



## FEDERAL TRADE COMMISSION

[File No. 192 3172]

### **Everalbum, Inc.; Analysis of Proposed Consent Order to Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement; request for comment.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

**INFORMATION** section below. Please write “Everalbum, Inc.; File No. 192 3172” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** James Trilling (202-326-3497), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Write “Everalbum, Inc.; File No. 192 3172” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Everalbum, Inc.; File No. 192 3172” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the <https://www.regulations.gov> website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

### **Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, an agreement containing a consent order from Everalbum, Inc., also doing business as Ever and Paravision ("Everalbum" or "Respondent"). The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission again will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Since 2015, Everalbum has operated "Ever," a photo storage and organization application available as an iOS or Android mobile application ("app") and in web and desktop formats. Ever allows consumers to upload photos and videos (collectively, "content") from mobile devices, computers, or social media or cloud-based storage service accounts to Ever's cloud servers. In February 2017, Everalbum launched a new feature of the Ever mobile app, called "Friends." The Friends feature uses face recognition to organize users' photos by faces of the people who appear in them. When Everalbum launched the Friends feature, it enabled face recognition by default for all users of the Ever mobile app.

Everalbum's application of face recognition to Ever app users' content has not been limited to providing the Friends feature. The Commission's proposed complaint alleges that, in four instances, Everalbum used images it extracted from Ever users' photos in the development of face recognition technology. In one such instance, Everalbum used the resulting face recognition technology both in the Ever app and to build the face recognition services offered by its enterprise brand, Paravision (formerly Ever AI).

The proposed two-count complaint alleges that Everalbum violated Section 5(a) of the FTC Act by misrepresenting the company's practices with respect to Ever users' content.

Proposed complaint Count I alleges that Everalbum misrepresented the circumstances under which the company would apply face recognition to Ever users' content. According to the proposed complaint, Everalbum published a help article entitled "What is Face Recognition?" on its website in July 2018. The proposed complaint alleges that the help article represented that the Ever app's "Friends" feature was not active—and, therefore, that Everalbum would not apply face recognition technology to users' content—unless users affirmatively enabled the feature. The proposed complaint further alleges that the help article was false or misleading, because, until April 2019, for users in most geographic locations, Everalbum applied face recognition to users' content by default and users could not use an app setting to turn off face recognition.

Proposed complaint Count II alleges that Everalbum misrepresented that the company would delete the content of Ever users who chose to deactivate their Ever accounts. According to the proposed complaint, when Ever users sought to deactivate their accounts, Everalbum presented them with pop-up messages that represented that account deactivation would result in Everalbum deleting their content. The proposed complaint alleges that Everalbum also made a similar representation in response to consumer inquiries and in its privacy policy. Despite its representations, Everalbum allegedly did not

delete any users' content upon account deactivation and instead stored the content indefinitely.

The proposed order contains provisions to address Respondent's conduct and prevent it from engaging in the same or similar acts or practices in the future. Provision I of the proposed order prohibits Respondent from making misrepresentations related to the collection, use, disclosure, maintenance, or deletion of Covered Information (as defined in the order); consumers' ability to control any of these actions; the extent to which Everalbum accesses or permits access to Covered Information; the extent, purpose, and duration of Everalbum's retention of Covered Information after consumers deactivate their accounts; or the extent to which Everalbum otherwise protects the privacy, security, availability, confidentiality, or integrity of any Covered Information.

Part II of the proposed order requires Respondent to clearly and conspicuously disclose, and obtain consumers' affirmative express consent for, all purposes for which it will use or share User's Biometric Information before using the information to create data needed for face recognition analysis or to develop face recognition models or algorithms.

Part III of the proposed order requires Respondent to delete (A) photos and videos of Ever app Users who requested deactivation of their accounts, (B) face recognition data that it created without obtaining Users' affirmative express consent, and (C) models and algorithms it developed in whole or in part using images from Users' photos.

Parts IV through VII of the proposed order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance. Part VIII of the proposed order states that the order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

**April J. Tabor,**

*Acting Secretary.*

**Statement of Commissioner Rohit Chopra in the Matter of Everalbum, Inc.**

Today's facial recognition technology is fundamentally flawed and reinforces harmful biases. I support efforts to enact moratoria or otherwise severely restrict its use. Until such time, it is critical that the FTC meaningfully enforce existing law to deprive wrongdoers of technologies they build through unlawful collection of Americans' facial images and likenesses.

