIC)

And

The Center for Digital Democracy (CDD)

I. Introduction

1. This complaint concerns the proposed use and transfer of WhatsApp, Inc. user data to Facebook, Inc. for targeted advertising and other purposes.
2. As set forth in detail below, WhatsApp plans to transfer user data that was previously collected under the promise this data would not be used or disclosed for marketing purposes. WhatsApp plans to require users to opt out of the transfer of their personal information to Facebook.
3. The proposed change in business practices will therefore constitute an unfair and deceptive trade practice, subject to investigation and injunction by the Federal Trade Commission.

II. Parties

4. The Electronic Privacy Information Center (“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.¹ A complaint filed by EPIC and a

¹ 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

coalition of privacy and civil liberties organization in December 2009, concerning Facebook's changes to user privacy settings, and a supplemental complaint filed by EPIC in February 2010 led to the Commission's 2012 comprehensive settlement with Facebook.² In 2014, EPIC and the Center for Digital Democracy filed a complaint with the FTC requesting an injunction and investigation of Facebook's proposed acquisition of WhatsApp, specifically in regards to the effect of the transaction on user privacy.³ In response, the Commission notified Facebook and WhatsApp that they must honor their privacy commitments to users.⁴

5. The Center for Digital Democracy (CDD) is a not-for-profit DC-based organization focused on protecting consumers in the digital marketplace.⁵ During the 1990's (and then operating as the Center for Media Education) its work to protect privacy on the Internet led to the passage of the Children's Online Protection Act (COPPA) by Congress in 1998.⁶ CDD's advocacy on the Google-DoubleClick merger played a major role in the FTC's decision to address privacy concerns arising from online behavioral advertising.⁷ Through a series of complaints filed at the commission, CDD has brought attention to privacy

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>.

² In the Matter of Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>; 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; 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; *In re Facebook, Inc.*, Decision and Order, No. C-4365 (2012), available at <http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

³ In the Matter of WhatsApp, Inc., (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://www.epic.org/ftc/WhatsApp-Complaint.pdf>.

⁴ Letter from Jessica Rich, Director of FTC Bureau of Consumer Protection, to WhatsApp and Facebook (Apr. 10, 2014) https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapptr.pdf [Exhibit A].

⁵ Ctr. for Digital Democracy, *About CDD*, <http://www.democraticmedia.org/about-cdd> (last accessed Mar. 6, 2014).

⁶ Katherine C. Montgomery, *Generation Digital*, MIT PRESS, <http://mitpress.mit.edu/books/generation-digital> (last accessed Mar. 6, 2014).

⁷ Louise Story, *F.T.C. Approves Doubleclick Deal*, N.Y. TIMES, Dec. 21, 2007, available at <http://www.nytimes.com/2007/12/21/business/21adco.html>.

concerns with mobile devices, real-time tracking and targeting platforms, social media, and from the databroker industry.⁸ CDD's four-year campaign to ensure that COPPA was effectively implemented across all major platforms and applications resulted in the FTC's December 2012 decision to strengthen its rules on children's privacy.⁹

6. WhatsApp, Inc. is an American company and owned and operated by Facebook, Inc.¹⁰ WhatsApp, Inc. is incorporated in Delaware and its primary place of business is 650 Castro Street, Suites 120-219, Mountain View, California, 94041.¹¹ WhatsApp, Inc. is the developer of WhatsApp, a cross-platform Small Message Service (SMS) application for mobile phones.¹² WhatsApp, Inc. was formed in 2009 and acquired by Facebook, Inc. in 2014.¹³ As of February 1, 2016, the app has one billion users worldwide.¹⁴
7. Facebook, Inc. is an American company incorporated in Delaware and headquartered at 1 Hacker Way, Menlo Park, California 94025.¹⁵ The company operates a social network service with 1.13 billion daily active users worldwide as of June 2016.¹⁶

