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Federal Trade Commission, Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Submitted Via <https://ftcpublishcommentworks.com/ftc/alternativescoringproducts/>

RE: Spring Privacy Series: Alternative Scoring Products, Project No. P145401

To Whom It May Concern:

On behalf of the Direct Marketing Association (“DMA”), we provide these comments in response to the Federal Trade Commission’s (“FTC”) “Alternative Scoring Products” workshop on March 19, 2014. DMA appreciates the opportunity to clarify how data is used in the marketing ecosystem to provide consumers with relevant and useful advertisements and offers.

The DMA is the world’s largest trade association dedicated to advancing and protecting responsible data-driven marketing in the United States (“U.S.”) and globally.¹ Founded in 1917, DMA represents thousands of companies and nonprofit organizations that use and support responsible data-driven marketing practices and techniques. DMA provides data-driven marketers the voice to shape policy and public opinion, the connections to grow members’ businesses, and the tools to ensure full compliance with responsible and best practices as well as professional development.

Marketers have engaged in the responsible collection and use of data for marketing purposes for more than 100 years. Marketers have long derived value from data using predictive analytics, a process that enables marketers to provide more relevant and interesting ads or offers to consumers. Predictive analytics are used to predict a consumer’s likelihood of being interested in a product or service, to develop new and innovative products and services, to enhance the consumer experience by delivering relevant content, and to prevent fraud and provide secure transactions.

The marketing uses of predictive analytics are wholly distinct from the way that “credit scores” are used to establish a consumer’s eligibility for purposes including credit worthiness, insurance, or employment. In contrast to these eligibility determinations, predictive analytics use propensity modeling to make the best guess about what consumers may be interested in. The results of predictive analytics are beneficial—the delivery of a marketing offer that has a greater chance of being relevant and interesting to a consumer. Another beneficial application of predictive analytics is in the context of security. Predictive analytics can help turn raw transactional and other data into useful information used to prevent fraud and promote increased consumer safety.

¹ www.thedma.org

The remarkable growth of the Data Driven Marketing Economy (“DDME”) has been possible in part because a flexible framework of legal and self-regulatory protections currently governs the responsible use of data for marketing purposes. This robust framework of sectoral laws and self-regulatory codes protects consumers while allowing responsible data use to drive innovation, fuel the U.S. economy, create jobs, and deliver significant value to American consumers. The framework combines specific legal restrictions, which focus on concrete harms that can flow from the potential misuse of data, with enforceable industry self-regulation that responds to a rapidly changing business landscape. According to a recent study, the resulting DDME added \$156 billion in revenue to the U.S. economy and fueled more than 675,000 jobs in 2012 alone.²

Only last week, the FTC announced two enforcement actions that illustrate the continued effectiveness of the current sectoral regime and self-regulatory frameworks. The Commission reached settlements with two data companies regarding potential violations of the Fair Credit Reporting Act (“FCRA”), based on the potential harm their data sales practices may have caused to customers.³ DMA commends the FTC for their continued efforts to identify concrete harms to consumers, including the scheduling of a public workshop focused on both the positive and negative impacts of predictive analytics on low income and underserved consumers.⁴

Given that a robust and successful framework of protections already governs the use of data for marketing purposes, DMA encourages the FTC to continue the U.S. tradition of focusing on discernible, concrete harms to consumers when considering the use of consumer data in the commercial sphere.

I. The U.S. has a Long History of Predictive Analytics in Marketing

The use of “predictive analytics” in marketing is not a new phenomenon. In 1888, Sears predicted that consumers in the rural West would more likely be interested in Sears’ catalogs because those consumers lacked access to stores with Sears’ products. In 1912, L.L. Bean purchased from the State of Maine a list of non-residents who had obtained Maine hunting licenses, correctly predicting that such out-of-state hunting enthusiasts would be interested in a hunting gear catalog. These are just a few of the innumerable examples of businesses leveraging the power of data and analytics to boost their product and service offerings and improve the consumer experience through smarter marketing.

