Remarks at the FTC Workshop on "Big Data: A Tool for Inclusion or Exclusion?"
U.S. Federal Trade Commissioner Julie Brill

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Thank you, Katherine, for the introduction, and welcome back to all of you who are here with us in person or watching our webcast today. I'd like to recognize you, Katherine, as well as Tiffany George, Katherine Worthman, Patrick Eagan-Van Meter, and all the other FTC staff who put together today's excellent workshop.

Our presenters and panelists are providing us with details about the current and emerging uses of big data to categorize consumers, the surrounding legal issues, and possible best practices for big data analytics providers. I'd like to provide a more general perspective that makes a simple point: providing transparency into the big data algorithms that categorize consumers has been done before, it has put some concerns to rest, and companies and consumers have been better off as a result.

As I've said on one or two other occasions, I believe that big data analytics can bring significant benefits to consumers and to society, but we must endow the big data ecosystem with appropriate privacy and data security protections in order to achieve these benefits. Today I'd like to focus on three of the more challenging issues at the intersection of big data and consumer protections that pertain to this workshop. I'd also like to offer some suggestions about what industry can do right now to address these concerns. Consumer trust is critical here, and transparency and accountability are key to building it.

The first challenge involves scores derived from credit report and alternative scoring models. In this realm, as in many others, the past is prologue: the origins of the Fair Credit Reporting Act (FCRA) have something to teach us about our current environment. The FCRA was our nation's first "big data" law. The seeds for it were planted in the growing economy after World War II. Businesses formed cooperatives to enable quicker and more accurate decisions about creditworthiness by sharing information about consumers who were in default or delinquent on loans. Over time, these agencies combined, paving the way for consumers to gain access to credit, insurance and jobs. As credit bureaus increased their ability to draw inferences and make correlations through ever-larger databases, unease about the amount of information that credit bureaus held – as well as its accuracy and its use – also increased. Congress passed the FCRA in 1970 to address to these concerns.[1]

The FCRA governs the use of information to make decisions about consumer credit, insurance, employment, housing and other transactions initiated by consumers. It covers not only credit bureaus but also their sources and clients. The FCRA gives consumers important rights. For instance, consumers are entitled to access their data, challenge its accuracy, and be notified when they are denied credit or get a loan at less than favorable rates because of negative information in their files.

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[1] *See generally* Mark Furletti, Payment Cards Center, Federal Reserve Bank of Philadelphia, *An Overview and History of Credit Reporting* 3-4 (June 2002), *available at* http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2002/CreditReportingHistory_062002.pdf.

The use of credit scores has thrived under the FCRA's rights of notice, access, correction, relevancy and accuracy; and the FCRA has enabled the credit reporting enterprise to serve a purpose useful not only to the credit reporting agencies and their clients, but also to consumers. The credit scores that first emerged from analysis of consumers' credit files broadened access to credit,[2] and they made determinations of a particular consumer's creditworthiness more efficient and more objective than was the case with prior, more subjective determinations.[3]

As scoring models began to proliferate and enter into new types of decisions – including employment, insurance, and mortgage lending – consumers and regulators grew concerned about what exactly was going on within these models.[4] Some of the most important questions were whether credit-related scores were using variables that act as proxies for race, ethnicity, age, and other protected categories.

In 2003, Congress directed the FTC and the Federal Reserve to study these questions in the context of credit-based insurance scores and traditional credit scores.[5] After extensive and rigorous studies, both agencies found that the scores they examined largely did *not* serve as proxies for race or ethnicity.[6] The FTC and Federal Reserve reports shed a lot of light on traditional credit scores and assuaged some important concerns, which was good for everyone involved: consumers, credit bureaus, and credit score users.

Fast forward to today. We're now seeing a proliferation of other types of scores being used to make FCRA-covered eligibility determinations.[7] While these scores are subject to the

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[2] *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT S-1 (Aug. 2007), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf ("The large savings in cost and time that have accompanied the use of credit scoring are generally believed to have increased access to credit, promoted competition, and improved market efficiency.") [FRB, CREDIT SCORING REPORT].

