

**Comments of the
Software & Information Industry Association
on the
FTC Workshop on Alternative Scoring Products
March 19, 2014
(Comments filed April 17, 2014)**

The Software and Information Industry (SIIA) appreciates the opportunity to comment on Federal Trade Commission's (FTC) Workshop on Alternative Scoring Products held on March 19, 2014. The workshop usefully framed important developments in the use of data analytics for providing new and improved services to customers and a good summary of some of the policy issues that these uses might raise.

As the principal trade association of the software and digital information industry, the more than 500 members of SIIA develop and market software and electronic content for business, education and consumers. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. As leaders in the global market for software and information products and services, our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

SIIA's main comment on the proceedings can be summarized as follows: the current statutory and regulatory framework seems to be adequate for addressing the issues raised by the use of predictive analytics in general and the use of consumer scores as described in the Commission's March 19 workshop. However, the FTC should monitor the marketplace (1) to take strong and effective enforcement measures against firms that violate current statutory or regulatory constraints and (2) to ascertain whether there are business practices that could lead to consumer harm, but are not addressed adequately within the current framework. A general workshop exploring the concept of consumer harm in more detail might be helpful as well, since the workshop revealed substantial differences in views regarding which business practices constituted consumer harm. The FTC's recently announced workshop on the effect of big data on low income and underserved customers is a step in the right direction and an opportunity to explore further the notion of consumer harm in the use of data.¹

Existing Regulatory Framework

¹ Federal Trade Commission, FTC to Examine Effects of Big Data on Low Income and Underserved Consumers at September Workshop, April 11, 2014 available at <http://www.ftc.gov/news-events/press-releases/2014/04/ftc-examine-effects-big-data-low-income-underserved-consumers>

The Fair Credit Reporting Act (FCRA) provides the FTC with a wide range of regulatory tools to respond to the possibility of harmful acts or practices in the use of consumer scores. The FCRA sets out extensive consumer rights and company responsibilities regarding the use of information for determining eligibility for insurance, credit or employment.²

SIIA discussed the use of FCRA to apply to new technologies such as social networks in a recent White Paper that is attached to these comments.³ In particular, it is useful to point out in the context of the workshop on consumer scores that the FTC took action in 2012 for failure to comply with the FCRA against a company, Spokeo, which systematically made available to paying customers crude consumer scores relating to credit and wealth.⁴ These scores were marketed and used as tools to determine whether consumers were eligible for credit and employment. And since our White Paper was issued, the FTC has brought new enforcement actions for violations of FCRA, which signals the continued vitality of the statute.⁵

These cases, and others like it, establishes that the FTC has clear authority to use the FCRA against firms using the latest data analytics techniques and to protect consumers against unregulated use of consumer scores that are used for these eligibility questions.

In addition, Section 5 of the Federal Trade Commission Act provides the Commission with substantial authority to regulate “unfair or deceptive acts or practices in or affecting commerce.”⁶ The statute defines unfairness as taking place when:

...the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.⁷

The commission has used this section 5 unfairness authority in over 30 cases involving data security, an authority that was recently upheld in the context of a

² 15 U.S.C. § 1681a available at <http://www.law.cornell.edu/uscode/text/15/1681a>

³ SIIA, *How The FCRA Protects the Public*, December 2013 available at http://siia.net/index.php?option=com_docman&task=doc_download&gid=4767&Itemid=318

⁴ Center for Democracy and Technology FTC Complaint Against Spokeo, Inc. (June 30, 2010) at <https://www.cdt.org/files/pdfs/Spokeo.pdf>

⁵ Federal Trade Commission, *Two Data Brokers Settle FTC Charges That They Sold Consumer Data Without Complying With Protections Required Under the Fair Credit Reporting Act*, April 9, 2014, available at <http://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data>

⁶ 15 U.S.C. 45 (a)(1) available at <http://www.law.cornell.edu/uscode/text/15/45>

⁷ 15 U.S.C. 45 (n) available at <http://www.law.cornell.edu/uscode/text/15/45>

court challenge.⁸ This authority is also available to the FTC to challenge acts or practices in the area of consumer scores that are likely to cause substantial injury to consumers without a countervailing benefit.

