

December 9, 2021

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

The Honorable Gary Gensler  
Chair  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Dear Attorney General Garland and Chair Gensler:

I write to urge the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to commence criminal and civil investigations into Facebook to determine if the company or its executives may have violated U.S. wire fraud and securities laws. Extensive documentation in the public record—bolstered by whistleblower Frances Haugen’s recent revelations<sup>1</sup>—suggests that Facebook may have misled investors, the SEC, its advertising customers, and the public about the reach of its advertisements, a core aspect of Facebook’s business model. These allegations, if true, could represent serious violations of 18 U.S.C. § 1343, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Sarbanes-Oxley Act—breathhtakingly illegal conduct by one of the world’s largest social media companies.

Advertising is the cornerstone of Facebook’s business. As the company has repeatedly stated in public filings, Facebook “generate[s] substantially all of [its] revenue from selling advertising placements to marketers.”<sup>2</sup> For example, in the third quarter of 2021, advertisements

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<sup>1</sup> Whistleblower Aid, “Supplemental Disclosure of Securities Law Violations by Facebook, Inc.,” 2021, [https://drive.google.com/file/d/1nHBbCSeINlvZzbRUhhUB2m\\_Ms6hBfnn/view](https://drive.google.com/file/d/1nHBbCSeINlvZzbRUhhUB2m_Ms6hBfnn/view).

<sup>2</sup> Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2020,” January 27, 2021, p. 7, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>; Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2019,” January 29, 2020, p. 7, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf>; Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2018,” January

were responsible for over 97% of Facebook’s revenue, producing nearly \$29 billion for the company.<sup>3</sup> As such, the accuracy of Facebook’s representations about its advertising reach is materially important for investors and the public. More reach means more advertising and revenue; less reach—and correspondingly “the loss of marketers, or reduction in spending by marketers”—“could seriously harm [Facebook’s] business.”<sup>4</sup>

For years, a crucial metric for Facebook’s advertising was an ad’s so-called “Potential Reach.” In fact, until recently,<sup>5</sup> the company only presented two metrics to advertisers about the anticipated success of an ad campaign before purchase: Potential Reach and Estimated Daily Reach.<sup>6</sup> Facebook explicitly described Potential Reach—one of the elements of an ad’s Estimated Daily Reach—as an “estimate [of] how many people in a given area could see an ad a business might run,”<sup>7</sup> calling the figure “arguably the single most important number in our ads creation interfaces.”<sup>8</sup> Unsurprisingly, advertisers planned their advertising budgets and buys around Facebook’s representations; they were willing to pay more for campaigns with higher Potential Reaches.<sup>9</sup>

But evidence has mounted suggesting that high-level executives at Facebook may have known that the Potential Reach metric was meaningfully and consistently inflated. Public analyses from as early as 2017 demonstrated that Facebook’s Potential Reach represented that its ads could reach more 18- to 34-year-olds than existed in each of the 50 states according to data from the U.S. Census Bureau.<sup>10</sup> Facebook’s internal analyses reportedly confirmed the misleading nature of Potential Reach.<sup>11</sup> And the company’s Targeting Team apparently mobilized to address the issue by developing solutions such as filters for duplicate accounts.<sup>12</sup> But Facebook’s top executives refused to act, despite acknowledging their longstanding awareness of the problem. In response to a proposal from now-Chief Marketing Officer Alex

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31, 2019, p. 5, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/a109a501-ed16-4962-a3af-9cd16521806a.pdf>.

<sup>3</sup> Facebook, Inc., “Facebook Reports Third Quarter 2021 Results,” Press Release, October 25, 2021, <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Third-Quarter-2021-Results/default.aspx>.

<sup>4</sup> Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2020,” January 2021, p. 15, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>.

<sup>5</sup> Facebook switched from “Potential Reach” (i.e., presenting a single data point about an ad’s reach) to “Estimated Audience Size” (i.e., presenting a range for an ad’s reach) in October 2021. Meta for Developers, “Updates To Potential Reach and Pre-Campaign Estimates,” Ashish Gupta, September 30, 2021, <https://developers.facebook.com/blog/post/2021/09/30/updates-potential-reach-pre-campaign-estimates>.

<sup>6</sup> Class Action Complaint, p. 4, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978 (N.D. Calif. Aug. 15, 2018), <https://storage.courtlistener.com/recap/gov.uscourts.cand.330648/gov.uscourts.cand.330648.1.0.pdf>.

<sup>7</sup> *Id.* See page 6.

<sup>8</sup> Plaintiffs’ Notice of Motion for Class Certification and Memorandum of Points and Authorities, p. 4, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978 (N.D. Calif. Apr. 23, 2021).

<sup>9</sup> Class Action Complaint, p. 4, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978 (N.D. Calif. Aug. 15, 2018), <https://storage.courtlistener.com/recap/gov.uscourts.cand.330648/gov.uscourts.cand.330648.1.0.pdf>.

<sup>10</sup> *Id.* See page 9.

<sup>11</sup> Plaintiffs’ Notice of Motion for Class Certification and Memorandum of Points and Authorities, p. 6, DZ Reserve v. Facebook, Inc., No. 3:18-cv-04978 (N.D. Calif. Apr. 23, 2021).

<sup>12</sup> *Id.* See pages 7-9.

