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Dear Attorney General Garland, Chair Khan, and Chair Gensler,

We write to ask you to open a criminal investigation into Mark Zuckerberg, Sheryl Sandberg, and other relevant executives at Facebook for an apparently routine practice of defrauding advertisers and investors, as well as engaging in insider trading.

Documents from the ongoing case *DZ Reserve v. Facebook* in the Northern District of California, as well as the *Employees' Retirement System of Rhode Island v. Facebook*, and documents released by Frances Haugen suggest a pervasive pattern of deception by the social networking giant.¹ We believe, based on the evidence revealed in these lawsuits, that Facebook likely used criminal activity to exploit its market power, and that key executives have likely profited in personal capacity from illicit activities.

Below are five clear examples of apparent criminal activity.

Example One: Inflation of Video Metrics

In 2016, advertisers alleged that Facebook knowingly inflated video view numbers by claiming to calculate views that lasted three seconds or longer, when in fact they included views under three seconds.² These advertisers said in a lawsuit that Facebook's misleading viewership numbers meant that Facebook inflated viewership measures by 150 to 900 percent.

¹ *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. Aug. 15, 2018). Lauren Feiner, *FTC Files Renewed Antitrust Complaint Against Facebook*, CNBC, Aug. 19, 2021, <https://www.cnbc.com/2021/08/19/ftc-files-new-antitrust-complaint-against-facebook.html>.

² Suzanne Vranica, *Advertisers Allege Facebook Failed to Disclose Key Metric for More Than a Year*, WALL ST. J., Oct. 16, 2018, <https://www.wsj.com/articles/advertisers-allege-facebook-failed-to-disclose-key-metric-error-for-more-than-a-year-1539720524>.

A class action lawsuit made direct claims that “Facebook’s misrepresentations induced video advertising purchasers, including Plaintiffs, to continue purchasing video advertisements, and to purchase additional video advertisements, because purchasers believed that users were watching their videos, on average, for longer” and that it “distorted the market price” causing advertisers to “pay more than they otherwise would have paid.”³

Such falsification was designed to create a change in decision-making by Facebook customers. Advertisers and journalists base their resource allocation on such metrics, so the veracity of these metrics is crucial and material to their business. Facebook had every reason to know the importance of these metrics to the advertisers and journalists that depend on them. In fact, Facebook’s deception campaign is directly correlated with a simultaneous rise in video ad spending and content creation on Facebook.⁴ For context, these misrepresentations came at the same time as Facebook’s campaign to “pivot to video” and seem clearly intended to induce marketers and journalists to misjudge the performance of video content and redirect resources based on a false premise.⁵ Internal documents showed they were aware for a year before making changes, suggesting clear intent to defraud.⁶ Facebook’s intentional misrepresentation of video metrics has the clear markers of criminal fraud and should be investigated as such.

Example Two: Inflation of Advertising Reach

The second example is also a case of fraud in advertising metrics, in which Facebook insiders knowingly misled advertisers by overestimating how many people Facebook advertisements reached. These documents were released on April 23, 2021, and they show that Facebook exaggerated its reach by counting duplicate or fake accounts as distinct people that advertisers could touch through Facebook. The litigation may also have uncovered additional fraudulent, deceptive, or otherwise illegal actions in violation of federal consumer protection or securities laws.

High-ranking Facebook executives knew and understood their metrics to be misleading. The specific attribute at issue was the “Potential Reach” reported to advertisers. Facebook’s Ads Manager tells advertisers the “Potential Reach” of the specific ad.⁷ Potential reach, according to Facebook internal documents, is “arguably the single most important number in our ads creation interfaces,” and helps structure the amount of ad spend for campaigns.⁸

³ LLE ONE. LLC v. Facebook Inc., No. 4:16-cv-06232-JSW (N.D. Calif. filed Oct. 16, 2018). Fourth Amended Class Action Complaint at 10-11.

⁴ Laura Owen, *Did Facebook’s Faulty Data Push Publishers to Make Terrible Decisions on Video?*, NiemanLab, Oct. 17, 2018, <https://www.niemanlab.org/2018/10/did-facebooks-faulty-data-push-news-publishers-to-make-terrible-decisions-on-video/>.

