

ANNEX IV



OFFICE OF CHAIRWOMAN
EDITH RAMIREZ

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

February 23, 2016

VIA EMAIL

Věra Jourová
Commissioner for Justice, Consumers and Gender Equality
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Dear Commissioner Jourová:

The United States Federal Trade Commission (“FTC”) appreciates the opportunity to describe its enforcement of the new EU-U.S. Privacy Shield Framework (the “Privacy Shield Framework” or “Framework”). We believe the Framework will play a critical role in facilitating privacy-protective commercial transactions in an increasingly interconnected world. It will enable businesses to conduct important operations in the global economy, while at the same time ensuring that EU consumers retain important privacy protections. The FTC has long committed to protecting privacy across borders and will make enforcement of the new Framework a high priority. Below, we explain the FTC’s history of strong privacy enforcement generally, including our enforcement of the original Safe Harbor program, as well as the FTC’s approach to enforcement of the new Framework.

The FTC first publicly expressed its commitment to enforce the Safe Harbor program in 2000. At that time, then-FTC Chairman Robert Pitofsky sent the European Commission a letter outlining the FTC’s pledge to vigorously enforce the Safe Harbor Privacy Principles. The FTC has continued to uphold this commitment through nearly 40 enforcement actions, numerous additional investigations, and cooperation with individual European data protection authorities (“EU DPAs”) on matters of mutual interest.

After the European Commission raised concerns in November 2013 about the administration and enforcement of the Safe Harbor program, we and the U.S. Department of Commerce began consultations with officials from the European Commission to explore ways to strengthen it. While those consultations were proceeding, on October 6, 2015, the European Court of Justice issued a decision in the *Schrems* case that, among other things, invalidated the European Commission’s decision on the adequacy of the Safe Harbor program. Following the decision, we continued to work closely with the Department of Commerce and the European

Commission in an effort to strengthen the privacy protections provided to EU citizens. The Privacy Shield Framework is a result of these ongoing consultations. As was the case with the Safe Harbor program, the FTC hereby commits to vigorous enforcement of the new Framework. This letter memorializes that commitment.

Notably, we affirm our commitment in four key areas: (1) referral prioritization and investigations; (2) addressing false or deceptive Privacy Shield membership claims; (3) continued order monitoring; and (4) enhanced engagement and enforcement cooperation with EU DPAs. We provide below detailed information about each of these commitments and relevant background about the FTC's role in protecting consumer privacy and enforcing Safe Harbor, as well as the broader privacy landscape in the United States.¹

I. Background

A. FTC Privacy Enforcement and Policy Work

The FTC has broad civil enforcement authority to promote consumer protection and competition in the commercial sphere. As part of its consumer protection mandate, the FTC enforces a wide range of laws to protect the privacy and security of consumer data. The primary law enforced by the FTC, the FTC Act, prohibits "unfair" and "deceptive" acts or practices in or affecting commerce.² A representation, omission, or practice is deceptive if it is material and likely to mislead consumers acting reasonably under the circumstances.³ An act or practice is unfair if it causes, or is likely to cause, substantial injury that is not reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition.⁴ The FTC also enforces targeted statutes that protect information relating to health, credit and other financial matters, as well as children's online information, and has issued regulations implementing each of these statutes.

The FTC's jurisdiction under the FTC Act applies to matters "in or affecting commerce." The FTC does not have jurisdiction over criminal law enforcement or national security matters. Nor can the FTC reach most other governmental actions. In addition, there are exceptions to the FTC's jurisdiction over commercial activities, including with respect to banks, airlines, the business of insurance, and the common carrier activities of telecommunications service providers. The FTC also does not have jurisdiction over most non-profit organizations, but it does have jurisdiction over sham charities or other non-profits that in actuality operate for profit. The FTC also has jurisdiction over non-profit organizations that operate for the profit of their for-profit members, including by providing substantial economic benefits to those members.⁵ In some instances, the FTC's jurisdiction is concurrent with that of other law enforcement agencies.

¹ We provide additional information about U.S. federal and state privacy laws in Attachment A, and a summary of our recent privacy and security enforcement actions in Attachment B. This summary is also available on the FTC's website at <https://www.ftc.gov/reports/privacy-data-security-update-2015>.

² 15 U.S.C. § 45(a).

³ See FTC Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁴ See 15 U.S.C § 45(n); FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁵ See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

We have developed strong working relationships with federal and state authorities and work closely with them to coordinate investigations or make referrals where appropriate.