III. Factual Background

A. WhatsApp Proposes to Transfer Previously Collected User Data to Facebook for Targeted Advertising Purposes

8. On August 25, 2016, WhatsApp posted an entry to the company blog announcing the first update to its Terms of Service and Privacy Policy in more than four years "as part of [WhatsApp's] plans to test ways for people to communicate with businesses in the months ahead."¹⁷

⁸ Rimma Katz, *Center for Digital Democracy asks FTC to investigate mobile data targeting*, MOBILE MARKETER, Apr. 9, 2010, available at <http://www.mobilemarketer.com/cms/news/legal-privacy/5927.html>.

⁹ Press Release, Federal Trade Comm'n, *FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Childrens Online Privacy Protection Rule* (Dec. 19, 2012), <http://www.ftc.gov/news-events/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over>.

¹⁰ *The Facebook Companies*, FACEBOOK, <https://www.facebook.com/help/111814505650678>.

¹¹ *Contact WhatsApp*, WHATSAPP, <https://www.whatsapp.com/contact/>.

¹² *Id.*

¹³ WhatsApp Blog, *Facebook* (Feb. 19, 2014), <https://blog.whatsapp.com/499/Facebook>.

¹⁴ WhatsApp Blog, *One Billion* (Feb. 1, 2014), <https://blog.whatsapp.com/616/One-billion>

¹⁵ Facebook Newsroom, *Company Info*, <http://newsroom.fb.com/company-info/>.

¹⁶ *Id.*

¹⁷ WhatsApp Blog, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

9. According to WhatsApp, WhatsApp “plan[s] to share some information with Facebook and the Facebook family of companies that will allow [WhatsApp] to coordinate more” with Facebook.¹⁸
10. According to WhatsApp, WhatsApp plans to transfer “the phone number [users] verified when [they] registered with WhatsApp” and the last time users accessed the app.¹⁹
11. WhatsApp users provide their mobile phone numbers to the company in order to create a WhatsApp account.²⁰ A phone number is widely considered a unique personal identifier that enables the linking of personal information, including medical records, financial records, and education records, as well as web site visits, and other personal data.²¹
12. As of February 1, 2016, WhatsApp has one billion users worldwide. According to the company, “[t]hat’s nearly one in seven people on Earth who use WhatsApp each month.”²²
13. Facebook and WhatsApp are currently the two largest social networks worldwide, with an estimated two-and-a-half billion active users combined.²³
14. According to WhatsApp’s blog post, WhatsApp and Facebook intend to use WhatsApp user data to provide “friend suggestions and more relevant ads on Facebook.”²⁴
15. According to WhatsApp, users may receive messages containing marketing information.²⁵

¹⁸ WhatsApp FAQ, *I Have Questions About the Updated Terms of Service and Privacy Policy*, <https://www.whatsapp.com/faq/general/28030012>.

¹⁹ *Id.*

²⁰ WhatsApp, *Privacy Policy* (last modified Aug. 25, 2016), <https://www.whatsapp.com/legal/?l=en#privacy-policy> [hereinafter “WhatsApp Updated Privacy Policy”].

²¹ See, e.g., NIST, Guide to Protecting the Confidentiality of Personally Identifiable Information (PII) at § 2.1 (2010), http://www.nist.gov/customcf/get_pdf.cfm?pub_id=904990 (telephone number is example of PII data); California Online Privacy Protection Act, Cal. Bus. & Prof. Code §§ 22575–22579 (2014) (definition of PII includes telephone number); Children’s Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 (2014) (definition of “personal information” includes telephone number).

²² WhatsApp Blog, *One Billion* (Feb. 1, 2016), <https://blog.whatsapp.com/616/One-billion>.

²³ Mark James, *Mark Zuckerberg Doesn’t Care About Your Holiday Snaps – Facebook is There to Make Money*, INTERNATIONAL BUSINESS TIMES (Aug. 26, 2016), <http://www.ibtimes.co.uk/mark-zuckerberg-doesnt-care-about-your-holiday-snaps-facebook-there-make-money-1578224>.

