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Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20001

Re: *Big Data: A Tool for Inclusion or Exclusion?* (Project No. P145406) Workshop Comment

Dear Commissioners,

Thank you for organizing this workshop on issues surrounding consumer protection and big data. The event represents a timely and important topic. I submit these comments for the record.

Today's complex media, communications, and information environment is increasingly driven by data and algorithms. The present FTC workshop considers whether the recent rise of big data, in a variety of consumer contexts, is a tool for inclusion or exclusion and aims specifically to "*examine the potentially positive and negative effects of big data on low income and underserved populations.*" While the potential benefits and harms linked to big data are far-reaching and will continue to impact a number of industries, the particular concerns brought forth by the Commission are especially crucial for the current and future activities of the digital marketing industry, one of the largest constituents of big data often in the form of highly detailed personal information.

The digital marketing industry has incorporated novel uses of personal data at a high rate of speed, making it nearly impossible for consumers to fully comprehend current data-based advertising practices and equally difficult for regulators to do their job and steer this industry towards the best interests of consumers. As a result, self-regulation and non-regulation have persisted for the unprecedented collecting, storing, sharing, and selling of U.S. consumers' personal data by firms. This information is then directly used for purposes of advertising-based persuasion, among other functions.[1]

However, as the general public has gained glimpses into just some of the marketing applications of big data, including now infamous examples such as the efforts of U.S. retailer Target to predict pregnancies of its customers to customize ads and coupons,[2] the attention of federal regulators has grown. This increase in regulatory attention (but not yet legislation) is evidenced not only in the present workshop, but also in a number of related efforts. Two May 2014 publications address these issues in depth—the FTC's study *Data Brokers: A Call for*

[1]http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/10/nsa-uses-google-cookies-to-pinpoint-targets-for-hacking
[2]http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html

Transparency and Accountability[3] and the White House Executive Office of the President's report *Big Data: Seizing Opportunities, Preserving Values*.[4]

Understandably, there is growing concern among U.S. consumers and regulators over big data applications, the trajectory and potential of these activities, and whether current measures and safeguards are able to hold firms accountable to operate in the best interests of consumers. These issues are especially important for protecting consumer groups that might be vulnerable to certain types of big-data based influence in the context of advertising persuasion, including low income individuals, children, the elderly, and other potentially vulnerable populations.

In light of this, I wish to pose a simple and yet pressing question to the Commission regarding the big data-based persuasion of all U.S. consumer groups and particularly those who might be most vulnerable to certain persuasions:

Considering the recent capabilities of marketing firms to amass and cross-reference increasingly granular forms of consumer data on a large scale, and related advances in the effectiveness of big data-based consumer influence, how likely is it that these same firms will act against their own business interests when it comes to limiting activities that are simultaneously revenue-generating and yet unmistakably opposed to the desires and/or best interests of consumers?

If the recent trajectory of the data-driven digital marketing industry is any indication—one towards increased and more invasive forms of consumer data collection and use—it remains difficult to imagine an scenario where advertisers will be capable of reigning in their own practices simply on moral or ethical grounds. This is especially critical in cases where predictive analytics and data models are shown through field tests to definitively increase the ability of firms to influence consumers' actions (e.g. notice, click, or buy), and thus boost profitability for any firm willing to employ these practices.

While questions primarily dealing with inclusion and exclusion will remain important for the harmful potentials of big data applications, there is a significant and specific need to assess which consumers are most vulnerable to big data-based persuasion and how these practices function in their present forms, along with an eye towards experimental and emerging applications. Legal scholar and University of Washington Professor Ryan Calo provides a vivid picture of this exact problem, questioning:

"What if an advertiser had a way to count how many decisions you had made, or determine your present emotional state? That advertiser might try to reach you at your most susceptible. An obese person trying to avoid snacking between meals could receive a text on his phone from the nearest donut shop exactly when he was least likely to resist."[5]

Unmistakably, in this fictitious yet realistic example, the desire of the obese dieter is *not* to receive the ad for the donut shop and especially not at that precise moment of vulnerability. And

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[3]http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf
[4]http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf
[5]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309703

yet, if we entertain this somewhat dystopic example, and if say a firm's A/B testing proved that this particular practice increased not only consumers' 'intent to purchase' but also subsequent sales at said donut shop, it is then incredibly difficult to imagine marketers acting against their own financial interests by *explicitly prohibiting* the use of a predictive model to deliver targeted ads that utilized, in this case, a consumer's estimated 1) degree of fatigue, 2) emotional state, and 3) mobile phone-derived location.

Similarly, any number of parallel scenarios related to data-based consumer persuasion might be offered here in order to consider not only the 'what if ?' but also to ponder what practices might currently be in use?