Enforcement is the lynchpin of the FTC's approach to privacy protection. To date, the FTC has brought over 500 cases protecting the privacy and security of consumer information. This body of cases covers both offline and online information and includes enforcement actions against companies large and small, alleging that they failed to properly dispose of sensitive consumer data, failed to secure consumers' personal information, deceptively tracked consumers online, spammed consumers, installed spyware or other malware on consumers' computers, violated Do Not Call and other telemarketing rules, and improperly collected and shared consumer information on mobile devices. The FTC's enforcement actions—in both the physical and digital worlds—send an important message to companies about the need to protect consumer privacy.

The FTC has also pursued numerous policy initiatives aimed at enhancing consumer privacy that inform its enforcement work. The FTC has hosted workshops and issued reports recommending best practices aimed at improving privacy in the mobile ecosystem; increasing transparency of the data broker industry; maximizing the benefits of big data while mitigating its risks, particularly for low-income and underserved consumers; and highlighting the privacy and security implications of facial recognition and the Internet of Things, among other areas.

The FTC also engages in consumer and business education to enhance the impact of its enforcement and policy development initiatives. The FTC has used a variety of tools—publications, online resources, workshops, and social media—to provide educational materials on a wide range of topics, including mobile apps, children's privacy, and data security. Most recently, the Commission launched its "Start With Security" initiative, which includes new guidance for businesses drawing on lessons learned from the agency's data security cases, as well as a series of workshops across the country. In addition, the FTC has long been a leader in educating consumers about basic computer security. Last year, our OnGuard Online site and its Spanish language counterpart, Alerta en Línea, had more than 5 million page views.

B. U.S. Legal Protections Benefiting EU Consumers

The Framework will operate in the context of the larger U.S. privacy landscape, which protects EU consumers in a number of ways.

The FTC Act's prohibition on unfair or deceptive acts or practices is not limited to protecting U.S. consumers from U.S. companies, as it includes those practices that (1) cause or are likely to cause reasonably foreseeable injury in the United States, or (2) involve material conduct in the United States. Further, the FTC can use all remedies, including restitution, that are available to protect domestic consumers when protecting foreign consumers.

Indeed, the FTC's enforcement work significantly benefits both U.S. and foreign consumers. For example, our cases enforcing Section 5 of the FTC Act have protected the privacy of U.S. and foreign consumers alike. In a case against an information broker, Accusearch, the FTC alleged that the company's sale of confidential telephone records to third

parties without consumers' knowledge or consent was an unfair practice in violation of Section 5 of the FTC Act. Accusearch sold information relating to both U.S. and foreign consumers.⁶ The court granted injunctive relief against Accusearch prohibiting, among other things, the marketing or sale of consumers' personal information without written consent, unless it was lawfully obtained from publicly available information, and ordered disgorgement of almost \$200,000.⁷

The FTC's settlement with TRUSTe is another example. It ensures that consumers, including those in the European Union, can rely on representations that a global self-regulatory organization makes about its review and certification of domestic and foreign online services.⁸ Importantly, our action against TRUSTe also strengthens the privacy self-regulatory system more broadly by ensuring the accountability of entities that play an important role in self-regulatory schemes, including cross-border privacy frameworks.

The FTC also enforces other targeted laws whose protections extend to non-U.S. consumers, such as the Children's Online Privacy Protection Act ("COPPA"). Among other things, COPPA requires that operators of child-directed websites and online services, or general audience sites that knowingly collect personal information from children under the age of 13, provide parental notice and obtain verifiable parental consent. U.S.-based websites and services that are subject to COPPA and collect personal information from foreign children are required to comply with COPPA. Foreign-based websites and online services must also comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the United States. In addition to the U.S. federal laws enforced by the FTC, certain other federal and state consumer protection and privacy laws may provide additional benefits to EU consumers.

C. Safe Harbor Enforcement

As part of its privacy and security enforcement program, the FTC has also sought to protect EU consumers by bringing enforcement actions that involved Safe Harbor violations. The FTC has brought 39 Safe Harbor enforcement actions: 36 alleging false certification claims, and three cases—against Google, Facebook, and Myspace—involving alleged violations of Safe Harbor Privacy Principles.⁹ These cases demonstrate the enforceability of certifications and the repercussions for non-compliance. Twenty-year consent orders require Google, Facebook, and Myspace to implement comprehensive privacy programs that must be reasonably designed to address privacy risks related to the development and management of new and existing products

⁶ See Office of the Privacy Commissioner of Canada, Complaint under PIPEDA against Accusearch, Inc., doing business as Abika.com, https://www.priv.gc.ca/cf-dc/2009/2009_009_0731_e.asp. The Office of the Privacy Commissioner of Canada filed an *amicus curiae* brief in the appeal of the FTC action and conducted its own investigation, concluding that Accusearch's practices also violated Canadian law.

