



December 4, 2012

Senator John D. Rockefeller, Chairman
 Senator Kay Bailey Hutchison, Ranking Member,
 Committee on Commerce, Science, and Transportation
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RE: The Nomination of Joshua Wright to be a Commissioner of the Federal Trade Commission

Dear Chairman Rockefeller, Ranking Member Hutchison, members of the Committee:

On December 4, 2012, the Committee will consider the nomination of Dr. Joshua D. Wright to the Federal Trade Commission. EPIC takes no position on the nomination. However, we are writing to bring to your attention two issues related to the purpose and effectiveness of the Commission that we believe could be addressed by the Committee at the nomination hearing and at subsequent hearings regarding the Federal Trade Commission: (1) the Commission's failure to modify its consent orders to reflect public comments, and (2) the Commission's failure to incorporate the elements of the Consumer Privacy Bill of Rights in settlements resulting from privacy violations. EPIC recommends that you examine the nominee's views on the importance of public comments for the agency's deliberations as well as the basic requirements to protect privacy once a company is subject to an FTC consent order.

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 EPIC routinely submits comments to the Commission on proposed orders that implicate the privacy interests of consumers. However, to date, the Commission has adopted all proposed consent orders

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 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>.

without making any changes based on public feedback.² This is true even in circumstances where hundreds of people, by public comments established by the FTC, have urged the Commission to give greater weight to such key phrases as a “comprehensive privacy program.”³ Given the Commission’s unwillingness to modify settlements in response to comments, the ability of the public to meaningfully participate in privacy settlements is unclear.

Although the Commission has solicited public comments for proposed settlement agreements in twenty-one cases involving privacy violations over the past two years, it has never modified a settlement in response to public comment. The Commission is empowered to file complaints and to adopt consent orders with companies that engage in unfair and deceptive trade practices in violation of the Federal Trade Commission Act.⁴ When the Commission reaches a settlement with such a company, the Commission’s own regulations state that the Commission shall “promptly” place an accepted consent agreement and complaint “on the public record for a period of 30 days, or such other period as the Commission may specify, for the receipt of comments or views from any interested person.”⁵ The regulations do not, however, specify the role that public comments should play in the Commission’s evaluation of settlements, and thus public comments have little practical effect on the Commission’s final settlements. Even in the cases that generated the most public feedback, the Commission notified commenters that the consent orders would remain unmodified.⁶

If for some reason, the Commission is unwilling to act on public comments it receives on proposed settlements, we believe the Congressional oversight committees should intervene and either instruct the Commission to be more responsive to the public’s concern or amend the FTC Act so as to make the agency’s determinations regarding public comments subject to judicial review.

Additionally, in spite of its public support for the Consumer Privacy Bill of Rights, the Commission has failed to include compliance with the CPBR as a requirement for companies that violate consumers’ privacy. Set out earlier this year by the Department of Commerce, the Consumer Privacy Bill of Rights (CPBR) provides substantive privacy protections for users.⁷ The CPBR enumerates seven practices: Individual Control,

² 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-FTCSettlement-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.

³ See *Fix Google Privacy*, ELEC. PRIVACY INFO. CTR., <https://epic.org/fixgoogleprivacy/> (last visited Dec. 4, 2012).

⁴ 15 U.S.C. § 45(b)

⁵ 16 C.F.R. § 2.34(c)

⁶ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Janet Aldrich et. al (Jul. 27, 2012), *available at* <http://www.ftc.gov/os/caselist/0923184/120810facebookcmltr.pdf>.

⁷ 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)

Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.⁸ These practices are central to the right of privacy, and appear in numerous frameworks, such as the Organization for Economic Cooperation and Development (OECD) Privacy Guidelines⁹ and the Privacy Act of 1974.¹⁰ The Commission has publicly endorsed the privacy practices contained in the CPBR.¹¹ The Commission’s 2012 privacy report stated that “[s]taff from the FTC and Commerce worked closely to ensure that the agencies’ privacy initiatives are complementary,”¹² and in response to comments received by EPIC, the Commission said that it “fully supports the CPBR.”¹³ Yet the Commission has so far failed to require CPBR practices in settlements with companies found to have violated consumer privacy.

As a routine manner, in settlements involving privacy violations, the Commission should expect the settling parties to comply with the Fair Information Practices contained in the CPBR. The Commission has attempted to explain the omission of CPBR practices in its settlements by stating that its settlements are designed to protect against the specific types of misconduct that gave rise to the original complaint in each case.¹⁴ But this explanation is unconvincing, as the Commission has also admitted to designing the terms of its settlements so that they “are broad enough to address misconduct beyond that expressly challenged in the complaint.”¹⁵ Although the CPBR is divided into specific practices, it forms a coherent framework that resists division or selective application. Thus, applying the CPBR is the best way to provide adequate prospective relief in privacy cases.

The nomination of a new Commissioner to the Federal Trade Commission provides an opportunity to discuss the Commission’s practices and to assess whether the FTC is sufficiently responsive to public concerns about privacy.

We appreciate your interest in EPIC’s views and would be pleased to speak further with you and your staff.

Sincerely,

⁸ *Id.* at 10.

⁹ OECD, OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1980), *available at* <http://www.oecd.org/internet/interneteconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsofPersonalData.htm#part2>.

¹⁰ Privacy Act of 1974, 5 USC § 552a.

¹¹ 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)

¹² FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 3 (2012), *available at* <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

¹³ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Aug. 30, 2012), *available at* <http://ftc.gov/os/caselist/1023058/120911myspaceletterepic.pdf>.

¹⁴ *Id.*

¹⁵ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Jul. 27, 2012), *available at* <https://epic.org/privacy/facebook/Facebook-Ltr-To-EPIC-07-27-12.pdf>

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