⁵ *Id.*

⁶ One Facebook engineer wrote that almost a year after receiving complaints of unreliable video viewership metrics from advertisers that “somehow there was no progress on the task for the year.” *Id.*

⁷ Plaintiffs’ Notice of Motion for Class Certification and Memorandum of Points and Authorities at 3-4, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978, [hereinafter Motion for Class Certification].

⁸ Motion for Class Certification at 4; Exhibit 3, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00088221.

Despite its importance, or perhaps because of it, Facebook deceived advertisers by exaggerating the number of users advertisers could reach on its platform. In *DZ Reserve*, plaintiffs provide evidence that Facebook inflated advertisers' Potential Reach by including duplicate or fake accounts, thus misleading advertisers into overpaying.

Public reports soon suggested the extent of Facebook's misrepresentation. There were clues to the fraud. The social media giant was telling advertisers it reached more teenagers in the United States than the census counted in the United States.⁹ Internally, Facebook engineers and insiders understood they were exaggerating Potential Reach. For instance, in response to public news analyses of Potential Reach's overestimates, a Facebook data engineer said that a public report had the "order of magnitude in inflation correct."¹⁰ And such deception was intentional. As Facebook's current Vice President for Analytics and Chief Marketing Officer Alex Schultz noted, the overestimates that public reports had found were not "a metrics bug" but instead a "deliberate product decision ... since launch [in the late 2000s]."¹¹

Panic began to set in. Facebook Vice President for Ads Rob Goldman said that Facebook's handling of duplicate accounts was "pretty indefensible."¹² Another called the handling "deeply wrong."¹³ Senior officials understood the depths of the misrepresentation. Facebook Chief Operating Officer Sheryl Sandberg knew of the deception. In an email, Sandberg wrote, "We spoke about this a long time ago many times. I thought we knew about this but we also recognized that when the self-reporting data was so different than the census we knew we had to address it. I believe we still do."¹⁴ (Exhibit 20)

Facebook employees understood the significance of their misrepresentations. Facebook Vice President Carolyn Everson, discussing the practice of counting duplicate accounts, wrote in an email, "I think it clearly impacted planning and we are going to get really criticized for that (and

⁹ Alex Hern, *Facebook Claims it Can Reach More Young People than Exist in UK, US, and Other Countries*, The Guardian, Sept 7, 2017, <https://www.theguardian.com/technology/2017/sep/07/facebook-claims-it-can-reach-more-people-than-actually-exist-in-uk-us-and-other-countries>.

¹⁰ Motion for Class Certification at 6, 14; Exhibit 25, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083940; Third Amended Consolidated Class Action Complaint at 14, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021) [hereinafter Third Amended Complaint].

¹¹ Motion for Class Certification at 1; Exhibit 20, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00173289 (Email from Alex Schultz (Sept. 6, 2017, 06:45)) ("Totally fair if anyone disagrees with this but I don't think this is a metrics bug. I think it's a deliberate product decision and as such should be handled by the ads team and not metrics review.

"In my opinion this is a deliberate product decision to use self-reported age and not a metrics bug. We discussed this way back when I worked with Rabkin (and Tim Kendall) back in 2007-2008 so I believe it's been a deliberate tradeoff since launch.

"I believe this communication that age is self-reported is the correct answer and I actually think it's a really good answer. We could certainly get into age modeling if we felt that was the right thing to do (but that would introduce whole new sources of error - we are already really good at this in the US) or we could retire the tool which I know has been suggested and rejected down the years.) (Emphasis in original).

¹² Motion for Class Certification at 1.

¹³ *Id.*

¹⁴ *Id.*

justifiably so). If we overstated how many actual real people we have in certain demos, there is no question that impacted budget allocations. We have to prepare for the worst here.”¹⁵

In another email, Facebook executive Ami Vora wrote, “I think there is a real chance this is a bad moment for us – ‘Facebook lies about its user #s to get record profits’ ... the target on our back just gets bigger.”¹⁶

Despite recognizing they had been caught lying to advertisers, Facebook insiders did little to nothing to address their misrepresentations and actually rejected internal proposals to make estimates more accurate. In response to public reports of Potential Reach’s overestimates, Facebook executive Rob Goldman noted that Twitter had recently addressed a similar scandal by donating money from that scandal to “non-profit civic engagement projects.” Goldman added, “We are exploring similar symbolic action, which has the potential to absorb at least some of the narrative.”¹⁷ In other words, they knew what they did was deceptive.