Recent advances in methods of predictive analytics have greatly enhanced, but not changed fundamentally, the role that marketing plays in the U.S. economy. Technology and innovation have vastly improved the results of predictive analytics, yielding significantly greater returns for consumers who receive more tailored offers and advertisements, and for businesses

² Deighton and Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* (2013), available at <http://ddminstitute.thedma.org/#valueofdata>.

³ Federal Trade Commission, Press Release: Two Data Brokers Settle FTC Charges That They Sold Consumer Data Without Complying With Protections Required Under the Fair Credit Reporting Act, available at <http://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data>.

⁴ Federal Trade Commission, Press Release: FTC to Examine Effects of Big Data on Low Income and Underserved Consumers at September Workshop, available at <http://www.ftc.gov/news-events/press-releases/2014/04/ftc-examine-effects-big-data-low-income-underserved-consumers>.

that see higher returns on their marketing investments. The result is a more efficient and effective relationship between consumers and businesses.

Nonprofits also use predictive analytics to keep fundraising costs down by using analytics to focus on the people most likely to donate, and to seek out populations in greatest need of assistance and tailor their approach to engaging those communities. For example, the Humane Society, World Vision, and other nonprofits create statistical (demographic) pictures of major donors and then search for new donors that fit those profiles.⁵ Political campaigns use predictive analytics to target political advertisements by mail, and online in real-time. Pandora, for example, offers a new service enabling candidates and political organizations to target Pandora listeners based on its sense of their political leanings.⁶ They do so by matching election results for a particular ZIP code with subscribers' musical preferences in that same ZIP code.

Today, the goal of marketers remains the same—to use data and analytics to connect with customers and consumers in meaningful ways. While modern techniques are more sophisticated, the fundamental approach remains the same—to predict consumer propensity for the purpose of delivering relevant and meaningful marketing offers and advertisements to consumers.

II. Marketing Predictive Analytics are not “Scoring”

Consumers understand “scoring” as a process of assigning a fixed numerical valuation to a consumer for making an eligibility determination related to credit worthiness, insurance, or employment, the denial of which carries potentially significant harm to the consumer. In contrast, marketing does not “score” individuals, but rather builds “propensity models” that estimate consumers' preferences for marketing, content, and services. The use of predictive analytics in marketing has one purpose: to improve the likelihood that consumers receive marketing, content, and other services tailored to their interests and preferences.

There are many differences between credit scoring and marketing predictive analytics, but we highlight two of the most obvious and important. The first is eligibility. A credit “score” is used to establish an individual's eligibility to receive a product or benefit. The FCRA regulates the use of credit scores to make eligibility decisions for credit, employment, housing, and other areas in which a consumer faces material consequences based on a decision. In these contexts, the law imposes obligations on the user of the information, such as notifying the consumer of an adverse decision and providing other information relating to the use of a credit report in making important eligibility decisions. The use of predictive analytics in marketing has no such impact on a consumer. Marketers use predictive analytics to reach out to groups of consumers to advertise, offer, and otherwise deliver content. Thus, no eligibility decision is made and there is no possible “adverse impact” when marketing predictive analytics are used — the worst that can happen to a consumer is that the substance of the ad, offer, or content will not be tailored for that consumer.

⁵ Wallace, Nicole. *Nonprofits Are Taking a Wide-Eyed Look at What Data Could Do*. The Chronicle of Philanthropy. Feb. 24, 2014, available at <https://philanthropy.com/article/Nonprofits-Take-a-Wide-Eyed/144857/>.

⁶ Dvoskin, Elizabeth. *Pandora Thinks It Knows if You Are a Republican*. Wall Street Journal. Feb. 13, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304315004579381393567130078>.

A helpful way to think about the distinction between credit scoring and marketing predictive analytics is to look at advertising for cars. Marketers use predictive analytics to identify audiences of consumers that share a common interest – a particular style of car (*e.g.*, sedan versus minivan, electric versus diesel), or consumers that are more likely to buy a used car than a new car. Providing ads that are relevant to consumers’ interests is more efficient for marketers and provides greater value to consumers. If a person responds to the car ad by visiting a local dealer, elects to purchase a car, and then seeks to secure a car loan, then an eligibility determination may be made in order to extend credit or services. The use of propensity modeling and other forms of analytics to identify the most relevant audience for a marketing campaign is not the same process used in establishing an individual’s creditworthiness for securing a loan. The data used for marketing the car to a consumer is not used in the eligibility decision regarding whether that consumer receives a car loan. Thus, there is no adverse impact on a consumer when marketing predictive analytics are used for marketing purposes.