Many commentators have suggested that the issues raised by predictive analytics and certain other data uses go beyond privacy, consumer protection and the protections offered by FCRA to touch on issues of fairness and discrimination.⁹ This might be the case. However, any such potentially problematic practices relating to discrimination may be covered under statutory constraints that are outside the FTC's jurisdiction. These existing laws include:

- Title VII of the Civil Rights Act of 1964 makes it unlawful for employers and employment agencies to discriminate against an applicant or employee because of such individual's "race, color, religion, sex, or national origin,"¹⁰ which is enforced by the Equal Employment Opportunity Commission and state fair employment practices agencies.
- The Equal Credit Opportunity Act makes it unlawful for any creditor to discriminate against any applicant for credit on the basis of "race, color, religion, national origin, sex or marital status, or age,"¹¹ which is enforced by the Consumer Financial Protection Bureau.¹²
- Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, prohibits discrimination in the sale, rental or financing of housing "because of race, color, religion, sex, familial status, or national origin."¹³ The act also protects people with disabilities and families with children. It is enforced by the Department of Housing and Urban Development.
- The Genetic Information Nondiscrimination Act of 2008 prohibits U.S. health insurance companies and employers from discriminating on the basis of information derived from genetic tests.¹⁴ Enforcement is divided among a number of agencies including the Department of Health and Human Services (for health insurance) and the Equal Employment Opportunity Commission (for employment).

⁸ United States District Court District Of New Jersey Federal Trade Commission v. Wyndham Worldwide Corporation, Civil Action No. 13-1887 (ES), April 7, 2014 available at <http://ashkansoltani.files.wordpress.com/2014/04/ftc-v-wyndham-opinion.pdf>

⁹ Cynthia Dwork & Deirdre K. Mulligan, It's Not Privacy and It's Not Fair, 66 Stan. L. Rev. Online 35, September 3, 2013 at <http://www.stanfordlawreview.org/online/privacy-and-big-data/its-not-privacy-and-its-not-fair>

¹⁰ 42 U.S.C. §2000e-2 available at <http://www.law.cornell.edu/uscode/text/42/2000e-2>

¹¹ 15 U.S.C. § 1691 available at <http://www.law.cornell.edu/uscode/text/15/1691>

¹² The Federal Reserve Board originally enforced the Equal Credit Opportunity Act, but the Dodd-Frank Act of 2011 transferred jurisdiction to CFPB. See Consumer Financial Protection Bureau, CFPB Consumer Protection Laws: ECOA, June 2013 p. 1 available at http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf

¹³ 42 U.S.C. 3604 available at <http://www.law.cornell.edu/uscode/text/42/3604>

¹⁴ Pub. L. No. 110-233, 122 Stat. 881 available at <http://www.gpo.gov/fdsys/pkg/PLAW-110publ233/pdf/PLAW-110publ233.pdf>

The FTC should coordinate closely with the agencies enforcing these statutes to determine whether statutes outside the FTC's jurisdiction cover harms.

Consumer Scores

While the workshop focused on “alternative scoring,” there was no consensus on the definition of this term. This term is inherently confusing, since it is not clear what “alternative” means. It could mean any score that is not a traditional credit scores. Or it could mean any score that is not used for purposes regulated under the FCRA. By jumping back and forth between these meanings an impression can be created that anything other than traditional credit scores are outside the scope of FCRA and a potential source of unregulated harm. This confusion can be avoided by using a different term.

A more neutral term and definition has been provided after the workshop by the World Privacy Forum. In their recent report, they define consumer scores as “numbers given to individuals to describe or predict their characteristics, habits, or predilections.”¹⁵ They are “built using predictive modeling.”¹⁶

In effect, consumer scores are probability statements regarding the likelihood of a person having particular traits or characteristics that are derived from some form of analysis. This definition is extraordinarily broad and covers a vast array of very different types of scores used for very different purposes. A key though is that the score is derived according to an algorithm from underlying information, called factors. It is therefore important to understand that analytical process.