As the plaintiffs argued, current Vice President of Analytics and Chief Marketing Officer Alex “Schultz separately directed Facebook’s sales staff not to discuss duplicate and fake accounts with advertisers.” An internal email revealed that salespeople have “been given guidance from growth (Alex Schultz) that we should not include messaging about [Monthly Active People] and duplicate or false accounts outside of earnings ... as there are a number of downstream implications.”¹⁸

In a deposition, Facebook executive Rob Goldman, when asked if he would call “reduc[ing] the overestimation problem significantly” a “good thing,” replied, “No.”¹⁹ In other words, he saw little or no issue with these inflated metrics, even as an analysis of removing duplicate accounts found that doing so would reduce the number of people displayed by Potential reach by “~10% Globally.”²⁰

Facebook employees still proposed ways to address Potential Reach’s overestimates. In early 2018, the Facebook Product Manager in charge of Potential Reach, Yaron Fidler, met with Facebook’s Central Metrics XFN team to discuss proposed fixes.²¹ Central Metrics XFN’s purpose

¹⁵ Exhibit 16, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083061 (Email from Carolyn Everson (Oct. 25, 2017, 17:31). (“SUMA [Single Use Multiple User or duplicate accounts] is going to go down horribly in my view without a strong narrative on what consumers are doing and why (specific examples) and also we have to be 100% certain that it did not impact billing on anything. I think it clearly impacted planning and we are going to get really criticized for that (and justifiably so). If we overstated how many actual real people we have in certain demos, there is no question that impacted budget allocations. We have to prepare for the worst here.”).

¹⁶ Exhibit 16, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083059 (Email from Ami Vora to Elisabeth Diana and Carolyn Everson (Oct. 26, 2017, 08:52)) (“The combo of long-term eroded trust + congressional testimony + suma + earnings means the target on our back just gets bigger.”).

¹⁷ Exhibit 16, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083058–59 (Email from Rob Goldman to Ami Vora, Elisabeth Diana, Carolyn Everson (Oct. 26, 2017, 11:57)).

¹⁸ Motion for Class Certification at 7; Exhibit 32, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00079721.

¹⁹ Exhibit 31, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021).

²⁰ Third Amended Complaint at 19; Exhibit 34, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021).

²¹ Motion for Class Certification at 6, 7-8.

is to “[p]rotect the trust of our partners in external metrics, while minimizing the restriction of this on revenue or innovation.”²² In discussing steps to address Potential Reach’s overestimation, Fidler said, “Revenue impact is indeed significant. The question is how do we quantify the loss of advertiser trust.”²³

“Also,” Fidler added, “in a way it’s revenue we should have never made given the fact it’s based on wrong [data].”²⁴

Facebook executives firmly rejected Fidler’s plan. Describing the April 12, 2018 meeting, Schultz said that he “tried to stop [Fidler’s proposal] there a few times and Yaron [Fidler] kept pushing.”²⁵ Later, another executive objected to Schultz’s treatment of Fidler. They told him, “The status quo in ads Reach estimation and reporting is deeply wrong,” and “de-duplicating would “dramatically improve things. . . . I think we hung Yaron a bit out to dry today.”²⁶

Fidler tried again to make the Potential Reach figures more accurate by proposing in June 2019 that Facebook claim that the Potential Reach figures count accounts and not unique persons. He acknowledged that the change would come at “[t]he cost of losing the people based narrative.”²⁷ Facebook leadership, however, appeared to prefer this narrative as Facebook Chief Revenue Officer David Fischer told Fidler that it “would be costly to change to accounts.”²⁸

Facebook employees expressed concern at Facebook executives’ choices. One Facebook employee said, “My question lately is: how long can we get away with the reach overestimation?”²⁹ By late 2018, Fidler spoke bluntly about the risks accompanying Facebook’s refusal to fully address Potential Reach’s overestimation: “This is a lawsuit waiting to happen,” adding, “just like video,” which was a comparison to its deception over video metric inflation.³⁰

Example Three: Securities Fraud

After deceiving advertisers and refusing to correct the problem, Facebook insiders compounded what appeared to be illegal activity by refusing to disclose this material information to its investors. Despite significant internal deliberation, Facebook chose not to report the issue on its November

²² Motion for Class Certification at 8; Exhibit 40, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021).