Instead of a tired and obese individual struggling to avoid unhealthy foods, consider the low income consumer whose 1) checking account has just been overdrawn and 2) who is also trying to make it just a few more days until the next paycheck posts, all while resisting the urge to take out yet another high-interest payday loan. These events might trigger an advertisement for a payday loan, perhaps for an especially alluring offer that is 'only available for the next 30 minutes' that displays just before a YouTube video begins.

Or, similarly, take the gambling addict whose 1) history of visiting casinos and 2) tonight's sizable bar tab, together, indicate a timely opportunity to push a mobile phone ad for an online gambling site. These examples are entirely pessimistic in the attempt to underscore the types of temptations that marketers now face under expanded access to bigger and more granular data.[6]

In a marketing firm's decision to restrict data models shown to be effective at influencing consumers and generating transactions, the result of this type of self-imposed regulation would be direct loss of ad revenue. In the cases of the donut shop, payday loan, and gambling website, rather than firms resisting these type of ethically-fraught yet potentially lucrative temptations, it is far easier to imagine quite the opposite. That is, upon the successful testing of the new fatigue-emotion-location ad model, or any of the others, this technique is then incorporated by the firm at scale and offered to all clients to increase ad-based transactions and related revenue streams.

While these pictures of big data-driven marketing are intentionally severe, they are perhaps not as far-fetched as one might imagine given the scope and development arc of current industry practices. However, understanding the fundamental responsibility of marketers—to increase sales and/or boost brand awareness—helps to avoid outright vilifying the industry, as is so often the case over issues of personal privacy and personal data use. For incorporating effective data-driven advertising practices, regardless of whether these might nudge consumers to make poor decisions, it stands to reason that marketers simply cannot help themselves. And how could they be expected to do so? If we maintain that advertisers are principally tasked with this singular responsibility to influence consumers, it is unreasoned to expect self-imposed behaviors that act against one's business interests. The result is the current predicament surrounding big data-based

[6]Data corresponding to each of these time-based events (overdrawing one's checking account, the day of the month/week on which an individual is regularly paid, trips to casinos, and specific credit card purchases) could be easily gleaned and utilized to generate advertisements given the current state of personal data collection and sharing by financial firms with marketers. A similar practice already exists, see http://money.cnn.com/2011/07/06/pf/banks_sell_shopping_data

consumer persuasion and the question of how best to enact advertising regulation in the U.S. given the current state of the art?

Returning to the example of Target corporation's pregnancy prediction-based marketing, the online version of *New York Times* article that initially reported Target's practices garnered an impressive 570 viewer comments. Of these, Joanne from Arizona summed up the feeling shared by many, remarking, "Target, just because you can, doesn't mean you should."[2]

This tension between what is possible and what is implemented speaks well to the current situation. For the big-data based persuasion of consumers, both now and into the future, what will it mean to 'cross the line' so to speak, both legally and ethically?

Projecting an improbable moral compass upon an industry that is squarely tasked with influencing people's behavior, and then anticipating effective self-imposed restraints for developing and incorporating new modes of data-driven persuasion, is unreasonable. For identifying and then protecting the best interests consumers, especially those who are in particularly vulnerable situations, a complete reliance on industry self-regulation is outright dangerous.

I have attempted to raise the question regarding whether marketers can and will act against their own financial interests for limiting data-driven persuasion practices that are both shown to be effective *and* simultaneously opposed to the desires and/or best interests of consumers. An example of this big data dilemma is articulated in Calo's previous example of using an ad to nudge (or perhaps trip) the presently fatigued and obese dieter into the nearby donut shop.

Admittedly, these comments only raise concerns and provide little in the way of answers—a much more difficult task, of course, given the problem. For locating productive ways to begin addressing these and related issues, I look forward to seeing how the upcoming workshop can incorporate a range of critical concerns and, most importantly, provide possible solutions.

When it comes to big data, personal privacy, and consumer protection, the relationship between firms and consumers has gotten off to a very rocky start, with marketers bobbing and weaving to gather as much personal data as possible and then using this information in any way that suggests even a hint (click) of consumer influence. This troubled beginning should come as little surprise. After all, advertising dollars speak in one direction, towards results.

These early and aggressive approaches to coupling big data and advertising means there is now much sorting out to do between firms and regulators. In doing so, the interests of individuals must remain first and foremost. Further, it is crucial to recognize that the early trajectory and barbarism of big data-based marketing (e.g. collection, storage, sale, use) need not dictate its future. Given what is at stake for all consumers, new regulations that are first protective of consumers and second amiable to marketing innovations, in that order, are needed at this time.

Respectfully submitted,
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