The analytical process takes place in stages. Tal Zarsky, a noted legal scholar working in the area of data analytics, breaks the process down into three parts. First is the data gathering phase. Second, is the data analysis phase and third is the data use or “implementation” phase.¹⁷ Helen Nissenbaum, a noted privacy scholar who developed the widely used contextual analysis framework for privacy, divides the analytical process into the three parts of (1) tracking and monitoring, (2) data aggregation and analysis and (3) data dissemination.¹⁸

¹⁵ Pam Dixon and Robert Gellman, [The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future](http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf), World Privacy Forum, April 2014, p. 6 available at http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf

¹⁶ World Privacy Forum, p. 8

¹⁷ T.Z. Zarsky, “Desperately Seeking Solutions: Using Implementation-Based Solutions for the Troubles of Information Privacy in the Age of Data Mining and the Internet Society,” 56 Me. L. Rev. 13, 2004, p. 30–32, available at http://www.maine.gov/legis/academic/maine-law-review/pdf/vol56_1/vol56_me_l_rev_013.pdf

¹⁸ Helen Nissenbaum, [Privacy In Context: Technology, Policy, And The Integrity Of Social Life](#), Stanford University Press, 2010 p. 11.

In the data analysis phase a variety of statistical techniques are applied to aggregated and linked data sets. Two varieties of these techniques are relevant. Data analysis takes place when researchers break down the data into pre-existing subcategories, hypothesize a connection among variables in the data, test the hypothesis and either confirm or deny it.¹⁹

Alternatively, there is data mining, which refers to the discovery of patterns within the data itself without needing to formulate a hypothesis about what pattern will emerge from the examination of the data. The correlations and patterns discovered in the data are unpredictable in advance. Neither the data subject nor the data collector knows or can anticipate with any certainty what patterns will emerge.²⁰ The newly discovered regular pattern can be used to predict information about new potential customers whose behavior has not been tracked in any database.

Data and analytics have been around for quite some time. Big data analytics is relatively new. The term “big data” refers to very large sets of data that outstrip the memory capacity that computers use for processing, which has led to the development of massive parallel-processing computing platforms for large-scale data processing and analytics.²¹ It also relates to the different kinds of data that are typically used in analysis, unstructured text, video and audio data that are not organized in neat, hierarchical patterns. Finally, big data includes rapidly changing data sets that are a sharp departure from the older static data bases that could be analyzed over a period of days or weeks. The “three Vs” slogan that big data consists of new data analysis techniques put to work on data sets of increased volume, variety and velocity is derived from these underlying realities.²²

The presence of big data analytics means that consumer scores are not just the familiar static credit scores that are developed over a period of time from fixed data bases. They are often dynamic scores that change rapidly, sometimes several times a day, depending on the availability of information and the business need to update. This fact limits the practicality and utility of any measure that would provide consumer access to consumer scores or their underlying factors.

Economically, information companies provide consumer scores to client businesses who use them for a variety of purposes, including the FCRA-regulated purposes of determining eligibility for insurance, employment or credit and also the unregulated purposes such as marketing.

¹⁹ Zarsky, p. 27.

²⁰ Zarsky, p. 28.

²¹ Viktor Mayer-Schonberger and Kenneth Cukier, Big Data: A Revolution That Will Transform How We Live, Work, and Think, Houghton Mifflin Harcourt, 2013, p. 6

²² “To these, IBM’s Michael Schroeck adds Veracity. In other words, a firm’s imperative to screen out spam and other data that is not useful for making business decisions.” Lars Nielsen and Noreen Burlingame, A Simple Introduction to Data Science, New Street Communications, LLC, 2012, p. 10

Sometimes consumer scores are developed internally by integrated companies that collect, manage and analyze information that they gather from public and private sources according to algorithmic formulas that they have also developed. These integrated companies collect the information, manage the data bases and provide the analytics function all with in-house resources.

Consumer scores are also developed through contractual arrangements with separate analytics companies, service providers who do not themselves collect information about consumers. An analytics company might take on a task of developing or applying an algorithm to the data provided by the information company and returning a result to them. The analytics company collects no information and develops and implements plans and policies regarding the collected information solely at the direction of the information company for whom it works.

