

September 22, 2016

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

Dear Chairwoman Ramirez and FTC Commissioners:

The undersigned consumer privacy organizations write in support of the complaint the Electronic Privacy Information Center (“EPIC”) and the Center for Digital Democracy (“CDD”) recently filed concerning WhatsApp’s plan to transfer user data to Facebook in violation of commitments the company previously made to subscribers.<sup>1</sup> We are deeply concerned about the impact this proposed change in data practices will have on the privacy and security of WhatsApp users in the U.S. and across the world. We urge the FTC to investigate this matter and to fulfill its obligation to prevent WhatsApp and Facebook from engaging in unfair and deceptive trade practices.

WhatsApp has over one billion users worldwide,<sup>2</sup> and its popularity has been due in large part to its strong public commitment to privacy. The company has long made its pro-privacy commitment a key part of its brand, underscored by numerous public statements and official blog posts on the importance of confidential communications.<sup>3</sup>

When Facebook acquired WhatsApp in 2014, both companies made numerous promises to the public and to the FTC that WhatsApp’s data privacy practices would not change.<sup>4</sup> Consumer privacy organizations raised concerns about the acquisition, and the Commission

---

<sup>1</sup> *In the Matter of WhatsApp, Inc.*, (Aug. 29, 2016) (EPIC, CDD Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf>.

<sup>2</sup> WhatsApp Blog, *One Billion* (Feb. 1, 2014), <https://blog.whatsapp.com/616/One-billion>.

<sup>3</sup> See, e.g., WhatsApp, *Archived Privacy Policy* (last modified July 7, 2012), <https://www.whatsapp.com/legal/?doc=privacy-policy&version=20120707> (“We do not use your mobile phone number or other Personally Identifiable Information to send commercial or marketing messages without your consent . . . .”); WhatsApp Blog, *Just Wanted to Say a Few Things* (Nov. 9, 2009), <https://blog.whatsapp.com/index.php/2009/11/a-few-things/> (Nov. 9, 2009); WhatsApp Blog, *Why We Don’t Sell Ads* (Jun. 18, 2012), <http://blog.whatsapp.com/index.php/2012/06/whywe-dont-sell-ads/>.

<sup>4</sup> WhatsApp Blog, *Setting the Record Straight* (Mar. 17, 2014), <https://blog.whatsapp.com/529/Setting-the-record-straight>; WhatsApp Blog, *Facebook* (Feb. 19, 2014) <https://blog.whatsapp.com/499/Facebook>; Cecilia Kang, *Privacy Advocates Decry Facebook’s Purchase of WhatsApp*, WASH. POST (Mar. 6, 2014), [https://www.washingtonpost.com/business/technology/privacy-advocates-decry-facebooks-purchase-of-whatsapp/2014/03/06/2f14a56e-a569-11e3-84d4-e59b1709222c\\_story.html?tid=hpModule\\_88854bf0-8691-11e2-9d71-f0feafdd1394](https://www.washingtonpost.com/business/technology/privacy-advocates-decry-facebooks-purchase-of-whatsapp/2014/03/06/2f14a56e-a569-11e3-84d4-e59b1709222c_story.html?tid=hpModule_88854bf0-8691-11e2-9d71-f0feafdd1394).

responded with a clear warning that the companies must continue to honor their privacy promises to WhatsApp users or risk violating Section 5 of the FTC Act.

The Commission stated the companies must obtain “affirmative consent” from WhatsApp users before materially changing its practices for information it collected before the merger.<sup>5</sup> The FTC stated at the time that “WhatsApp must continue to honor these promises to consumers. Further, if the acquisition is completed and WhatsApp fails to honor these promises, both companies could be in violation of Section 5 of the Federal Trade Commission (FTC) Act and, potentially, the FTC’s order against Facebook.” The FTC has previously interpreted affirmative consent to require opt-in consent, particularly in the context of material retroactive changes to privacy promises.<sup>6</sup>

On August 25, 2016, WhatsApp announced plans to use and transfer customer data, including users’ verified telephone numbers, to Facebook for user profiling and targeted advertising.<sup>7</sup> WhatsApp previously collected phone numbers and other personal information from over one billion users with the promise that this information would not be used or disclosed for marketing purposes. WhatsApp’s reversal on this promise is a material, retroactive change that will apply to previously collected data. Contrary to FTC policy, WhatsApp does not intend to provide clear notice or obtain customers’ affirmative express consent – i.e., *opt-in consent* – before implementing these changes for previously collected information. Rather, these material, retroactive changes are buried in WhatsApp’s lengthy revised privacy policy and consumers have 30 days to opt-out.<sup>8</sup>

European authorities have already begun investigating WhatsApp’s reversal on the privacy promises it made when seeking regulatory approval of Facebook’s acquisition of the

---

<sup>5</sup> 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/297701/140410facebookwhatapp1tr.pdf](https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapp1tr.pdf).

<sup>6</sup> See FED. TRADE COMM’N, FTC STAFF REP.: SELF-REG. PRINCIPLES FOR ONLINE BEHAV. ADVERTISING n. 63 (Feb. 2009),  
<https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf> (requiring “affirmative express consent (opt-in)” for material retroactive changes to privacy promises). The Commission has previously found that retroactive application of materially changed privacy policies to previously collected consumer data is an unfair trade practice. 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>.

<sup>7</sup> WhatsApp Blog, *Looking Ahead for WhatsApp* (Aug. 25, 2016),  
<https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

<sup>8</sup> 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>.

messaging service.<sup>9</sup> European Union Competition Commissioner Margrethe Vestager has indicated the EU is reconsidering its approval of WhatsApp's 2014 merger with Facebook.<sup>10</sup> Vestager stated that the companies' promises not to merge user data was "a part of the decision [to approve the merger] so therefore we're asking some follow-ups to find out what's going on."<sup>11</sup>

WhatsApp plans to make material, retroactive changes to its numerous privacy promises regarding the use and disclosure of user data without first obtaining users' affirmative express consent. This is exactly what the FTC said WhatsApp and Facebook cannot do. It is a clear violation of the prohibition on unfair and deceptive trade practices the FTC is obligated to enforce under Section 5 of the FTC Act.

We urge the Commission to fulfill its duty to protect consumer privacy, and to investigate and enjoin WhatsApp and Facebook's proposed change in business practices.

We appreciate your attention to this important matter.

Sincerely,

Bill of Rights Defense Committee & Defending Dissent Foundation  
Center for Digital Democracy  
Center for Financial Privacy and Human Rights  
Common Sense Kids Action  
Constitutional Alliance  
Consumer Action  
Consumer Federation of America  
Consumer Watchdog  
Cyber Privacy Project  
Demand Progress  
Electronic Privacy Information Center  
The FoolProof Foundation  
Patient Privacy Rights  
Privacy Rights Clearinghouse  
Privacy Rights Now Coalition  
Privacy Times  
U.S. PIRG

---

<sup>9</sup> Aoife White & Peter Levring, *Facebook Grilled by EU's Vestager Over WhatsApp Merger U-Turn*, BLOOMBERG (Sep. 9, 2016), <http://www.bloomberg.com/news/articles/2016-09-09/facebook-grilled-by-eu-s-vestager-over-whatsapp-merger-u-turn>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*