⁷ See *FTC v. Accusearch, Inc.*, No. 06CV015D (D. Wyo. Dec. 20, 2007), *aff'd* 570 F.3d 1187 (10th Cir. 2009).

⁸ See *In the Matter of True Ultimate Standards Everywhere, Inc.*, No. C-4512 (F.T.C. Mar. 12, 2015) (decision and order), available at <https://www.ftc.gov/system/files/documents/cases/150318trust-edo.pdf>.

⁹ See *In the Matter of Google, Inc.*, No. C-4336 (F.T.C. Oct. 13 2011) (decision and order), available at <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz>; *In the Matter of Facebook, Inc.*, No. C-4365 (F.T.C. July 27, 2012) (decision and order), available at <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook>; *In the Matter of Myspace LLC*, No. C-4369 (F.T.C. Aug. 30, 2012) (decision and order), available at <https://www.ftc.gov/news-events/press-releases/2012/09/ftc-finalizes-privacy-settlement-myspace>.

and services and to protect the privacy and confidentiality of personal information. The comprehensive privacy programs mandated under these orders must identify foreseeable material risks and have controls to address those risks. The companies must also submit to ongoing, independent assessments of their privacy programs, which must be provided to the FTC. The orders also prohibit these companies from misrepresenting their privacy practices and their participation in any privacy or security program. This prohibition would also apply to companies' acts and practices under the new Privacy Shield Framework. The FTC can enforce these orders by seeking civil penalties. In fact, Google paid a record \$22.5 million civil penalty in 2012 to resolve allegations it had violated its order. Consequently, these FTC orders help protect over a billion consumers worldwide, hundreds of millions of whom reside in Europe.

The FTC's cases have also focused on false, deceptive, or misleading claims of Safe Harbor participation. The FTC takes these claims seriously. For example, in *FTC v. Karnani*, the FTC brought an action in 2011 against an Internet marketer in the United States alleging that he and his company tricked British consumers into believing that the company was based in the United Kingdom, including by using .uk web extensions and referencing British currency and the UK postal system.¹⁰ However, when consumers received the products, they discovered unexpected import duties, warranties that were not valid in the United Kingdom, and charges associated with obtaining refunds. The FTC also charged that the defendants deceived consumers about their participation in the Safe Harbor program. Notably, all of the consumer victims were in the United Kingdom.

Many of our other Safe Harbor enforcement cases involved organizations that joined the Safe Harbor program but failed to renew their annual certification while they continued to represent themselves as current members. As discussed further below, the FTC also commits to addressing false claims of participation in the Privacy Shield Framework. This strategic enforcement activity will complement the Department of Commerce's increased actions to verify compliance with program requirements for certification and re-certification, its monitoring of effective compliance, including through the use of questionnaires to Framework participants, and its increased efforts to identify false Framework membership claims and misuse of any Framework certification mark.¹¹

II. Referral Prioritization and Investigations

As we did under the Safe Harbor program, the FTC commits to give priority to Privacy Shield referrals from EU Member States. We will also prioritize referrals of non-compliance with self-regulatory guidelines relating to the Privacy Shield Framework from privacy self-regulatory organizations and other independent dispute resolution bodies.

¹⁰ See *FTC v. Karnani*, No. 2:09-cv-05276 (C.D. Cal. May 20, 2011) (stipulated final order), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110609karnanistip.pdf>; see also Lesley Fair, FTC Business Center Blog, *Around the World in Shady Ways*, <http://www.business.ftc.gov/blog/2011/06/around-world-shady-ways> (June 9, 2011).

¹¹ Letter from Stefan M. Selig, Under Secretary of Commerce for International Trade, International Trade Administration, to Věra Jourová, Commissioner for Justice, Consumers and Gender Equality (Feb. 23, 2016).