Some external service companies provide additional services to enable the smoother functioning of the operations of information companies. For example, an external database management company might maintain and update information provided by an information company but have no control over what information is stored or how it is used.

In addition, an industry infrastructure provider might provide an exchange for companies seeking access to different data bases for different purposes or seeking to merge their own data with those of other information companies. The exchange provider does not collect or control or use any consumer information. It merely makes available a networking function that allows companies seeking such information to find each other and work together.

No Evidence of Unregulated Harmful Acts or Practices

The March 19 workshop covered a number of practices in some detail, but did not present any evidence that the current regulatory framework was unable to deal with harmful uses of data. This should be a focus at future FTC workshops, including the September workshop on how data use might impact low-income and underserved consumers.

For instance, there was some discussion of Klout scores and an anecdote recounted of how one employer refused to hire an applicant because that person's Klout score was too low.²³ A Klout score is a number between 1 and 100 that represents person's influence. The more influential a person is, the higher the Klout Score. It is calculated based on the number of followers, friends and contacts in

²³ Transcript, pp. 88-89 available at http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf

various social networks and the number of times they retweet or repost information a person provides. Klout uses 400 signals from eight different networks to update a person's Klout Score every day, and discards information over 90 days old.²⁴ People are able to opt out of the calculation of a Klout score about them.²⁵ The major business function of a Klout score is to enable businesses to reach social media participants who might be especially influential if they were persuaded that a particular product or service was valuable.²⁶

None of the activities of Klout appear to be harmful to the consumer. Nevertheless, the discussion at the workshop suggested that Klout was functioning as an entity that should be regulated under the FCRA because a Klout score had been used by an employer to make an eligibility decision about an applicant. But a single use of a piece of information about a prospective employee does not generate coverage under the FCRA. To be covered the information provided must be a consumer report, that is it must be "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility..."²⁷ A one-time use of a Klout score by an employer does not establish that Klout scores are consumer reports. Moreover, the one-time use of a Klout score by an employer in an eligibility decision does not establish that Klout is a credit reporting agency, that is an entity that "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties..."²⁸

A second discussion in the workshop suggested that the practice of cohort scoring was harmful and escaped regulation under the FCRA. An example of cohort scoring was described when a payment card company lowered the credit limit of a cardholder who shopped at places where high-risk customers also shopped. At the workshop, it was pointed out that this risk-based decision was subject to the same panoply of laws that covers all credit and financial decisions and that unfair discrimination in the use of risk factors was covered under these laws.²⁹ That particular example, then, is not an instance of a harmful practice that escapes regulation.

In addition, the concern was raised at the workshop about other possible circumstances where "who your friends are tells companies who you are", and the

²⁴ <https://klout.com/corp/score>

²⁵ <http://klout.com/corp/privacy>

²⁶ <http://klout.com/s/business>

²⁷ 15 U.S.C. §1681a(d)(1) available at <http://www.law.cornell.edu/uscode/text/15/1681a>

²⁸ 15 U.S.C. § 1681a(f) available at <http://www.law.cornell.edu/uscode/text/15/1681a>

²⁹ Transcript, pp. 94-95 available at

http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf

general use of cohort analysis as a “predictive modeling validation tool.”³⁰ The implication was that all cohort analyses should be subject to regulation. These cohort analyses are common, almost ubiquitous in today’s online digital environment. Personalization functions at online outlets such as movie, book or music websites involve cohort analysis. Recommendation engines suggest that other people who bought the product you just bought also bought a different product. People are put in cohorts and their future behavior predicted based on the behavior of others in that cohort.

Typically this use of cohort analysis is not harmful. People can always ignore these recommendations and use their own judgment and taste. For many consumers, these recommendations are a source of information and welcome, if sometimes unanticipated, guidance. On balance, these practices seem beneficial and any possible harm easily outweighed by the advantage most consumers find in these analyses.