Second, there is no one “marketing score” for a consumer; predictive analytics reflect the fact that consumer propensities are dynamic, based on factors such as age, education level, geography, and other factors that evolve over time, all of which contribute to consumers’ various preferences and propensities and cannot be captured in a single valuation. Because of this, much of the data being used to model consumer propensities has a fixed shelf life, and a marketer’s “best guess” of any given consumer’s preferences or propensities on any particular subject or issue is reflective of the combination of these dynamic factors at a specific moment. What a consumer likes or is interested in buying today is not likely to be the same tomorrow. Marketing data is similarly dynamic in order to keep pace with constantly changing consumer preferences.

DMA also would like to provide comment on a presentation made during the workshop, in which Ashkan Soltani proffered that “price differentiation” is prevalent in the marketplace. It is inaccurate to describe the use of predictive analytics to tailor marketing offers to consumers as “price differentiation.” On a basic level, price differences occur in the marketplace for many reasons, including the costs associated with delivering products to different locales (*i.e.*, the placement of distribution centers relative to the consumer seeking to purchase a good). However, in many instances, predictive analytics have the effect of lowering prices for consumers and increasing the quality of customer service. This is no different than the price or service differences between consumers that result when one consumer is part of a customer loyalty program and the other is not. Frequent flyer programs serve as a good example. Frequent flyer program members often receive preferred services such as early boarding privileges, access to airport clubs, and specially tailored flight offers. At the same time, new customers may receive a coupon or better pricing than current customers in an attempt by the business to acquire new customers. Consumers do not label such discounts pejoratively as causing “disparate impact” or establishing “price differentiation schemes” because these discounts lower prices for consumers and increase the quality of customer service. Similarly, marketing tools that help match consumers with relevant offers do not harm the public, but in fact benefit consumers through greater efficiency and lower costs.

III. Beneficial Uses of Marketing Predictive Analytics

In the marketing context, predictive analytics is the process of applying statistical techniques, such as modeling, to current and historical data for the purpose of tailoring marketing

materials to meet the preferences of consumers. Predictive analytics can be used to boost engagement with existing customers. In this sense, predictive analytics can serve as a customer relationship management tool. Businesses can learn about customers' choices and preferences in order to develop new product offerings or cross-promote goods and services known to be of value to groups of existing customers. Predictive analytics can also be used to identify new customers. The process encourages businesses to grow intelligently and in accordance with the needs and preferences of consumers, making for a more responsive and efficient marketplace. In either case, businesses are able to leverage internal customer data, data provided by a marketing information service provider, or both, to accomplish these goals.

The use of predictive analytics is the means by which retailers, non-profits, and other organizations can tailor their product or service offerings to consumers so that the interaction feels more personal. This means, for example, that if a small business is considering how to invest its limited marketing dollars for a new store opening, predictive analytics can help reveal the types of consumers that would find this news worthwhile – based on geography, demographics, and other relevant factors – and help deliver its marketing materials to just such a group. The information gleaned from predictive analytics would guide the small business in its marketing strategy to ensure the relevance and interest of the advertisements to the recipients and to maximize the return on investment. The consumers receiving the marketing materials would be able to take advantage of the offerings to their benefit. Even more, predictive analytics react to the dynamic evolution of consumers' preferences, making the analysis more valuable over time than a static snapshot.

Predictive analytics are used to protect the safety and security of consumers as well. Data can be modeled to detect patterns of fraud across a business or industry and solutions can be crafted to prevent future fraud. Technological platforms can analyze data in real time to detect irregularities or abnormalities in transactions, and other techniques can evaluate historical data to predict future fraud attempts, and to enhance authentication and verification measures. For example, the application of predictive modeling of fraudulent claims in the insurance industry—a significant and ever-present problem in that industry—has reduced overall claims costs by five percent.⁷ The use of predictive analytics for fraud prevention has yielded tangible, positive results for business and consumers in all areas of the economy. The success is due to advances in technology that permit the analysis of multiple sources of large and diverse data sets.