²⁴ WhatsApp FAQ, *I Have Questions About the Updated Terms of Service and Privacy Policy*, <https://www.whatsapp.com/faq/general/28030012>.

16. According to WhatsApp, “Facebook and the other companies in the Facebook family also may use information from us to improve your experiences within their services such as making product suggestions (for example, of friends or connections, or of interesting content) and showing relevant offers and ads.”²⁶
17. Users can only install WhatsApp if they provide their mobile phone number and allow WhatsApp to send them an SMS message with an activation code.²⁷

B. WhatsApp Will Require Users to Opt Out of the Facebook Data Transfer

18. According to WhatsApp, existing users will have a 30-day time period to opt out of the proposed data transfer to Facebook for advertising purposes.²⁸
19. WhatsApp describes two options for users to opt out of the proposed data transfer to Facebook, which the company describes in a blog post as “Option 1” and “Option 2.”²⁹
20. According to WhatsApp, users can opt out via “Option 1” when they are prompted to accept WhatsApp’s updated Terms of Service and Privacy Policy. WhatsApp provides a visual image of this notice, which does not reference the proposed data transfer to Facebook:

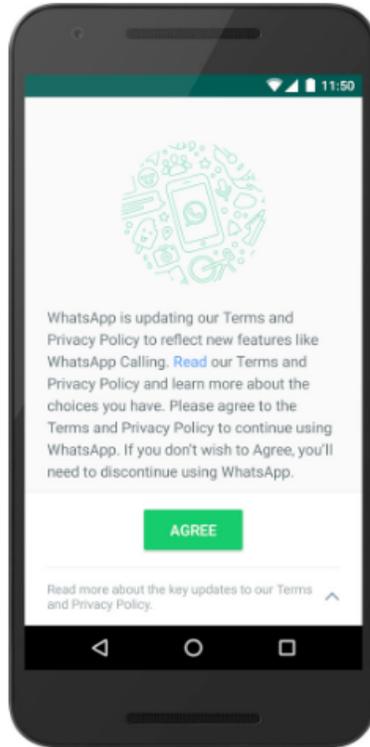
²⁵ WhatsApp Updated Privacy Policy.

²⁶ WhatsApp Updated Privacy Policy.

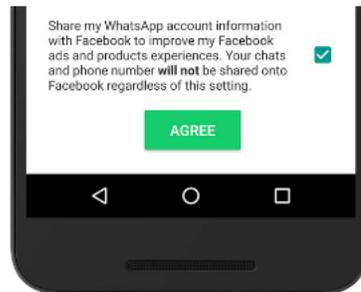
²⁷ Paul Ducklin, *WhatsApp and Privacy – Will Facebook Make Things Better, Worse, or Both?*, NAKED SECURITY (Mar. 19, 2014), <https://nakedsecurity.sophos.com/2014/03/19/whatsapp-and-privacy-will-facebook-make-things-better-worse-or-both/>

²⁸ WhatsApp FAQ, *How Do I Choose Not to Share My Account Information With Facebook to Improve My Facebook Ads and Products Experiences?*, <https://www.whatsapp.com/faq/en/general/26000016>.

²⁹ *Id.*



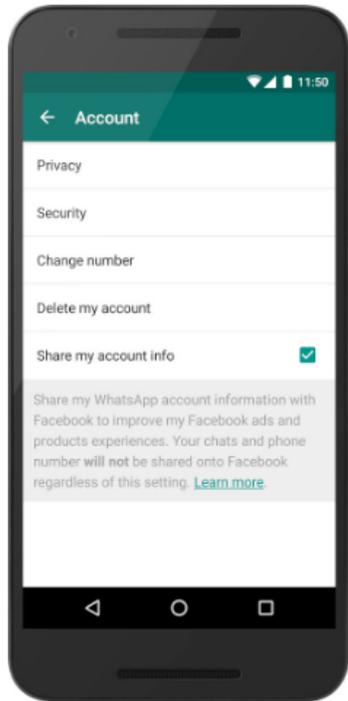
21. In order to opt out via Option 1, users must navigate to a separate screen and “uncheck the box or toggle the control” to prevent their account information from being shared with Facebook for advertising purposes.³⁰ WhatsApp provides a visual image of this step:



