



April 9, 2018

Re: Questions for Mark Zuckerberg

Dear Senator,

On behalf of the American Civil Liberties Union (“ACLU”), we submit this letter for the record in connection with the Senate Judiciary and Commerce, Science, and Transportation Committees joint hearing, “Facebook, Social Media Privacy, and the Use and Abuse of Data,” where Facebook Chairman and Chief Executive Officer Mark Zuckerberg is scheduled to testify.

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Over the last month, the public has learned of various privacy breaches that have impacted tens of millions of Facebook users. The personal information of as many as 87 million people may have been improperly shared with Cambridge Analytica, which appears to have used this data to influence American voters.¹ Most Facebook users have reportedly had their public profile scraped for malicious purposes.² And, Facebook is currently being sued over concerns that it continues to fail to prevent ads that appear on the platform from improperly discriminating on the basis of gender, age, and other protected characteristics.³ These incidents highlight both the existence of systemic deficiencies within Facebook and the need for stronger privacy laws in the U.S. to protect consumers.

We anticipate that members will question Mr. Zuckerberg regarding the recent incidents, the reasons Facebook has failed to adequately protect user privacy, and regulatory proposals the company will support. In addition to these topics, we urge you to ask Mr. Zuckerberg the following questions:

- Why has Facebook failed to take sufficient steps to ensure that advertisers do not wrongly exclude individuals from housing,

¹ Kurt Wagner, *Facebook says Cambridge Analytica may have had data from as many as 87 million people*, RECODE, April 4, 2018, <https://www.recode.net/2018/4/4/17199272/facebook-cambridge-analytica-87-million-users-data-collection> (last visited Apr 5, 2018).

² Tony Romm, Craig Timberg & Elizabeth Dwoskin, *Malicious Actors’ used its tools to discover identities and collect data on a massive global scale*, WASHINGTON POST, April 5, 2018, https://www.washingtonpost.com/news/the-switch/wp/2018/04/04/facebook-said-the-personal-data-of-most-its-2-billion-users-has-been-collected-and-shared-with-outsiders/?utm_term=.31c3a8a679ee (last visited Apr 5, 2018).

³ Charles Baglie, *Facebook Vowed to End Discriminatory Housing Ads. Suits Says it Didn’t.*, NEW YORK TIMES, March 27, 2018, available at <https://www.nytimes.com/2018/03/27/nyregion/facebook-housing-ads-discrimination-lawsuit.html> (last visited Apr 5, 2018).

employment, credit, and public accommodation ads based on gender, ethnic affinity, age, or other protected characteristics?

- Will Facebook provide privacy protections related to consent, retention, data portability, and transparency to American consumers that it will provide to EU consumers as a result of Europe’s law on data protection, the General Data Protection Regulation (“GDPR”)⁴, which will go into effect on May 25, 2018? In short, does Facebook plan to offer better privacy protection to Europeans than it does to Americans?

1. **Facebook Ad Discrimination**

Facebook offers advertisers many thousands of targeting categories, including those based on characteristics that are protected by civil rights laws — such as, gender, age, familial status, sexual orientation, disability, and veteran status — and those based on “proxies” for such characteristics. In the case of ads for housing, credit, and employment, discriminatory ad targeting and exclusion is illegal. Even outside these contexts, however, discriminatory targeting could raise civil rights concerns. For example, do we want any advertisers to be able to offer higher prices to individuals who Facebook believes are a particular race, or to exclude them from receiving ads offering certain commercial benefits?