To facilitate referrals under the Framework from EU Member States, the FTC is creating a standardized referral process and providing guidance to EU Member States on the type of information that would best assist the FTC in its inquiry into a referral. As part of this effort, the FTC will designate an agency point of contact for EU Member State referrals. It is most useful when the referring authority has conducted a preliminary inquiry into the alleged violation and can cooperate with the FTC in an investigation.

Upon receipt of a referral from an EU Member State or self-regulatory organization, the FTC can take a range of actions to address the issues raised. For example, we may review the company's privacy policies, obtain further information directly from the company or from third parties, follow up with the referring entity, assess whether there is a pattern of violations or significant number of consumers affected, determine whether the referral implicates issues within the purview of the Department of Commerce, assess whether consumer and business education would be helpful, and, as appropriate, initiate an enforcement proceeding.

The FTC also commits to exchange information on referrals with referring enforcement authorities, including the status of referrals, subject to confidentiality laws and restrictions. To the extent feasible given the number and type of referrals received, the information provided will include an evaluation of the referred matters, including a description of significant issues raised and any action taken to address law violations within the jurisdiction of the FTC. The FTC will also provide feedback to the referring authority on the types of referrals received in order to increase the effectiveness of efforts to address unlawful conduct. If a referring enforcement authority seeks information about the status of a particular referral for purposes of pursuing its own enforcement proceeding, the FTC will respond, taking into account the number of referrals under consideration and subject to confidentiality and other legal requirements.

The FTC will also work closely with EU DPAs to provide enforcement assistance. In appropriate cases, this could include information sharing and investigative assistance pursuant to the U.S. SAFE WEB Act, which authorizes FTC assistance to foreign law enforcement agencies when the foreign agency is enforcing laws prohibiting practices that are substantially similar to those prohibited by laws the FTC enforces.¹² As part of this assistance, the FTC can share information obtained in connection with an FTC investigation, issue compulsory process on behalf of the EU DPA conducting its own investigation, and seek oral testimony from witnesses or defendants in connection with the DPA's enforcement proceeding, subject to the requirements of the U.S. SAFE WEB Act. The FTC regularly uses this authority to assist other authorities around the world in privacy and consumer protection cases.¹³

¹² In determining whether to exercise its U.S. SAFE WEB Act authority, the FTC considers, inter alia: "(A) whether the requesting agency has agreed to provide or will provide reciprocal assistance to the Commission; (B) whether compliance with the request would prejudice the public interest of the United States; and (C) whether the requesting agency's investigation or enforcement proceeding concerns acts or practices that cause or are likely to cause injury to a significant number of persons." 15 U.S.C. § 46(j)(3). This authority does not apply to enforcement of competition laws.

¹³ In fiscal years 2012-2015, for example, the FTC used its U.S. SAFE WEB Act authority to share information in response to almost 60 requests from foreign agencies and it issued nearly 60 civil investigative demands (equivalent to administrative subpoenas) to aid 25 foreign investigations.

In addition to prioritizing Privacy Shield referrals from EU Member States and privacy self-regulatory organizations,¹⁴ the FTC commits to investigating possible Framework violations on its own initiative where appropriate using a range of tools.

For well over a decade, the FTC has maintained a robust program of investigating privacy and security issues involving commercial organizations. As part of these investigations, the FTC routinely examined whether the entity at issue was making Safe Harbor representations. If the entity was making such representations and the investigation revealed apparent violations of the Safe Harbor Privacy Principles, the FTC included allegations of Safe Harbor violations in its enforcement actions. We will continue this proactive approach under the new Framework. Importantly, the FTC conducts many more investigations than ultimately result in public enforcement actions. Many FTC investigations are closed because staff does not identify an apparent law violation. Because FTC investigations are non-public and confidential, the closing of an investigation is often not made public.

The nearly 40 enforcement actions initiated by the FTC involving the Safe Harbor program evidence the agency's commitment to proactive enforcement of cross-border privacy programs. The FTC will look for potential Framework violations as part of the privacy and security investigations we undertake on a regular basis.

III. Addressing False or Deceptive Privacy Shield Membership Claims

As referenced above, the FTC will take action against entities that misrepresent their participation in the Framework. The FTC will give priority consideration to referrals from the Department of Commerce regarding organizations that it identifies as improperly holding themselves out to be current members of the Framework or using any Framework certification mark without authorization.

In addition, we note that if an organization's privacy policy promises that it complies with the Privacy Shield Principles, its failure to make or maintain a registration with the Department of Commerce likely will not, by itself, excuse the organization from FTC enforcement of those Framework commitments.