22. According to WhatsApp, users can opt out via “Option 2” within 30 days by navigating to their WhatsApp account settings and “uncheck[ing] the box or togg[ing] the control” to prevent their account information from being shared with Facebook for advertising purposes.³¹ WhatsApp provides a visual image of this step:

³⁰ *Id.*

³¹ *Id.*



23. According to WhatsApp even when users opt out of the data transfer to Facebook, “Facebook and the Facebook family of companies will still receive and use [user account] information for other purposes, such as improving infrastructure and delivery systems, understanding how [WhatsApp] services or [Facebook’s] are used, securing systems, and fighting spam, abuse, or infringement activities.”³²
24. Other companies in the Facebook family include Instagram LLC, advertising companies Atlas and LiveRail, and virtual reality company Oculus.³³

C. WhatsApp and Facebook Repeatedly Promised that WhatsApp User Data Would Not Be Used for Marketing Purposes Without User Consent

25. Prior to the August 25, 2016 update, WhatsApp’s privacy policy promised, “We do not use your mobile phone number or other Personally Identifiable Information to send commercial or marketing messages without your consent”³⁴
26. On November 19, 2009, founder Jan Koum posted to the WhatsApp official Blog, “So first of all, let’s set the record straight. We have not, we do not and we will

³² *Id.*

³³ Facebook, *The Facebook Companies*, <https://www.facebook.com/help/111814505650678>.

³⁴ WhatsApp, *Privacy Policy* (last modified July 7, 2012), <https://www.whatsapp.com/legal/?doc=privacy-policy&version=20120707>.

not **ever** sell your personal information to anyone. Period. End of story. Hopefully this clears things up.”³⁵

27. On June 18, 2012, Koum posted to the WhatsApp Blog:

At every company that sells ads, a significant portion of their engineering team spends their day tuning data mining, writing better code to collect all your personal data, upgrading the servers that hold all the data and making sure it’s all being logged and collated and sliced and packaged and shipped out... And at the end of the day the result of it all is a slightly different advertising banner in your browser or on your mobile screen. ... At WhatsApp, our engineers spend all their time fixing bugs, adding new features and ironing out all the little intricacies in our task of bringing rich, affordable, reliable messaging to every phone in the world. That’s our product and that’s our passion. Your data isn’t even in the picture. We are simply not interested in any of it.³⁶

28. On February 19, 2014, Koum posted to the WhatsApp Blog:

Here’s what will change for you, our users: nothing. WhatsApp will remain autonomous and operate independently. You can continue to enjoy the service for a nominal fee. You can continue to use WhatsApp no matter where in the world you are, or what smartphone you’re using. And you can still count on absolutely no ads interrupting your communication. There would have been no partnership between our two companies if we had to compromise on the core principles that will always define our company, our vision and our product.³⁷

29. On February 24, 2014, Facebook chief executive Mark Zuckerberg was quoted as saying “We are absolutely not going to change plans around WhatsApp and the way it uses user data. WhatsApp is going to operate completely autonomously.”³⁸

³⁵ WhatsApp Blog, *Just Wanted to Say a Few Things*, <https://blog.whatsapp.com/index.php/2009/11/a-few-things/> (Nov. 9, 2009).

³⁶ WhatsApp Blog, *Why We Don’t Sell Ads*, <http://blog.whatsapp.com/index.php/2012/06/why-we-dont-sell-ads/> (Jun. 18, 2012).