IV. Value of Marketing Predictive Analytics

The use of predictive analytics benefits the marketing ecosystem and the U.S. economy in many significant ways. The use of digital predictive analytics promotes a seamless brand experience whereby data from in-store, online, and mobile purchasing are integrated to infer consumers' preferences to deliver more relevant marketing and higher value content. The process helps marketers not just “satisfy” their customers by meeting the minimum set of expectations needed for continuing the customers' relationship with the brand, but also to

⁷Steve Culp, *Insurers Help Themselves and Their Customers by Fighting Fraud More Effectively*, Forbes Feb. 3, 2014, available at <http://www.forbes.com/sites/steveculp/2014/02/03/insurers-help-themselves-and-their-customers-by-fighting-fraud-more-effectively/>

“engage” customers to build a stronger relationship that adds value to both the business and the consumer.

It is important to note that the widespread economic and social benefits produced by predictive analytics derive from policies that permit—and encourage—the free flow of data. A recent study, commissioned by DMA’s Data-Driven Marketing Institute (“DDMI”) and conducted independently by Professors John Deighton of Harvard Business School and Peter Johnson of Columbia University, entitled, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* (“Value of Data”), quantifies this fact.⁸ The Value of Data study found that the DDME added \$156 billion in revenue to the U.S. economy and fueled more than 675,000 jobs in 2012 alone. The study also found that an additional 1,038,000 jobs owe their existence in part to the DDME. The study estimated that 70% of the value of the DDME – \$110 billion in revenue and 475,000 jobs nationwide – depends on the ability of firms to share data across the DDME.

The clear efficiencies that are realized by marketing to relevant and interested audiences have spurred entrepreneurs to develop high quality and effective predictive analytics solutions that offer marketers and businesses the opportunity to boost customer engagement and increase outreach to new customers. The burst of innovation in this space has led to the creation of multiple industries surrounding the delivery of predictive analytics solutions, supported by hundreds of businesses, thousands of jobs, and a competitive marketplace driving down costs for businesses and consumers. The savings achieved and the higher returns produced are reinvested into the economy to generate more innovation, creating a positive feedback loop for the American economy.

V. The Sectoral Legal System and Industry Self-Regulation, Together, Protect Consumers While Promoting Innovation

The current regulatory framework, designed to address concrete harms associated with the misuse of data, complemented by self-regulatory codes of conduct backed by enforcement mechanisms, appropriately foster market innovation while protecting and providing great value to consumers.

The use of predictive analytics has not created new concerns regarding the private sector’s responsible use of marketing data for marketing purposes. The expanding scope of data and advancing technology have not made existing protections less valuable or less effective, and policy frameworks should continue to focus on uses of data shown to be harmful to consumers, rather than on restricting the responsible use of data for marketing purposes that drives the U.S. economy.

The current U.S. sectoral legal framework provides protections for consumers in particular areas where the nature of the data, if misused or misappropriated, could cause discernible harm to consumers. The U.S. has wisely taken a harm-based approach to these protections, identifying areas where consumers may be harmed and regulating those areas. For

⁸ Deighton and Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* (2013), available at <http://ddminstitute.thedma.org/#valueofdata> (hereinafter “*The Value of Data*”).

example, the Health Information Portability and Accountability Act (“HIPAA”) protects the use of patient health data, the FCRA protects against the use of consumer data for eligibility purposes, the Children’s Online Privacy Protection Act (“COPPA”) protects children’s privacy on the Internet, and the Gramm–Leach–Bliley Act (“GLB”) protects consumers’ financial privacy. This harm-based approach to regulation has allowed the private sector to use data responsibly to improve consumer interactions with businesses with clear limits on certain uses, while at the same time enabling the delivery of more relevant marketing. The existing sectoral framework has thus proven to be a successful means of advancing innovation while also providing consumers with transparency and control over their data choices.