The case of Everalbum is a troubling illustration of just some of the problems with facial recognition. Everalbum operates a business line called Paravision, which developed and marketed facial recognition technology, including to clients in the security and air travel industries.<sup>1</sup> The company enhanced their facial recognition technology by allegedly baiting consumers into using Ever, a "free" app that allowed users to store and modify photos.<sup>2</sup>

As outlined in the complaint, Everalbum made promises that users could choose not to have facial recognition technology applied to their images, and that users could delete the images and their account. In addition to those promises, Everalbum had clear evidence that many of the photo app's users did not want to be roped into facial recognition. The company broke its promises, which constitutes illegal deception

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<sup>1</sup> PARAVISION, <https://www.paravision.ai/> (last visited on Jan. 4, 2020).

<sup>2</sup> Compl., In the Matter of Everalbum, Inc., Comm'n File No. 1923172. This is not the only photo-sharing application that has drawn scrutiny for its ties to facial recognition and surveillance technology. Kashmir Hill & Aaron Krolik, *How Photos of Your Kids Are Powering Surveillance Technology*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/interactive/2019/10/11/technology/flickr-facial-recognition.html>.

according to the FTC's complaint. This matter and the FTC's proposed resolution are noteworthy for several reasons.

First, the FTC's proposed order requires Everalbum to forfeit the fruits of its deception. Specifically, the company must delete the facial recognition technologies enhanced by any improperly obtained photos. Commissioners have previously voted to allow data protection law violators to retain algorithms and technologies that derive much of their value from ill-gotten data.<sup>3</sup> This is an important course correction.

Second, the settlement does not require the defendant to pay any penalty. This is unfortunate. To avoid this in the future, the FTC needs to take further steps to trigger penalties, damages, and other relief for facial recognition and data protection abuses. Commissioners have voted to enter into scores of settlements that address deceptive practices regarding the collection, use, and sharing of personal data. There does not appear to be any meaningful dispute that these practices are illegal. However, since Commissioners have not restated this precedent into a rule under Section 18 of the FTC Act, we are unable to seek penalties and other relief for even the most egregious offenses when we first discover them.<sup>4</sup>

Finally, the Everalbum matter makes it clear why it is important to maintain states' authority to protect personal data. Because the people of Illinois, Washington, and Texas passed laws related to facial recognition and biometric identifiers, Everalbum took greater

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<sup>3</sup> The Commission voted 3-2 on a settlement with Google and YouTube that allowed the companies to retain algorithms and other technologies enhanced by illegally obtained data on children. Based on my analysis, the Commission also allowed Google and YouTube to profit from their conduct, even after paying a civil penalty. *See* Dissenting Statement of Commissioner Rohit Chopra In the Matter of Google LLC and YouTube, LLC, Comm'n File No. 1723083 (Sep. 4, 2019), <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rohit-chopra-regarding-youtube>. The Commission voted 3-2 on a settlement with Facebook to address unlawful facial recognition practices that violated a 2012 Commission order. Like the Google/YouTube settlement, Facebook was not required to forfeit any facial recognition or other related technologies. The settlement also provided an unusual immunity clause for senior executives, including Mark Zuckerberg and Sheryl Sandberg. *See also* Dissenting Statement of Commissioner Rohit Chopra In re Facebook, Inc., Comm'n File No. 1823109 (Jul. 24, 2019), <https://www.ftc.gov/public-statements/2019/07/dissenting-statement-commissioner-rohit-chopra-regarding-matter-facebook>.

<sup>4</sup> Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Adults, Comm'n File No. P144400 (Oct. 19, 2020), <https://www.ftc.gov/public-statements/2020/10/statement-commissioner-rohit-chopra-regarding-report-congress-protecting>; Rohit Chopra & Samuel A.A. Levine, The Case for Resurrecting the FTC Act's Penalty Offense Authority (Oct. 29, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3721256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256)

care when it came to individuals in these states.<sup>5</sup> The company's deception targeted Americans who live in states with no specific state law protections.

With the tsunami of data being collected on individuals, we need all hands on deck to keep these companies in check. State and local governments have rightfully taken steps to enact bans, moratoria, and other restrictions on the use of these technologies. While special interests are actively lobbying for federal legislation to delete state data protection laws, it will be important for Congress to resist these efforts. Broad federal preemption would severely undercut this multi-front approach and leave more consumers less protected.

It will be critical for the Commission, the states, and regulators around the globe to pursue additional enforcement actions to hold accountable providers of facial recognition technology who make false accuracy claims and engage in unfair, discriminatory conduct.<sup>6</sup>

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<sup>5</sup> Compl., *supra* note 2.

<sup>6</sup> Prepared Remarks of Commissioner Rohit Chopra at Asia Pacific Privacy Authorities 54th APPA Forum (Dec. 7, 2020), <https://www.ftc.gov/public-statements/2020/12/prepared-remarks-commissioner-rohit-chopra-asia-pacific-privacy>.