³⁷ WhatsApp Blog, *Facebook*, <http://blog.whatsapp.com/index.php/2014/02/facebook/> (Feb. 19, 2014).

³⁸ *Id* (quoting Jessica Guynn, *Mark Zuckerberg: WhatsApp Worth Even More Than \$19 Billion*, Los Angeles Times (February 24, 2014), <http://www.latimes.com/business/technology/la-fi-tn-mark-zuckerberg-whatsapp-wortheven-more-than-19-billion-20140224,0.603681.l.storv#axzz2vluc7Aev>).

III. The WhatsApp Proposed Change is Widely Viewed as a Reduction of WhatsApp User Privacy

30. Following the announcement of the proposed change in business practices, numerous experts, media outlets, and technologists described the proposed change as bad for the privacy of WhatsApp users.
31. The Indian Express reported that the change will “mark a significant departure from how WhatsApp has been viewed, an app that was strictly about no ads.”³⁹
32. Wired noted, “Another aspect of the privacy rollback likely to rankle users is that not only will the phone number and analytics sharing be activated by default, WhatsApp users will only have a month in which to opt out.”⁴⁰
33. Gizmodo explained, “This very obviously betrays WhatsApp’s commitment to privacy that it has long held.”⁴¹
34. A reporter with InvestorPlace asked, “What’s that? That’s just the sound of Facebook Inc tearing up the privacy agreement of WhatsApp’s billion users, allowing businesses to invade user inboxes.”⁴²
35. Another technology reporter observed, “WhatsApp’s foundation is secure, encrypted, private chats across all platforms. Anything that pushes against that, like sharing information with another company, poses a risk to maintaining that privacy and security.”⁴³
36. Elizabeth Denham, the Information Commissioner for the United Kingdom, recently announced her office is investigating the changes

³⁹ Shruti Dhapola, *WhatsApp’s Privacy Policy is Bigger Than Just Sharing Info With Facebook*, THE INDIAN EXPRESS (Aug. 29, 2016), <http://indianexpress.com/article/technology/opinion-technology/whatsapps-new-privacy-policy-goes-beyond-sharing-info-with-facebook/>.

⁴⁰ Brian Barrett, *WhatsApp’s Privacy Cred Just Took a Big Hit*, WIRED (Aug. 25, 2016), <https://www.wired.com/2016/08/whatsapp-privacy-facebook/>.

⁴¹ William Turton, *WhatsApp Betrays Privacy Stance, Will Share Data With Facebook*, GIZMODO (Aug. 25, 2016), <http://gizmodo.com/whatsapp-betrays-privacy-stance-will-share-data-with-f-1785733967>.

⁴² John Kilhefner, *Facebook Inc (FB) About-Faces on WhatsApp Privacy*, INVESTORPLACE (Aug. 27, 2016), <http://investorplace.com/2016/08/facebook-inc-fb-stock-shares-whatsapp/>.

⁴³ Jeff Gamet, *WhatsApp’s New Privacy Policy is a Big Trust Killer*, THE MAC OBSERVER (Aug. 26, 2016), <https://www.macobserver.com/news/whatsapps-new-privacy-policy-is-a-big-trust-killer/>.

WhatsApp and Facebook are making to how they handle customers' personal data.⁴⁴ Her announcement noted that the changes “will affect a lot of people” and users “may be concerned by the lack of control.”