[3] *See, e.g.*, Prepared Statement of the FTC Before the House Banking and Financial Svcs. Cmte. 1 (Sept. 21, 2000), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-credit-scoring/creditscoring.pdf ("With credit scoring, lending decisions are likely to be more objective, faster and less costly than traditional 'judgmental' decisions.").

[4] *See* H. REP. 108-263, part I, at 26, *available at* https://beta.congress.gov/108/crpt/hrpt263/CRPT-108hrpt263.pdf (reporting on a hearing of the House Subcommittee on Financial Institutions and Consumer Credit that explored how credit scores and other credit reporting information "are used by the lending, mortgage, consumer finance, insurance, and non-financial industries").

[5] Fair and Accurate Credit Transactions Act of 2003 § 215, Pub. L. 108-159 (Nov. 5, 2003), *available at* https://beta.congress.gov/bill/108th-congress/house-bill/2622/text.

[6] *See* FRB, Credit Scoring Report, *supra* note 2, at S-1 – S2 (concluding that "the credit characteristics included in credit history scoring models do not serve as substitutes, or proxies, for race, ethnicity, or sex"). *See also* FTC, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE 62-73 (July 2007), *available at* http://www.ftc.gov/sites/default/files/documents/reports/credit-based-insurance-scores-impacts-consumers-automobile-insurance-report-congress-federal-trade/p044804facta_report_credit-based_insurance_scores.pdf (finding that credit-based insurance scores "do not act solely as a proxy for membership" in the racial, ethnic, and income groups studied in the report but finding a small proxy effect with respect to African Americans and Hispanics).

[7] *See generally* FTC, Transcript of Spring Privacy Series: Alternative Scoring Products (Mar. 19, 2014), *available at* http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf; Pam Dixon and Robert Gellman, The Scoring of America: How Secret Consumer Scores Threaten

same obligations of access, accuracy, security, and other requirements imposed by the FCRA, they haven't yet been subject to the same kind of scrutiny that Congress and the federal agencies brought to bear on traditional credit scores. The use of new sources of information, including information that goes beyond traditional credit files, to score consumers raises fresh questions about whether these alternate scores may have disparate impacts along racial, ethnic, or other lines that the law protects, or that should be addressed.

Those questions are likely to linger and grow more urgent unless and until the companies that develop these alternate scores go further to demonstrate that their models do not contain racial, ethnic, or other prohibited biases. These companies may learn that their models have unforeseen inappropriate impacts on certain populations. Or they might simply find their algorithms should eliminate or demote the importance of certain types of data because their predictive value is questionable, as FICO recently discovered with respect to paid-off collection agency accounts and medical collections.[8]

Just as we did a decade ago, the FTC and other appropriate federal agencies should once again devote serious resources to studying the real world impact of alternative scoring models. But industry shouldn't wait for the federal agencies, or for Congress, to get involved to review their scoring models. Companies can begin this work now, and provide all of us with greater insight into – and greater assurances about – their models.

The second big data challenge that I'd like to discuss comes from the unregulated world of data brokers. As outlined in the Commission's recent report, and as discussed this morning, data brokers' profiles combine massive amounts of data from online and offline sources into profiles about nearly all of us.[9] Data brokers' clients use these profiles for purposes that range from marketing to helping companies determine whether and on what terms they should do business with us as individual consumers.

The main data broker issue I want to highlight today concerns data broker segments that track sensitive characteristics, including race, religion, ethnicity, sexual orientation, income, and health conditions. As I noted when the FTC released its landmark report on data brokers, I see a clear potential for these profiles – "Ethnic Second City Struggler," "Urban Scramble" - to harm

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Your Privacy and Your Future (Apr. 2014), *available at* http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf.

[8] *See* Annamaria Andriotis, *FICO Recalibrates Its Credit Scores*, WALL ST. J. (Aug. 7, 2014, 7:54 PM), *available at* http://online.wsj.com/articles/fico-recalibrates-its-credit-scores-1407443549; FICO, News Releases, FICO Score 9 Introduces Refined Analysis of Medical Collections (Aug. 7, 2014), http://www.fico.com/en/about-us/newsroom/news-releases/fico-score-9-introduces-refined-analysis-medical-collections/. FICO's changes followed a report by the Consumer Financial Protection Bureau (CFPB), which found that (1) "consumers with more medical than non-medical collections had observed delinquency rates that were comparable to those of consumers with credit scores about 10 points higher"; and (2) "consumers with paid medical collections were less likely to be delinquent than other consumers with the same credit score." CFPB, *Data Point: Medical Debt and Credit Scores* 5-6 (May 2014), *available at* http://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf.