To the extent any specific use might be harmful, the FTC should focus on whether that use is already regulated. For example, when cohort analysis is used for eligibility decisions, the FCRA applies. Social Intelligence, for instance, scours social media and provides reports to employers on a wide variety of factors that might influence an employer’s decision, which could include cohort information derived from the friends of a potential employee. The company is careful to comply with all the anti-discrimination statutes, and will not screen employees on the basis of any of the protected categories of race, color, religion, sex, or national origin. And they are in compliance with the FCRA.³¹

The key distinction is between the use of scores to make decisions about a company’s own customers or potential customers and the use of scores to make an eligibility determination. In the workshop, participants asserted that regulations should apply when credit offers are made based on scores relating to social networking status or when an applicant is denied credit.³² In those circumstances, however, FCRA does apply. Any consumer score that is used to make a final eligibility decision or take an adverse action regarding these eligibility contexts is potentially a consumer report. But there are different circumstances where consumer scores are not used to make final decisions about applicants. The final eligibility decision or adverse action is still to be made and the score is used solely to directly market to people to encourage more useful applications. Scores used in this

³⁰ Transcript, p. 94 available at http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf

³¹ See SIIA, *How The FCRA Protects the Public*, December 2013 available at http://siiia.net/index.php?option=com_docman&task=doc_download&gid=4767&Itemid=318

³² Transcript, p 97 available at http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf

context are marketing information, not eligibility information and need not be regulated under FCRA.

It is worth reiterating why marketing scores are not currently, and should not be, regulated. Inaccurate marketing scores do not lead to substantial consumer harm. They lead only to irrelevant and uninteresting advertising and marketing. Consumers have a variety of ways to learn about product offerings besides targeted ads, such as traditional print and video marketing as well as simply inquiring directly. In the absence of substantial consumer harm, FTC has concluded that it is not necessary to require consumer protections such as disclosure and correction for consumer data used only for marketing purposes:

“For data used solely for marketing purposes, the Commission agrees with the commenters who stated that the costs of providing individualized access and correction rights would likely outweigh the benefits.”³³

The FTC should explicitly reach a similar conclusion regarding consumer scores used only for marketing purposes.

A further discussion concerned price differentiation. Several participants in the workshop described circumstances where online scores were used to charge different customers different prices for the same product or service. The suggestion was that this was a consumer harm that deserved regulation, but that was not currently under any form of regulation.

In itself, price differentiation is not illegal and is not a consumer harm. It is a commonly accepted business practice used in a wide range of contexts including discounts for senior citizens, textbook and software discounts for students, and airline pricing. Price differentiation seeks to price according to a variety of factors, including consumer’s willingness to pay, which often means that people with higher incomes or greater wealth will pay more and less well-off consumers will pay less. Indeed, one oft-cited example of differentiated hotel and airline ticket pricing based on devices appeared to charge users of more expensive computers more, resulting in lower airline prices for consumers with less disposable income.³⁴

As a result, differential pricing can contribute to the progressive goal of reducing economic inequality. Price differentiation often increases output by making products and services affordable to consumers who would otherwise not consume them. When price differentiation increases output, welfare for society as a

³³ Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers, FTC Report, March 2012 p. 65 available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>;

³⁴ Dana Mattioli, On Orbitz, Mac Users Steered to Pricier Hotels, Wall Street Journal, August 23, 2012 available at <http://online.wsj.com/news/articles/SB10001424052702304458604577488822667325882>

whole increases.³⁵ In the international context, price differentiation can benefit developing countries by making the best products and services available to them at a price that the local market will bear. SIIA recently released a white paper (attached) on the benefits of geolocation tools and international price differentiation.³⁶

In addition, it is important to note that price differentiation is often based on a number of factors. For example, proximity to a competitor is a key factor, as Ashkan Soltani concluded during his presentation at the workshop. In addition, timing of purchase is long-accepted factor that can significantly alter prices, as is the case with airline tickets. As the FTC evaluates claims of price differentiation, it should be mindful of the many factors that businesses use to determine how to price their products and services.

Evaluation of Workshop Proposals

One recommendation that emerged from the workshop was for disclosure. As one participant put it there should be “no secret scores, no secret factors.”³⁷ Recommendations at some point in the workshop included the idea that an array of notice, consent and access requirements should apply to consumer scores.