IV. Prior FTC Statements

A. The FTC’s April 10, 2014 Letter to WhatsApp and Facebook Requires Opt-In Consent for the Proposed WhatsApp User Data Transfer to Facebook

37. In 2014, when Facebook proposed to acquire WhatsApp, numerous experts and consumer advocates warned that, if approved, Facebook would fail to uphold user privacy.⁴⁵
38. On March 6, 2014, EPIC and CDD filed a complaint with the FTC concerning the impact on consumer privacy of Facebook’s acquisition of WhatsApp.⁴⁶ According to the complaint,

WhatsApp built a user base based on its commitment not to collect user data for advertising revenue. Acting in reliance on WhatsApp representations, Internet users provided detailed personal information to the company including private text to close friends. Facebook routinely makes use of user information for advertising purposes and has made clear that it intends to incorporate the data of WhatsApp users into the user profiling business model. The proposed acquisition will therefore violate WhatsApp users’ understanding of their exposure to online advertising and constitutes an unfair and deceptive trade practice, subject to investigation by the Federal Trade Commission.⁴⁷

39. In response to EPIC and CDD’s complaint, on April 10, 2014, Jessica Rich, Director of the FTC’s Consumer Protection Bureau, sent a letter to the Chief Privacy officer of Facebook, Inc. and the General Counsel of WhatsApp, Inc. in connection with Facebook’s proposed acquisition of WhatsApp.⁴⁸

⁴⁴ Information Commissioner’s Office, *Statement on Changes to WhatsApp and Facebook’s Handling of Personal Data* (Aug. 26, 2016), <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2016/08/statement-on-changes-to-whatsapp-and-facebook-s-handling-of-personal-data/>.

⁴⁵ See *In the Matter of WhatsApp, Inc.*, (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://www.epic.org/ftc/WhatsApp-Complaint.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1.

⁴⁸ Letter from Jessica Rich, Director of FTC Bureau of Consumer Protection, to WhatsApp and Facebook (Apr. 10, 2014) https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapptr.pdf [Exhibit A at 2].

40. According to the FTC letter, WhatsApp users “have agreed to use the WhatsApp service, and to have WhatsApp collect and transmit their information, with the understanding that these promises will be honored.”⁴⁹
41. According to the FTC letter, “WhatsApp’s privacy policy clearly states, among other things, that users’ information will not be used for advertising purposes or sold to a third party for commercial or marketing use without the users’ consent.” (emphasis added)⁵⁰ The letter further states, “Facebook has recently promised consumers that it would not change the way WhatsApp uses customer information.”
42. According to the FTC letter, “The statements in WhatsApp’s privacy policy, combined with the recent public statements by both Facebook and WhatsApp, constitute clear promises to consumers about the collection and use of their data by WhatsApp and, following WhatsApp’s purchase, Facebook.”⁵¹
43. According to the FTC letter, “the FTC has made clear that, absent affirmative express consent by a consumer, a company cannot use data in a manner that is materially inconsistent with promises made at the time the data was collected, and that such use of data could be an unfair practice under Section 5.” (emphasis added)⁵²
44. In light of these promises, the FTC explains that “any use of WhatsApp’s subscriber information that violates these privacy promises, by either WhatsApp or Facebook, could constitute a deceptive or unfair practice under the FTC Act.” (emphasis added)⁵³
45. The FTC directs WhatsApp and Facebook that “if [they] choose to use data collected by WhatsApp in a manner that is materially inconsistent with the promises WhatsApp made at the time of collection, [they] must obtain consumers’ affirmative consent before doing so.” (emphasis added)⁵⁴

B. FTC Press Releases and Blog Posts Clarify WhatsApp and Facebook Must Obtain Opt-In Consent Prior to the Proposed Data Transfer

⁴⁹ Ex. A at 2.

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.* at 3 (citing *In re Facebook, Inc.*, Decision and Order, No. C-4365 (2012), <http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc.>; *In re Gateway Learning Corp.*, Decision and Order, No. C-4120 (2004), <http://www.ftc.gov/enforcement/cases-proceedings/042-3047/gateway-learning-corp-matter>).