²³ Third Amended Complaint at 19.

²⁴ *Id.* at 19; Exhibit 35, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021).

²⁵ Third Amended Complaint at 19; Exhibit 41, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00118422.

²⁶ Exhibit 41, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00118423; Third Amended Complaint at 19-20.

²⁷ Third Amended Complaint at 20; Exhibit 47, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00060550.

²⁸ Motion for Class Certification at 9-10; Exhibit 48, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00093092; Third Amended Complaint at 20.

²⁹ Motion for Class Certification at 10; Exhibit 49, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00041107.

³⁰ Third Amended Complaint at 20. Motion for Class Certification at 10-11; Exhibit 55, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00116578 (Email from Yaron Fidler (Oct. 10, 2018, 15:36:13 PDT)).

2017 earnings call. Facebook executives did not disclose in that earnings call, or apparently elsewhere, that Facebook's Potential Reach figures may be based in part on duplicate or fake accounts.³¹ The failure to disclose or address the problem occurred despite public reporting a month before the call showing that Facebook's Potential Reach figures overestimated advertisements' efficacy.³²

The released documents in *DZ Reserve* show that the choice not to disclose their awareness of Potential Reach's errors was intentional. On October 25, 2017, a Facebook executive wrote in an email thread that Chief Financial Officer "Dave [Wehner] review[ed] and declined" a suggestion to talk about updated estimates in Facebook's ad systems on Facebook's November 2017 earnings call.³³ The executive added, "The context is that investors view Wehner's prepared remarks as a place to listen for risks to the business. Highlighting this as an advertiser issue spotlights this as a business risk for us, when it currently is not."³⁴

The next day, Facebook Chief Revenue Officer David Fischer replied to the email thread and wrote, "I really feel we're underestimating the impact this will have if we don't feel we need to cover this in more [than] three sentences in earnings because it won't have a business impact. I expect this will be a significantly bigger deal with advertisers and I worry we'll be accused of hiding the ball."³⁵

While historically narrow readings of the law have made it difficult to prove securities fraud, there is enough evidence, along with the further support of documents released by whistleblower Frances Haugen, to prompt the criminal investigation we are calling for.³⁶

Example Four: Lying to Congress

Documents released on August 6, 2021, from *Employees' Retirement System of Rhode Island v. Facebook*, provide new details on Facebook's violation of the 2012 FTC Consent Decree. More importantly, they show that when Mark Zuckerberg understood the severity of this breach, he likely lied to Congress.³⁷

While the Federal Trade Commission established in 2019 that Facebook sold user data without users' consent, the *Employees' Retirement System of Rhode Island v. Facebook* suit provides new details on the extent of the breach. Cambridge Analytica was provided with over 87 million user

³¹ Third Amended Complaint at 17 ("Facebook CFO Dave Wehner never disclosed, on the earnings call or elsewhere, the impact of duplicate and fake accounts in Facebook's [Monthly Active User count] on its Potential Reach calculation.").

³² Alex Hern, *Facebook Claims it Can Reach More Young People than Exist in UK, US, and Other Countries*, The Guardian, Sept 7, 2017, <https://www.theguardian.com/technology/2017/sep/07/facebook-claims-it-can-reach-more-people-than-actually-exist-in-uk-us-and-other-countries>.

³³ Exhibit 16, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083063 (Email from Adam Isserlis (Oct. 25, 2017, 11:16:14)).

³⁴ *Id.*

³⁵ Exhibit 16, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. filed Apr. 23, 2021), FB-SINGER-00083062 (Email from David Fischer (Oct. 26, 2017, 08:13)).

³⁶ Re: Supplemental Disclosure of Securities Law Violation by Facebook, Inc., Whistleblower Aid, https://drive.google.com/file/d/1nHBbCSeINlvZzbRUhhUB2m_Ms6hBfnn/view.

