

December 15, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Facebook, File No. 092 3184

Dear Commissioners:

I write to oppose the proposed consent agreement with Facebook.

But first permit me to applaud the detailed investigation the Commission undertook, as well as the outreach efforts the Commission has made to publicize and explain the proposed consent agreement. That the investigation was thorough and painstaking is evident from reading the draft complaint.

However, as the Commission acknowledges in the release announcing the settlement, Facebook will not, by entering in the consent agreement, be admitting or denying that it has violated the law. Moreover, if the consent agreement is consummated, the public will be deprived of actually knowing whether or not Facebook engaged in the behaviors alleged in the draft complaint.

The truth in this matter is socially important and of enormous cultural moment. The degree to which Facebook respects or flaunts its own stated policies potentially impacts, not only the hundreds of millions of account holders Facebook states publicly that it has, but also the wider society. To an increasingly significant degree, Facebook has an impact on public discourse itself.

To take a random example: recently, the Seattle Public Library held a “recommended books” forum on Facebook, in what was no doubt a well-intentioned effort to reach out to the public where the public may be found. If you aren’t a member of Facebook, however, and you wished to participate, I believe you would have received a message like this, when arriving at the library’s Facebook page: “To interact with Friends of The Seattle Public Library you need to sign up for Facebook first.” Every day in America, there are perhaps thousands of similar examples. Wittingly or not, public institutions, and even public figures, are permitting themselves to be used as recruiters and as de facto community engagement agents. To my knowledge, the revenue that Facebook derives from the information it gathers is not shared with participants.

Another good reason to reject the consent agreement and pursue the case against Facebook is the fact that, as the associate director of the Federal Trade Commission’s division of privacy and identity protection appears to have acknowledged in the New York Times, Facebook is a “moving target.” Because Facebook is leveraging technology

to monetize user generated content and activity, and to advertise in ways that are unfamiliar or perhaps even untraceable, the only basis available for judging whether the company will take unfair advantage tomorrow is how that company has behaved in the past. Simply put, people need a detailed, accurate and authoritative record of how Facebook has operated in the past in derogation of its own policies, in order to judge for themselves whether Facebook can be trusted now.

I urge you to read US Federal Judge Rakoff's opinion in SEC v. Citigroup, which came down at more or less the same time that the Commission proposed the Facebook settlement. Judge Rakoff's opinion is not controlling precedent here, of course, but it is an important statement on how to weigh the public interest, particularly at this moment in American civic life when confidence in government is at a nadir and the public perception is that powerful corporations can always co-opt regulators, and escape the truth itself, by accepting modest, "cost of doing business" sanctions.

Here is a pertinent quote from Judge Rakoff's opinion:

"The point, however, is not that certain narrow interests of the parties might not be served by the Consent Judgment, but rather that the parties' successful resolution of their competing interests cannot be automatically equated with the public interest, especially in the absence of a factual base on which to assess whether the resolution was fair, adequate and reasonable."

Lastly, consider how Mark Zuckerberg, the CEO of Facebook, describes the proposed consent agreement in a blog post:

"As we have grown, we have tried our best to listen closely to the people who use Facebook. We also work with regulators, advocates and experts to inform our privacy practices and policies. Recently, the US Federal Trade Commission established agreements with Google and Twitter that are helping to shape new privacy standards for our industry. Today, the FTC announced a similar agreement with Facebook. These agreements create a framework for how companies should approach privacy in the United States and around the world."

Is it not apparent that the Commission is being co-opted, that consumers are being told that the Company is your willing partner in an active, ongoing effort to protect the public? Also from the same post by Zuckerberg: "Overall, I think we have a good history of providing transparency and control over who can see your information."

Lacking a definitive record, it's impossible to know how credible Facebook's characterization is.

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No doubt the Commission negotiated the proposed consent agreement in utmost good faith, with an eye not only on conserving scarce investigatory and enforcement resources, but also in “setting up” a more efficient mechanism to check Facebook’s compliance with its own policies on a going-forward basis.

But the costs of shortcutting the process, of not realizing a meaningful return on the Commission’s investment to date, are much higher. Those costs include: public perception that a large and influential corporation is above the law; no definitive historical record of what behavior was actually engaged in; no scrutiny of how agents or representatives of Facebook may, or may not have, acted willfully to deceive users.

Please do not ask the public to implicitly accept that Facebook is now “okay” and “safe,” without fully exposing the facts on which that faith should rest. Please reject the consent agreement and order that the case be brought and all available resources be applied to its prosecution.

Very truly yours,

/s/ William Carleton

William Carleton