⁵³ *Id.*

⁵⁴ *Id.*

46. The FTC’s press release on the April 10, 2014 letter to WhatsApp and Facebook clarifies that “before making any material changes to how they use data already collected from WhatsApp subscribers, the companies must get affirmative consent.” (emphasis added)⁵⁵
47. On March 25, 2015, the FTC posted a blog entry on “Mergers and Privacy Promises” that discussed the implications of the April 10, 2014 letter to WhatsApp and Facebook and provided the following guidance:

What if [a company] want[s] to materially change [its] practices for information [it] collected before the merger – for example, by sharing with third parties information [it] originally promised would not be shared? To change the privacy promises already made to consumers, [the company will] need to inform consumers and get their express affirmative consent to opt in to [the] new practices.⁵⁶

V. Legal Analysis

A. The FTC’s Section 5 Authority

48. The FTC Act prohibits unfair and deceptive acts and practices, and empowers the Commission to enforce the Act’s prohibitions.⁵⁷ These powers are described in FTC Policy Statements on Deception⁵⁸ and Unfairness.⁵⁹
49. A trade practice is unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁶⁰
50. The injury must be “substantial.”⁶¹ Typically, this involves monetary harm, but may also include “unwarranted health and safety risks.”⁶² Emotional harm and

⁵⁵ FTC, *FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition*

(Apr. 10, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed> [Exhibit B].

⁵⁶ FTC, *Mergers and Privacy Promises* (Mar. 25, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2015/03/mergers-privacy-promises> [Exhibit C].

⁵⁷ See 15 U.S.C. § 45 (2010).

⁵⁸ Fed. Trade Comm’n, FTC Policy Statement on Deception (1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [hereinafter FTC Deception Policy].

⁵⁹ Fed. Trade Comm’n, FTC Policy Statement on Unfairness (1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> [hereinafter FTC Unfairness Policy].

⁶⁰ 15 U.S.C. § 45(n); see, e.g., *Fed. Trade Comm’n v. Seismic Entertainment Productions, Inc.*, Civ. No. 1:04-CV- 00377 (Nov. 21, 2006) (finding that unauthorized changes to users’ computers that affected the functionality of the computers as a result of Seismic’s anti-spyware software constituted a “substantial injury without countervailing benefits.”).

other “more subjective types of harm” generally do not make a practice unfair.⁶³ Secondly, the injury “must not be outweighed by an offsetting consumer or competitive benefit that the sales practice also produces.”⁶⁴ Thus the FTC will not find a practice unfair “unless it is injurious in its net effects.”⁶⁵ Finally, “the injury must be one which consumers could not reasonably have avoided.”⁶⁶ This factor is an effort to ensure that consumer decision making still governs the market by limiting the FTC to act in situations where seller behavior “unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.”⁶⁷ Sellers may not withhold from consumers important price or performance information, engage in coercion, or unduly influence highly susceptible classes of consumers.⁶⁸

51. An act or practice is deceptive if it involves a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer’s detriment.⁶⁹
52. The Commission has previously found that retroactive application of materially changed privacy policies to previously collected consumer data is an unfair trade practice.⁷⁰
53. There are three elements to a deception claim. First, there must be a representation, omission, or practice that is likely to mislead the consumer.⁷¹ The relevant inquiry for this factor is not whether the act or practice actually misled the consumer, but rather whether it is likely to mislead.⁷²

⁶¹ FTC Unfairness Policy, *supra*.

⁶² *Id.*; see, e.g., *Fed. Trade Comm’n v. Information Search, Inc.*, Civ. No. 1:06-cv-01099 (Mar. 9, 2007) (“The invasion of privacy and security resulting from obtaining and selling confidential customer phone records without the consumers’ authorization causes substantial harm to consumers and the public, including, but not limited to, endangering the health and safety of consumers.”).

⁶³ FTC Unfairness Policy, *supra*.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ FTC Deception Policy, *supra*.

⁷⁰ See *In re Gateway Learning Corp.*, Decision and Order, No. C-4120 (2004), <http://www.ftc.gov/enforcement/cases-proceedings/042-3047/gateway-learning-corp-matter>.