Following complaints of discriminatory targeting, including efforts by the ACLU to raise concerns directly with the company, Facebook announced that it would no longer allow housing, credit, and employment ads targeted based on “affinity” for certain ethnic groups.⁵ However, it did not prohibit targeting based on gender, age, veteran status, or other protected categories. These changes also did not address questions or concerns surrounding intentional targeting or exclusion of ads for public accommodations (for example, transportation). However, even after Facebook announced that it would no longer allow targeting of certain ads based on ethnic affinity, a ProPublica study found that the platform still failed to catch and prevent discriminatory ads that improperly excluded categories of users under the guise of targeting based on interests or affinity, including African Americans, Jewish people, and Spanish speakers.⁶ Since then, Facebook has temporarily turned off ad targeting based on ethnic affinity until it can address these issues.⁷

⁴Regulation (EU) 2016/679 of the European Parliament and Council of the European Union on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [hereinafter GDPR], April 27, 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1490179745294&from=en>

⁵ Erin Egan, *Improving Enforcement and Promoting Diversity: Updates to Ethnic Affinity Marketing*, FACEBOOK, Nov. 11, 2016, <https://newsroom.fb.com/news/2016/11/updates-to-ethnic-affinity-marketing/> (last visited Apr 6, 2018).

⁶ Julia Angwin, Ariana Tobin & Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA, PROPUBLICA, November 21, 2017, <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> (last visited Apr 5, 2018).

⁷ Jessica Guynn, *Facebook halts ads that exclude racial and ethnic groups*, USA TODAY, Nov. 29, 2017, <https://www.usatoday.com/story/tech/2017/11/29/facebook-stop-allowing-advertisers-exclude-racial-and-ethnic-groups-targeting/905133001/> (last visited Apr 6, 2018).

Members should ask Zuckerberg why the platform has not turned off ad targeting for all protected categories or their proxies in the housing, credit, and employment, given that existing civil rights laws prohibit discriminatory ads in these contexts. In addition, they should question Zuckerberg regarding why the company has not taken sufficient steps – including increased auditing and facilitating research from independent entities – to assess and protect against discrimination outside of these contexts.

2. Privacy Protections Under the GDPR

For years, the ACLU has called on Facebook to provide more privacy protections to consumers and has emphasized the need for baseline privacy legislation in the U.S. With regards to Facebook, among other things, we have urged increased transparency, requirements that customers provide affirmative opt-in consent to share, use, or retain information, enhanced app privacy settings, auditing to assess third parties with access to Facebook, and other reforms. Many of these reforms have not been fully adopted, even in the wake of the Cambridge Analytica incident.⁸

However, some of these changes may soon be required for Facebook’s operation in the European Union as a result of Europe’s law on data protection, the GDPR, which will go into effect on May 25th. The GDPR does not provide an exact template for what baseline privacy regulation should look like in the U.S. – indeed, provisions such as the right to be forgotten would likely be unconstitutional if applied in the U.S. Nevertheless, there are elements of the GDPR that, if applied in the U.S., would help to ensure that Americans have full control over their data and are equipped with the tools necessary to safeguard their rights.

In recent statements, Zuckerberg has said that Facebook is working to extend a version of the GDPR that could be extended globally, but has failed to provide details regarding which provisions of the law will be applied to U.S. consumers.⁹ Given this, members of Congress should press Zuckerberg on whether Facebook intends to voluntarily provide certain GDPR protections¹⁰ to U.S. consumers, including:

- **Consent Requirements**: Absent certain exceptions,¹¹ the GDPR requires that companies obtain user consent to collect, use, or otherwise process their personal data.¹² This consent

⁸ Nicole Ozer & Chris Conley, *https://www.aclu.org/blog/privacy-technology/internet-privacy/after-facebook-privacy-debacle-its-time-clear-steps-protect*, ACLU, Mar. 23, 2018, *https://www.aclu.org/blog/privacy-technology/internet-privacy/after-facebook-privacy-debacle-its-time-clear-steps-protect* (last visited Apr 6, 2018).

⁹ David Ingrem & Joseph Menn, *Exclusive: Facebook CEO stops short of extending European privacy globally*, REUTERS, Apr. 3, 2018, *https://www.reuters.com/article/us-facebook-ceo-privacy-exclusive/exclusive-facebook-ceo-stops-short-of-extending-european-privacy-globally-idUSKCN1HA2M1* (last visited Apr 6, 2018).