These recommendations are too broad. Privacy requirement such as notice, consent and access should apply only in certain circumstances. Adam Thierer notes the defect in “precautionary” thinking that recommends regulatory action solely on the basis of possible harms, saying, “It is not enough to claim, ‘Well, it *could* happen!’”³⁸ Benjamin Wittes also suggests that the possibility of harm is not enough to warrant regulation, saying, “...for a privacy claim to be cognizable as a problem warranting public policy attention, there must be some asserted harm...” which he defines as “the malicious, reckless, negligent, or unjustified handling, collection, or use of a person’s data in a fashion adverse to that person’s interests...”³⁹

The FTC and Administration officials have suggested that privacy requirements should apply when the business context calls for it, but not when the

³⁵ Hal Varian, Differential Pricing and Efficiency, First Monday, Volume 1, Number 2, August 5, 1996 at <http://firstmonday.org/ojs/index.php/fm/article/view/473/394>

³⁶ SIIA, [Geolocation Tools and Geographical Price Discrimination](http://siiia.net/index.php?option=com_docman&task=doc_download&gid=4958&Itemid=318), 2014 available at http://siiia.net/index.php?option=com_docman&task=doc_download&gid=4958&Itemid=318

³⁷ Transcript, p. 100 available at http://www.ftc.gov/system/files/documents/public_events/182261/alternative-scoring-products_final-transcript.pdf

³⁸ Adam Thierer, [Permissionless Innovation](http://mercatus.org/permissionless/permissionlessinnovation.html), Mercatus Center, George Mason University, 2014, p. 31 available at <http://mercatus.org/permissionless/permissionlessinnovation.html>

³⁹ Benjamin Wittes, “Database: Digital Privacy and the Mosaic,” Brookings Institution, April 1, 2011, p. 17 available at http://www.brookings.edu/~media/Files/rc/papers/2011/0401_database_wittes/0401_database_wittes.pdf

information practices in question are commonly accepted business practices.⁴⁰ But this “respect for context” approach could unnecessarily require privacy restrictions even when there is no consumer harm. An alternative to this standard would be to consider privacy restrictions when a substantial risk of harm exists in the use of the data and these privacy requirements are needed to mitigate these risks.⁴¹ This is the approach SIIA recommends and is behind existing regulatory regimes such as FCRA and the FTC’s section 5 unfairness authority.

The discussion at the workshop has not demonstrated that the context in which consumer scores are used requires new privacy regulation. Vague suggestions that consumers would be surprised if they learned how their information was used for consumer scores are speculative and will not bear the normative weight that is sometimes put on them. Nor has the workshop described significant unregulated harms that could result from the use of consumer scores. In the absence of these showings, the FTC should not contemplate additional privacy requirements for consumer scores.

If in the future there is compelling evidence that additional consumer protections are needed, then these protections should not be provided at the early stages of the data analytical process described earlier. Rather, privacy regulation should be undertaken at the stage of usage or implementation, rather than at the stages of data collection or analysis.⁴² Data collection is not in itself harmful and in an age of ubiquitous data collection any attempt to impose controls on data collection improperly puts the entire burden of regulation on data subjects who are ill-equipped to assume this role. As discussed later, companies need to take on a greater role. The need for this realignment of responsibilities was highlighted several years ago by Daniel Weitzner and his colleagues who said:

Consumers should not have to agree in advance to complex policies with unpredictable outcomes. Instead, they should be confident that there will be redress if they are harmed by improper use of the information they provide, and otherwise they should not have to think about this at all.⁴³

⁴⁰ Executive Office of the President, *Consumer Data Privacy In A Networked World: A Framework For Protecting Privacy And Promoting Innovation In The Global Digital Economy* February 2012, <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>; Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, FTC Report, March 2012 at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>; see also Nissenbaum, *Privacy In Context* for the origin of this idea of contextual integrity

⁴¹ J. Howard Beales, III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information* 75 U. Chi. L. Rev. 109 2008

⁴² Zarsky, p. 49

⁴³ Daniel J. Weitzner, et al., “Information Accountability,” *Computer Sci. & Artificial Intelligence Laboratory Technical Report MIT-CSAIL-TR-2007-034*, 2007, available at <http://dspace.mit.edu/bitstream/handle/1721.1/37600/MIT-CSAIL-TR-2007-034.pdf>.