⁷¹ FTC Deception Policy, *supra*; see, e.g., *Fed Trade Comm’n v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) (holding that Pantron’s representation to consumers that a product was effective at reducing hair loss was materially misleading, because according to studies, the success of the product could only be attributed to a placebo effect, rather than on scientific grounds).

⁷² FTC Deception Policy, *supra*.

54. Second, the act or practice must be considered from the perspective of a reasonable consumer.⁷³ “The test is whether the consumer’s interpretation or reaction is reasonable.”⁷⁴ The FTC will look at the totality of the act or practice and ask questions such as “how clear is the representation? How conspicuous is any qualifying information? How important is the omitted information? Do other sources for the omitted information exist? How familiar is the public with the product or service?”⁷⁵
55. Finally, the representation, omission, or practice must be material.⁷⁶ Essentially, the information must be important to consumers. The relevant question is whether consumers would have chosen another product if the deception had not occurred.⁷⁷ Express claims will be presumed material.⁷⁸ Materiality is presumed for claims and omissions involving “health, safety, or other areas with which the reasonable consumer would be concerned.”⁷⁹
56. The FTC presumes that an omission is material where “the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false . . . because the manufacturer intended the information or omission to have an effect.”⁸⁰
57. The Commission has previously found that a company may not alter the privacy settings of its users.⁸¹
58. The Commission has previously found that a company may not repurpose user data for a use other than the one for which the user’s data was collected without first obtaining the user’s “express affirmative consent.”⁸²
59. As the FTC has stated,

When companies tell consumers they will safeguard their personal information, the FTC can and does take law enforcement action to make sure that companies live up these promises. The FTC has brought legal actions against organizations that have violated

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 110 (1984).

⁸¹ *In the Matter of Facebook, Inc., a corporation*; FTC File No. 092 3184, FTC.gov (Dec. 30, 2011), <http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

⁸² *In the Matter of Google, Inc.*; FTC File No. 102 3136 (Oct. 13, 2011) (Decision and Order), <http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzdo.pdf>.

consumers' privacy rights, or misled them by failing to maintain security for sensitive consumer information. In many of these cases, the FTC has charged the defendants with violating Section 5 of the FTC Act, which bars unfair and deceptive acts and practices in or affecting commerce. In addition to the FTC Act, the agency also enforces other federal laws relating to consumers' privacy and security.⁸³

C. WhatsApp and Facebook's Proposed Change in Business Practices Constitute Unfair and Deceptive Trade Practices

60. As described above, WhatsApp previously collected phone numbers and other personal information from over one billion users before announcing its plan to transfer user data to Facebook.
61. As described in detail above, WhatsApp represented to users that this information would not be used or disclosed for marketing purposes.
62. As of February 1, 2016, over one billion individuals provided their phone numbers and other personal information to WhatsApp with the understanding that their information would not be used or disclosed for marketing purposes.
63. As described in detail above, WhatsApp now plans to use and transfer previously collected user data to Facebook for targeted advertising purposes.
64. As described above, WhatsApp will require existing users to opt-out of the transfer of previously collected data to Facebook.
65. As described above, WhatsApp will not obtain affirmative express consent from its users to use and disclose data that "in a manner that is materially inconsistent with promises made at the time the data was collected."⁸⁴
66. Therefore, WhatsApp's proposed change in business practices constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

V. Prayer for Investigation and Relief

1. EPIC urges the Commission to investigate WhatsApp, Inc. and Facebook, Inc.'s proposed plan to transfer WhatsApp user data to Facebook and to use WhatsApp

⁸³ FTC, *Enforcing Privacy Promises*, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises>.

⁸⁴ Ex. A at 3.

user data for marketing purposes, and to enjoin its unfair and deceptive data practices.

2. Specifically, EPIC requests the Commission to:
 - a. Initiate an investigation of the proposed transfer of WhatsApp user data to Facebook;
 - b. Initiate an investigation of the proposed use of WhatsApp user data for marketing purposes; and
 - c. Provide such other relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

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