Schultz to retire Potential Reach—an idea he described as “suggested and rejected down the years”<sup>13</sup>—Chief Operating Officer Sheryl Sandberg “showed no interest in eliminating Potential Reach,” noting that “[w]e spoke about this a long time ago many times.”<sup>14</sup> Despite one Facebook executive’s pleas that “[t]he status quo in ads Reach estimate and reporting is deeply wrong”<sup>15</sup> and the Potential Reach Product Manager flatly stating that any revenue obtained through the metric was “revenue we should have never made given the fact it’s based on wrong data,”<sup>16</sup> Chief Revenue Officer David Fischer stated that it would be “costly” to switch course.<sup>17</sup> And even when presented with detailed data about the dishonesty of Potential Reach, then-Vice President for Ads Rob Goldman failed to mandate meaningful changes,<sup>18</sup> notwithstanding his statements that Facebook’s actions with respect to Potential Reach were “pretty indefensible.”<sup>19</sup>

At no point during the company’s alleged misrepresentations about Potential Reach—and their executives reported knowledge of the misrepresentations—did Facebook disclose the problems to their investors or the SEC. This may have been a deliberate choice, suggesting that Facebook and its executives could have violated federal law. Chief Financial Officer David Wehner allegedly “review[ed] and declined” a suggestion to discuss Potential Reach’s errors on a November 2017 earnings call, despite Fischer later stating that he “expect[ed] this will be a significantly bigger deal with advertisers” and that he “worr[ie]d Facebook would be] be accused of hiding the ball.”<sup>20</sup> Chief Marketing Officer Alex Schultz even described Potential Reach’s design as a “deliberate product decision,” rather than a “metrics bug.”<sup>21</sup> Thus, because evidence suggests that Facebook may have defrauded its investors, the SEC, and its advertising customers about Potential Reach (including through material omissions from its annual 10-K statements about the deceptive nature of one of the most important metrics for its advertising model),<sup>22</sup> Facebook could have violated:

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<sup>13</sup> *Id.* See page 5.

<sup>14</sup> *Id.* See pages 5-6.

<sup>15</sup> *Id.* See page 8.

<sup>16</sup> *Id.* See page 1.

<sup>17</sup> *Id.* See page 10.

<sup>18</sup> *Id.* See page 10.

<sup>19</sup> *Id.* See page 1.

<sup>20</sup> Letter from American Economic Liberties Project to Attorney General Merrick Garland, FTC Chair Lina Khan, and SEC Chair Gary Gensler, October 29, 2021, p. 6, <https://www.economicliberties.us/wp-content/uploads/2021/10/FB-Letter-Criminal-Charges-Final-Edited.pdf>.

<sup>21</sup> Plaintiffs’ Notice of Motion for Class Certification and Memorandum of Points and Authorities, Exhibit 20, p. 3, *DZ Reserve v. Facebook, Inc.*, No. 3:18-cv-04978 (N.D. Calif. Apr. 23, 2021).

<sup>22</sup> Notwithstanding Facebook’s detailed disclosures regarding its “Risk Factors” in its recent 10-K statements (as mandated by 17 C.F.R. § 229.105), nowhere in the company’s statements does it mention “Potential Reach” or any specific problems regarding the misleading nature of the metric. Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2020,” January 27, 2021, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>; Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2019,” January 29, 2020, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf>; Facebook, Inc., “Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2018,” January 31, 2019, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/a109a501-ed16-4962-a3af-9cd16521806a.pdf>.

1. 18 U.S.C. § 1343,<sup>23</sup> which makes it unlawful for anyone to “devise any scheme or artifice to defraud” for the purpose of “obtaining money or property by means of false or fraudulent pretenses, representations, or promises” using interstate wire communications.
2. Section 17(a) of the Securities Act of 1933,<sup>24</sup> which makes it unlawful for any company offering securities “(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”
3. Section 13(a) of the Securities Exchange Act of 1934<sup>25</sup> and its accompanying regulations,<sup>26</sup> which require companies with publicly held securities to file accurate periodic reports with the SEC.
4. Section 10(b) of the Securities Exchange Act of 1934<sup>27</sup> and Rule 10b-5,<sup>28</sup> which make it unlawful for any company “(a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”
5. Section 302 of the Sarbanes-Oxley Act,<sup>29</sup> which requires public companies to adopt procedures to ensure the accuracy of periodic reports to the SEC, making the CEO and CFO directly responsible for the contents of the reports.
6. Section 301 of the Sarbanes-Oxley Act,<sup>30</sup> which imposes criminal liability on any officer who knowingly or willfully certifies a noncompliant periodic report to the SEC.

Facebook is not above the law. The company’s executives cannot mislead investors, the SEC, its advertising customers, and the public about a core metric of its business model with impunity if such actions violate federal wire fraud or securities laws. Given the allegations of such misconduct, I urge the DOJ and SEC to immediately commence investigations into Facebook’s representations with respect to Potential Reach and, if you find that the company has in fact violated wire fraud or securities laws, to pursue all available criminal and civil sanctions as appropriate.

Thank you for your attention to this important matter.

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<sup>23</sup> 18 U.S.C. § 1343.

<sup>24</sup> 15 U.S.C. § 77q(a).

<sup>25</sup> 15 U.S.C. § 78m(a).

<sup>26</sup> *See, e.g.*, 17 C.F.R. § 240.12b-20.


<sup>27</sup> 15 U.S.C. § 78j.

<sup>28</sup> 17 C.F.R. § 240.10b-5.

<sup>29</sup> 15 U.S.C. § 7241.

<sup>30</sup> 15 U.S.C. § 1350.

Sincerely,



Elizabeth Warren  
United States Senator

CC: The Honorable Kenneth Polite, Assistant Attorney General, U.S. Department of Justice  
The Honorable Jonathan Kanter, Assistant Attorney General, U.S. Department of Justice