



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Jessica L. Rich
Office of the Director
Bureau of Consumer Protection

April 10, 2014

Erin Egan
Chief Privacy Officer
Facebook, Inc.
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Anne Hoge
General Counsel
WhatsApp Inc.
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Dear Ms. Egan and Ms. Hoge:

I am sending you this letter in connection with Facebook, Inc.'s proposed acquisition of WhatsApp Inc., a company that offers an instant messaging service with reportedly hundreds of millions of users worldwide.¹ As you know, both companies collect data from consumers but make different promises and statements with respect to consumers' privacy. In particular, and as discussed in more detail below, WhatsApp has made a number of promises about the limited nature of the data it collects, maintains, and shares with third parties – promises that exceed the protections currently promised to Facebook users. We want to make clear that, regardless of the acquisition, 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.²

WhatsApp's Statements to Consumers Regarding Privacy

In its most recent privacy policy, dated July 7, 2012, WhatsApp makes several statements about the types of data that it collects. It states that "WhatsApp does not collect names, emails,

¹ This letter represents my views and does not necessarily represent the views of the Commission or any individual Commissioner.

² See *In re Facebook, Inc.*, Decision and Order, No. C-4365 (2012), available at <http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

addresses or other contact information from its users' mobile address book or contact lists other than mobile phone numbers"³ It also states that "We do not collect location data" and that "The contents of messages that have been delivered by the WhatsApp Service are not copied, kept or archived by WhatsApp."⁴ The policy further represents that "We do not use your mobile phone number or other Personally Identifiable Information to send commercial or marketing messages without your consent" Similarly, it states that "We do not sell or share your Personally Identifiable Information (such as mobile phone number) with other third-party companies for their commercial or marketing use without your consent."⁵ WhatsApp's hundreds of millions of 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.

Statements Made by WhatsApp and Facebook After the Purchase of WhatsApp

Following Facebook's announced intent to acquire WhatsApp, both companies have made public statements indicating that the promises in WhatsApp privacy policies would be honored. Following the announcement of the purchase, an article was placed on the WhatsApp blog that stated:

Here's what will change for you, our users: nothing 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.⁶

Following the announcement of the proposed acquisition of WhatsApp, 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."⁷ Similarly, a Facebook spokesperson stated that "As we have said repeatedly, WhatsApp will operate as a separate company and will honor its commitments to privacy and security."⁸

Future Uses of WhatsApp User Data

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. As you know, the FTC has brought many cases alleging that the failure to keep promises made

³ WhatsApp Privacy Policy, July 7, 2012, *available at* www.whatsapp.com/legal.

⁴ *Id.*

⁵ *Id.*

⁶ WhatsApp Blog, *Facebook*, February 19, 2014, *available at* blog.whatsapp.com/index.php/2014/02/facebook.

⁷ Jessica Guynn, "Mark Zuckerberg: WhatsApp worth even more than \$19 billion," *Los Angeles Times* (February 24, 2014), *available at* <http://www.latimes.com/business/technology/la-fi-tn-mark-zuckerberg-whatsapp-worth-even-more-than-19-billion-20140224,0,6036811.story#axzz2vIuc7Aey>.

⁸ Jessica Guynn, "Privacy Groups Urge FTC to probe Facebook's deal to buy WhatsApp," *Los Angeles Times* (March 6, 2014), *available at* <http://www.latimes.com/business/technology/la-fi-tn-privacy-groups-urge-ftc-to-probe-facebooks-whatsapp-deal-20140306,0,5616080.story#axzz2vEhEBQqd>.

about privacy constitutes a deceptive practice under Section 5 of the FTC Act.⁹ In addition, 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 5.¹⁰

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. Facebook's purchase of WhatsApp would not nullify these promises and WhatsApp and Facebook would continue to be bound by them. Further, Facebook has recently promised consumers that it would not change the way WhatsApp uses customer information. Therefore, 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. Moreover, such an action could violate the FTC's order against Facebook. Among other things, the Order enjoins Facebook and its subsidiaries from misrepresenting the extent to which they maintain the privacy or security of consumers' personal information and requires Facebook and its subsidiaries to obtain consumers' affirmative express consent before sharing their nonpublic information in a manner that materially exceeds any privacy setting.

Before changing WhatsApp's privacy practices in connection with, or following, any acquisition, you must take steps to ensure that you are not in violation of the law or the FTC's order. First, if you choose to use data collected by WhatsApp in a manner that is materially inconsistent with the promises WhatsApp made at the time of collection, you must obtain consumers' affirmative consent before doing so. Second, you must not misrepresent in any manner the extent to which you maintain, or plan to maintain, the privacy or security of WhatsApp user data. Failure to take these steps could constitute a violation of Section 5 and/or the FTC's order against Facebook.¹¹ Finally, if you choose to change how you collect, use, and share newly-collected WhatsApp data, we recommend that you offer consumers an opportunity to opt out of such changes or, at least, that you make clear to consumers that they have an opportunity to stop using the WhatsApp service.

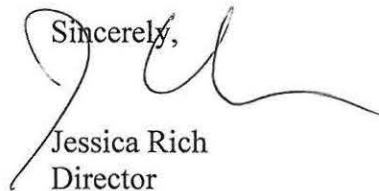
⁹ See, e.g., *In re Genelink, Inc.*, File No. 1123095 (2014) (proposed consent order), available at <http://www.ftc.gov/enforcement/cases-proceedings/112-3095/genelink-inc-matter>; *In re Upromise, Inc.*, Decision and Order, No. C-4351 (2012), available at <http://www.ftc.gov/enforcement/cases-proceedings/102-3116/upromise-inc>; *In re Twitter, Inc.*, Decision and Order, No. C-4316 (2011), available at <http://www.ftc.gov/enforcement/cases-proceedings/092-3093/twitter-inc-corporation>.

¹⁰ See *In re Facebook, Inc.*, Decision and Order, No. C-4365 (2012), available at <http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>; *In re Gateway Learning Corp.*, Decision and Order, No. C-4120 (2004), available at <http://www.ftc.gov/enforcement/cases-proceedings/042-3047/gateway-learning-corp-matter>.

¹¹ Violation of the order could subject the company to civil penalties of up to \$16,000 per violation.

Hundreds of millions of users have entrusted their personal information to WhatsApp. The FTC staff will continue to monitor the companies' practices to ensure that Facebook and WhatsApp honor the promises they have made to those users.

Sincerely,

A handwritten signature in black ink, appearing to read 'JR', written over the word 'Sincerely,'.

Jessica Rich
Director
Bureau of Consumer Protection