For decades, the private sector has developed and enforced robust self-regulatory codes of conduct to complement the sectoral legal framework. Unlike legislation, which is static and runs the risk of codifying practices that may become out-of-date even before a bill turns into law, industry self-regulation is nimble by its very nature and thus better suited to provide protections in cutting-edge areas such as the DDME.

The DMA itself promulgates and enforces its *Guidelines for Ethical Business Practice* (“*Guidelines*”), which set forth guidance for how marketers may responsibly collect and use data for marketing purposes.⁹ For more than four decades, DMA has ensured that data is used responsibly through the robust enforcement of the *Guidelines*. The *Guidelines* require choice and transparency regarding responsible collection and use of marketing data. Disclosures about marketing data collection and use should be provided as appropriate, but in a manner fitting the situation. In addition, the *Guidelines* require marketing data to be used solely for marketing purposes.

The *Guidelines* are updated regularly by DMA’s Ethics Policy Committee to account for changes in the way consumers and marketers create and engage with data. The DMA reviews complaints from several sources, such as consumers, member companies, non-members, and consumer protection agencies. Complaints are referred to the DMA’s Ethics Operating Committee and are reviewed for potential violations of the *Guidelines*. Penalties may be assessed, and violations may be referred to the Federal Trade Commission or other appropriate law enforcement agencies as appropriate.

In addition, the Digital Advertising Alliance (“DAA”), an organization that the DMA helped spearhead, has also released its *Self-Regulatory Principles for Online Behavioral Advertising*, *Self-Regulatory Principles for Multi-Site Data*, and *Application of Self-Regulatory Principles to the Mobile Environment* (collectively, “Self-Regulatory Principles”) to provide consumers with effective transparency and choice regarding the collection and use of web viewing data, and data gathered from mobile devices including precise location data and personal directory data.¹⁰ These programs effectively regulate marketing data practices, delivering enhanced transparency and control to consumers.

⁹ Direct Marketing Association. *Guidelines for Ethical Business Practice*. 2014 edition, available at http://thedma.org/wp-content/uploads/DMA_Guidelines_January_2014.pdf.

¹⁰ Digital Advertising Alliance. *The DAA Self-Regulatory Principles*, available at http://thedma.org/wp-content/uploads/DMA_Guidelines_January_2014.pdf.

The DAA programs include specific prohibitions on the use of web viewing data for eligibility purposes. The Self-Regulatory Principles prohibit the collection, use, or transfer of such data for employment eligibility, credit eligibility, health care treatment eligibility, and insurance eligibility, including underwriting and pricing. These restrictions are backed by the DAA's accountability programs, one of which, the DMA's Ethics Operating Committee, is described above.

Self-regulation has worked for decades to ensure responsible use of marketing data for marketing purposes, while enabling the growth of a strong DDME. DMA strongly urges the FTC to continue supporting the vital role of self-regulation, particularly in the absence of any new or widespread harms resulting from the responsible use of data.

VI. Conclusion

The use of predictive analytics for marketing purposes has long driven the relationship between businesses and consumers. Marketing predictive analytics boost industry and society's responsiveness to consumer demands, and help consumers and businesses build lasting engagements that benefit both sides. The application of predictive modeling also increases consumer trust through the deployment of enhanced security measures and fraud prevention techniques. While the use of predictive analytics is a longstanding business tool, recent technological innovations have improved the field in ways that have benefited all parts of the economy and society. The rapid development of and innovation in the use of predictive analytics has spurred U.S. growth, created jobs, and improved the quality and relevance of marketing and content for consumers. These benefits have been fostered by a U.S. regulatory approach that focuses on addressing concrete harms while looking to industry to develop and enforce self-regulation based on best practices that are adaptable to new technology and challenges. DMA supports maintaining this framework to maximize the benefits to consumers, businesses, and the economy.

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DMA thanks you for the opportunity to submit these comments, and we look forward to working with FTC on these important matters. Please do not hesitate to contact me with any questions at (202) 861-2420.

Sincerely,



Peggy Hudson
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Direct Marketing Association