¹⁰ GDPR places different restrictions on entities based on whether they are “controllers” or “processors” of data. Facebook has stated that it acts as a controller for the majority of its business practices, though acts as a processor in certain instances when “working with business and third parties.” For purposes of this letter, we have included obligations on Facebook as both a controller and processor. See *What is the General Data Protection Regulation*, Facebook Business, available at *https://www.facebook.com/business/gdpr*.

¹¹ Other than consent, a company may process data to fulfill a contractual obligation to which the user is a party or to take steps at the request of the user prior to a contract; to comply with a legal obligation, to perform a task in the

must be freely given, specific, informed, and made by an affirmative action or statement by the user, and authorized by a parent/guardian if the user is under age 16.¹³ If consent is written, the company must present the information in a manner that is intelligible, easily accessible, and uses clear and plain language. In addition, the user must have the right to withdraw their consent at any time.¹⁴ In addition, processing of certain categories of sensitive data, like biometrics, religious beliefs, health data, and political opinions requires more rigorous “explicit consent.”

- Data Portability: GDPR provides users the right to obtain a copy of the data they have provided in a “structured, commonly used and machine-readable format” and to have this data transferred to another provider.¹⁵
- Transparency: GDPR states that companies collecting data must provide transparency regarding their data processes. Among other things, users are entitled to know the amount of time their personal data will be stored (or the criteria used to determine the retention period), categories of personal data collected, whether the provision of the data is a statutory or contractual requirement, the existence of automated decision making, who receives their personal data, and the purpose for which their personal data is being collected, used, or otherwise processed.¹⁶ There are also similar transparency requirements in cases where an entity obtains personal data about an individual from a source other than the individual.¹⁷
- Use of Data for Marketing: GDPR provides user the right to object to use of their data for marking purposes, including profiling for direct marketing purposes.¹⁸
- Automated Decision-Making: Absent certain exceptions (for example, explicit consent), GDPR states that users have the right to not be subject to decisions based solely on automated processing, including profiling, if it has a legal or similarly significant effect.¹⁹
- Breach Notification: In cases of any personal data breach, companies must notify a user if it is likely to result in a “high risk to the rights and freedoms” of individuals.²⁰ While the ACLU believes that notification should be required in circumstances far broader than this – and there are state laws that require notice in any case where there is a breach involving

public interest; to protect the vital interests of a data subject or other person; or to pursue a legitimate interest unless the interests are overridden by the interests/rights of the data subject. *See* GDPR, *supra* note 4, art. 6.

¹² *Id.*

¹³ *Id.* at art. 4. GDPR permits members states to provide a lower age, no younger than 13, for consent purposes. *See Id.* at art. 6.

¹⁴ *Id.* at art.7.

¹⁵ *Id.* at art. 20.

¹⁶ *Id.* at art. 12.

¹⁷ *Id.* at art. 14.

¹⁸ *Id.* at art. 21.

¹⁹ *Id.* at art. 22.

²⁰ *Id.* at art. 34.

certain types of personal data²¹ – the GDPR breach policy could be a step forward in cases where there is not more protective applicable U.S. law.

Voluntary application of GDPR requirements by companies to U.S. consumers cannot be a substitute for baseline privacy legislation in the U.S., which must include enforcement mechanisms, redress in the case of breaches, and a private right of action not subject to mandatory arbitration. Until such legislation, however, voluntary application of these rights could help to safeguard users in the U.S.

If you have questions, please contact ACLU Legislative Counsel, Neema Singh Guliani, at 202-675-2322 or nguliani@aclu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Faiz Shakir". The signature is fluid and cursive, with a large initial "F" and "S".

Faiz Shakir
National Political Director

A handwritten signature in black ink, appearing to read "Neema Singh Guliani". The signature is fluid and cursive, with a large initial "N" and "G".

Neema Singh Guliani
Legislative Counsel

²¹ See California Civ. Code s. 1798.82(a).