[9] FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

low-income and other vulnerable consumers. [10] In an ideal world, a data broker's products that identify consumers who traditionally have been underserved by the banking community can be used to help make these consumers aware of useful opportunities for credit and other services. However, these same products could be used to make these consumers more vulnerable to high interest payday loans and other products that might lead to further economic distress.[11] It all depends on how these products are actually used. Importantly, our recent data broker report did not attempt to analyze the harms that could potentially come from the uses of consumer segmentation of poor or minority communities.

One of the reasons I support legislation to create greater transparency and accountability for data brokers, as well as their sources and their customers, is so we could begin to understand how these profiles are being used in fact, and whether and under what circumstances they are harming vulnerable populations. In the meantime, the data broker industry should take stronger, proactive steps right now to address the potential impact of their products that profile consumers by race, ethnicity or other sensitive classifications, or that are proxies for such sensitive classifications. Data brokers should find out how their clients are using these products, tell the rest of us what they learn about these actual uses, take steps to ensure any inappropriate uses cease immediately, and develop systems to protect against such inappropriate uses in the future.[12]

The third challenge I want to mention relates to companies' use of their own data about their customers. Companies are understandably eager to determine what makes their customers happy, and how they can more efficiently service their customers. As they dive into their own treasure trove of customer data in order to offer perks or better deals to loyal customers, companies may also find that these common practices disadvantage certain groups of individuals, thereby, in the words of the White House's recent big data report, "exacerbate[ing] existing socio-economic disparities."[13] Back in January, the *Harvard Business Review* asked

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[10] *See* Statement, Julie Brill, Comm'r, FTC, Data Brokers: A Call for Transparency and Accountability 3 (May 27, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/311551/140527databrokerrptbrillstmt.pdf [Brill, Data Broker Statement; Julie Brill, Comm'r, FTC "Big Data and Consumer Privacy: Identifying Challenges, Finding Solutions" (Feb. 2014), *available at* http://www.ftc.gov/public-statements/2014/02/big-data-consumer-privacy-identifying-challenges-finding-solutions].

[11] *See, e.g.*, FTC, Payday Loans (Mar. 2008), https://www.consumer.ftc.gov/articles/0097-payday-loans (illustrating how a $15 fee charged in connection with a two week payday loan amounts to a 391 percent annual percentage rate of interest); National Consumer Law Center, *Stopping the Payday Loan Trap: Alternatives That Work, Ones That Don't* 5-6 (June 2010), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf (summarizing studies that find correlations between payday loans and bank account closings, personal bankruptcies, evictions, and delinquencies in other payments).

[12] *See* Brill, Data Broker Statement, *supra* note 10, at 5 ("Data brokers are well-situated to monitor their clients' data use and to be part of an early warning system when their highly sensitive information is used for unlawful purposes.").

[13] EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 46-47 (2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

companies to think deeply about where "value-added personalization and segmentation end[s] and harmful discrimination begin[s]."[14]

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I want to emphasize that all of these industry players – traditional credit reporting agencies and their new-fangled progeny using alternative scoring models, data brokers and those companies that use their products, and companies engaged in analysis of their own customer data – can take steps right now to address concerns about the potential discriminatory impact of their use of algorithms. I am hopeful that the same reservoirs of data that create the concerns I outlined will also lead to ways to get them under control. I encourage all members of industry to look for ways that the data in their hands could be used to identify disparate treatment along racial, ethnic, gender, or other inappropriate lines – and to correct such treatment to the extent it exists.

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[14] *See* Michael Schrage, *Big Data's Dangerous New Era of Discrimination*, HARVARD BUSINESS REVIEW BLOG NETWORK (Jan. 29, 2014, 8:00 a.m.), http://blogs.hbr.org/2014/01/big-datas-dangerous-new-era-of-discrimination/.