Moreover, no new privacy requirements should fall on the external service providers or industry infrastructure providers described earlier. As noted above, these entities perform a necessary role in the industry but do not themselves collect or direct the use of consumer information. They are merely service providers to the information companies. As such, they are removed from decision making regarding information collection and use and should be immune from any new privacy requirements that might be contemplated for information companies in the area of consumer scores.

Additional Observations

The fact that the FTC should not recommend additional privacy requirements for consumer scores at this time does not mean that nothing should be done. In general the use of predictive analytics and big data raises concerns that deserve the attention of policymakers, privacy advocates, and the business community. There is even a good reason to suppose that these concerns go beyond privacy to general issues of fairness and justice in the use of information.⁴⁴ The expanding use of big data analytics to generate increasingly useful consumer scores is part of the environment generating these concerns.

There are alternatives, however, to increased government regulation for addressing these concerns. One approach emphasizes the need for company accountability.⁴⁵ Key elements of this new approach are:

- Reduce the focus on data collection and the attending notice and consent requirements, and focus more on a practical assessment of the risks (and benefits) associated with data uses.
- Eliminate or substantially reduce the role of the Purpose Specification and Use Limitation principles, which require a specific, articulated purpose for collecting personal data usually at the time of collection and restrict data uses to that purpose or related, “not incompatible” purposes.
- Restore the balance between privacy and the free flow of information that was the original goal of the OECD Guidelines, and avoid suppressing innovation with overly restrictive or inflexible data privacy laws.
- Make data users more accountable for the personal data they access, store, and use, and hold them liable when harm to data subjects occurs.

⁴⁴ Cynthia Dwork & Deirdre K. Mulligan, *It's Not Privacy and It's Not Fair*, 66 *Stan. L. Rev. Online* 35, September 2013 available at <http://www.stanfordlawreview.org/online/privacy-and-big-data/its-not-privacy-and-its-not-fair>

⁴⁵Viktor Mayer-Schönberger, Fred Cate and Peter Cullen, *Data Protection Principles for the 21st Century*, Oxford Internet Institute, December 2013 available at <http://www.oii.ox.ac.uk/news/?id=1013>

- Adopt a broader definition of the “harms” that inappropriate uses of personal data can cause, and put in place practical frameworks and processes for identifying, balancing, and mitigating those harms.

This accountability framework tries to shift to the data user the responsibility for protecting consumers from harm and limit reliance on the active involvement of the data subject.

In addition, a number of scholars have stressed the importance of internal accountability. For example, there is the interesting thought experiment of consumer subject review boards suggested by Ryan Calo.⁴⁶ The idea is that companies should appoint a small group of employees with different backgrounds to assess data projects involving consumers. Victor Mayer-Schonberger and Kenneth Cukier have a similar suggestion of an internal ombudsman (an algorithmist) who would internally vet projects.⁴⁷ Institutional reforms that provide more internal accountability might be one way to implement an accountability framework in general and in particular for the development and use of consumer scores. The FTC role could be to encourage companies through guidance and policy advice to devote internal resources to these assessment tasks in general and in particular in regard to the consumer scores.

Finally, the workshop revealed substantial differences in what constituted consumer harm. Some participants seemed to think the very existence of consumer scores, like the very existence of data bases, constituted a consumer harm that demanded government regulation. The FTC could help to clarify these issues by holding a workshop or series of workshops specifically directed to defining and clarifying the nature of what constitutes consumer harm in information use. The upcoming September workshop on the data use that might adversely affect low income or underserved customers would be a good opportunity to do this.

⁴⁶ Ryan Calo, “Consumer Subject Review Boards: A Thought Experiment,” 66 Stan. L. Rev. Online 97, September 2013 available at <http://www.stanfordlawreview.org/online/privacy-and-big-data/consumer-subject-review-boards>

⁴⁷ Mayer-Schönberger & Cukier, *Big Data*, pp. 181-182