³⁷ *Employees' Retirement System of Rhode Island v. Facebook, Inc.*, No. 2018-0307-JRS (Del. Ch. April 25, 2018).

profiles despite only 270,000 users agreeing to such use. According to the suit, “Facebook thus obtained the consent of roughly .31% of users whose data was shared.”³⁸

Yet, in his April 10, 2018, Senate testimony, Mark Zuckerberg stated: “The two broad categories that I think about are content that a person [has] chosen to share and that they have complete control over, they get to control when they put into the service, when they take it down, who sees it. And then the other category are data that are connected to making the ads relevant. You have complete control over both.”³⁹

In other words, what Zuckerberg said to the Senate was clearly untrue. This would not require legal action if he had not known about the data sold to Cambridge Analytica, but he did. As has been widely established, Facebook misled the public and regulators for over two years and knew of the improperly sold data since December 2015.⁴⁰

Example Five: Insider Trading

More importantly, plaintiffs allege Zuckerberg used advance knowledge of this scandal to advantage himself in stock trades. In Facebook’s December 2015 Form 8K, Zuckerberg claimed he “plan[ned] to sell or gift no more than \$1 billion of Facebook stock each year for the next three years.” But after he learned about the Cambridge Analytica data usage, he accelerated his trading activity, “selling 18,755,276 shares for proceeds of \$2,828,482,748 between August 17, 2016, and March 16, 2018 (just before *The New York Times* published its exposé revealing that Cambridge Analytica had extracted Facebook user data).”⁴¹

The suit highlights news coverage of the activity, in which CNBC noted, “[i]n the two weeks before Facebook’s recent struggles, Zuckerberg sold 1.14 million shares as part of regularly scheduled programs. *That was the most insider selling for any public company, going back as far as three months...*”⁴²

Does the Rule of Law Apply to Mark Zuckerberg?

Public enforcers must hold corporations and powerful individuals accountable to the law when they violate it. In 2005, two WPP executives were found guilty and sent to jail for overbilling the U.S. government on an advertising account.⁴³ With this series of deceptions, Facebook may have defrauded not just one advertiser, but millions of advertisers who rely on the firm’s metrics to make budgetary decisions, as well as the federal government itself if a federal agency purchased

³⁸ Employees’ Retirement System of Rhode Island v. Facebook, Inc., No. 2018-0307-JRS (Del. Ch. April 25, 2018); Public Version of Second Amended Complaint at 114.

³⁹ *Id.* At 134.

⁴⁰ *SEC v. Facebook, Inc.*, No. 3:19-cv-04241-JD (N.D. California. July 24, 2019). Complaint at 1.

⁴¹ Liam Vaughan, *Most Americans Today Believe the Stock Market is Rigged, and They’re Right*, Bloomberg, September 29, 2021, <https://www.bloomberg.com/news/features/2021-09-29/is-stock-market-rigged-insider-trading-by-executives-is-pervasive-critics-say>.

⁴² Employees’ Retirement System of Rhode Island v. Facebook, Inc., No. 2018-0307-JRS (Del. Ch. April 25, 2018). Public Version of Second Amended Complaint at 300.

⁴³ Janet Whitman, *Second Ogilvy Ex-Executive Is Sentenced to Prison Time*, WALL ST. J., July 15, 2005, <https://www.wsj.com/articles/SB112144840310186987>.

Facebook advertising related to misrepresentations during the applicable period, which would constitute a violation of the False Claims Act.

The Federal Trade Commission has multiple consent decrees with Facebook and is currently pursuing an antitrust case against the social media giant for maintaining its monopoly in the social media market. While these actions have merit, it is clear that Facebook's leaders simply do not believe they will ever face meaningful sanction for lawless behavior. At this point, Facebook's longstanding track record of unethical and potentially illegal behavior deserves criminal sanction. While the Sherman Act is a criminal statute, monopolization can be accompanied by other forms of criminal activity to maintain or exploit market power, or to illicitly profit in a personal capacity from firm behavior. Such criminal actions deserve swift rebuke.

To this end, the Department of Justice and the Federal Trade Commission should investigate whether Facebook committed fraud against advertisers or violated the federal False Claims Act, while the Securities and Exchange Commission should investigate whether Facebook violated securities law when it declined to disclose its Potential Reach overestimates in earnings calls, as well as possible insider trading violations by key Facebook insiders.

Enough is enough.

Sincerely,

American Economic Liberties Project

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