IV. Order Monitoring

The FTC also affirms its commitment to monitor enforcement orders to ensure compliance with the Privacy Shield Framework.

We will require compliance with the Framework through a variety of appropriate injunctive provisions in future FTC Framework orders. This includes prohibiting

¹⁴ Although the FTC does not resolve or mediate individual consumer complaints, the FTC affirms that it will prioritize Privacy Shield referrals from EU DPAs. In addition, the FTC uses complaints in its Consumer Sentinel database, which is accessible by many other law enforcement agencies, to identify trends, determine enforcement priorities, and identify potential investigative targets. EU citizens can use the same complaint system available to U.S. citizens to submit a complaint to the FTC at www.ftc.gov/complaint. For individual Privacy Shield complaints, however, it may be most useful for EU citizens to submit complaints to their Member State DPA or alternative dispute resolution provider.

misrepresentations regarding the Framework and other privacy programs when these are the basis for the underlying FTC action.

The FTC's cases enforcing the original Safe Harbor program are instructive. In the 36 cases involving false or deceptive claims of Safe Harbor certification, each order prohibits the defendant from misrepresenting its participation in Safe Harbor or any other privacy or security program and requires the company to make compliance reports available to the FTC. In cases that involved violations of Safe Harbor Privacy Principles, companies have been required to implement comprehensive privacy programs and obtain independent third-party assessments of those programs every other year for twenty years, which they must provide to the FTC.

Violations of the FTC's administrative orders can lead to civil penalties of up to \$16,000 per violation, or \$16,000 per day for a continuing violation,¹⁵ which, in the case of practices affecting many consumers, can amount to millions of dollars. Each consent order also has reporting and compliance provisions. The entities under order must retain documents demonstrating their compliance for a specified number of years. The orders must also be disseminated to employees responsible for ensuring order compliance.

The FTC systematically monitors compliance with Safe Harbor orders, as it does with all of its orders. The FTC takes enforcement of its privacy and data security orders seriously and brings actions to enforce them when necessary. For example, as noted above, Google paid a \$22.5 million civil penalty to resolve allegations it had violated its FTC order. Importantly, FTC orders will continue to protect all consumers worldwide who interact with a business, not just those consumers who have lodged complaints.

Finally, the FTC will continue to maintain an online list of companies subject to orders obtained in connection with enforcement of both the Safe Harbor program and the new Privacy Shield Framework.¹⁶ In addition, the Privacy Shield Principles now require companies subject to an FTC or court order based on non-compliance with the Principles to make public any relevant Framework-related sections of any compliance or assessment report submitted to the FTC, to the extent consistent with confidentiality laws and rules.

V. Engagement With EU DPAs and Enforcement Cooperation

The FTC recognizes the important role that EU DPAs play with respect to Framework compliance and encourages increased consultation and enforcement cooperation. In addition to any consultation with referring DPAs on case-specific matters, the FTC commits to participate in periodic meetings with designated representatives of the Article 29 Working Party to discuss in general terms how to improve enforcement cooperation with respect to the Framework. The FTC will also participate, along with the Department of Commerce, the European Commission, and Article 29 Working Party representatives, in the annual review of the Framework to discuss its implementation.

¹⁵ 15 U.S.C. § 45(m); 16 C.F.R. § 1.98.

¹⁶ See FTC, Business Center, Legal Resources, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=251.

The FTC also encourages the development of tools that will enhance enforcement cooperation with EU DPAs, as well as other privacy enforcement authorities around the world. In particular, the FTC, along with enforcement partners in the European Union and around the globe, last year launched an alert system within the Global Privacy Enforcement Network (“GPEN”) to share information about investigations and promote enforcement coordination. This GPEN Alert tool could be particularly useful in the context of the Privacy Shield Framework. The FTC and EU DPAs could use it to coordinate with respect to the Framework and other privacy investigations, including as a starting point for sharing information in order to deliver coordinated and more effective privacy protection for consumers. We look forward to continuing to work with participating EU authorities to deploy the GPEN Alert system more broadly and develop other tools to improve enforcement cooperation in privacy cases, including those involving the Framework.

The FTC is pleased to affirm its commitment to enforcing the new Privacy Shield Framework. We also look forward to continuing engagement with our EU colleagues as we work together to protect consumer privacy on both sides of the Atlantic.

Sincerely,

A handwritten signature in black ink, appearing to read "Edith Ramirez".

Edith Ramirez
Chairwoman