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Room H-113 (Annex X)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Submitted via <https://ftcpublic.commentworks.com/ftc/bigdataworkshop>

RE: “Big Data: A Tool for Inclusion or Exclusion?” Workshop, Project No. P145406

The Direct Marketing Association (“DMA”), provides these comments in response to the Federal Trade Commission’s (“FTC”) “Big Data: A Tool for Inclusion or Exclusion” Workshop held on September 15, 2014. DMA appreciates the opportunity to clarify how data is used in the marketing ecosystem to include and empower consumers through relevant and useful advertisements and offers.

DMA is the world’s largest trade association dedicated to advancing and protecting responsible data-driven marketing in the United States 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 long derived value from data using predictive analytics, a process that enables marketers to provide more relevant and interesting ads or offers to consumers. The recent advent of large data sets or “big data” has enhanced, but not changed, the basic role that marketing plays in the United States economy. Namely, the analysis of big data by marketers has made it easier and more efficient to connect consumers with the products and services they desire. These efficiencies have resulted in significant growth in the Data-Driven Marketing Economy (“DDME”) in recent years. In fact, according to a recent study, the Data-Driven Marketing Economy added \$156 billion in revenue to the U.S. economy and fueled more than 675,000 jobs in 2012 alone.² Section I below discusses in more detail the benefits of data for consumers, companies, and our national economy and civil society.

Sections II and III focus on the advantages of the flexible regulatory framework applied to the use of data for marketing purposes in the United States, which has contributed to the remarkable growth of the Data-Driven Marketing Economy. This framework combines specific, harm-based legal restrictions with enforceable industry self-regulation that responds to a rapidly changing business and technological landscape. It is this flexible framework of protections

¹ For more information about the DMA, please see www.thedma.org.

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> (hereinafter “*The Value of Data*”).



governing the responsible use of data for marketing purposes that has helped drive innovation and fuel the U.S. economy.

Against this backdrop, Section V discusses how big data enhances inclusion and empowers consumers in the marketplace.

I. Benefits of Big Data

For nearly a century, DMA members have been collecting and analyzing consumer data responsibly to help connect consumers with relevant messages about products and services. With the advent of the Internet, such techniques have expanded to the online environment, helping businesses provide customized offerings to an even broader consumer audience. This growth has occurred in a regulatory environment, discussed further below, that is effectively expanding transparency and limiting potential harms to consumers.

a. Benefits for the Economy and Society

While commentators have cited speculative warnings about the possible abuse of data, research has been able to show the concrete economic benefits 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.³ As noted above, the *Value of Data* study found that the Data-Driven Marketing Economy 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 part of their existence to these Data-Driven Marketing Economy jobs. The study estimated that 70% of the value of the Data-Driven Marketing Economy – \$110 billion in revenue and 475,000 jobs nationwide – depends on the ability of firms to share data across the DDME.

The billions of dollars and hundreds of thousands of jobs that the Data-Driven Marketing Economy has provided to the U.S. economy can be linked to the responsible use of data by marketers. Innovative applications of marketing analytics to big data provide benefits to society every day by making it more likely that an offer will be valuable to the consumer who receives it. For example, a retailer might look at what a registered customer has purchased at a particular store, through its website, and from its mobile site, and then analyze those purchases in comparison to others who have bought those items. Using analytics, the retailer will predict whether a customer is more likely to want a coupon for jewelry or for kitchen appliances and use the same data to identify and improve the channels where consumers are more likely to purchase and engage with the retailer's products. When successful, these techniques give consumers more information as they navigate the commercial marketplace and help consumers to obtain the goods and services they desire at competitive prices.

³ Deighton and Johnson, *The Value of Data*, at 5.



In addition to commercial marketing, data analytics also support targeting that advances other social benefits. For example, charities and other nonprofit organizations use big data analytics to support their missions. They use the same analytic techniques as marketers to help reach audiences more likely to support their cause and to reach those in greatest need of assistance. Such analytics help lower fundraising costs, freeing up donated funds to work on achieving the organization’s societal mission.

Big data does not require any new regulatory response to the private sector’s responsible use of marketing data for marketing purposes. On the contrary, the existing robust framework of sectoral laws and industry self-regulation has contributed to the thriving Data-Driven Marketing Economy, and to a marketplace of innovative digital goods and services that consumers embrace. DMA encourages the FTC to see the value in the U.S. tradition of focusing on discernible, concrete harms to consumers and to exercise caution in considering any new restrictions on the free flow of data that could impact the United States’ well-functioning and data-driven economy.

b. Benefits for Consumers

Consumers benefit from the use of predictive analytics because it provides them with more information about the businesses that can offer them the goods and services that they need. Specifically, the use of marketing predictive analytics enables businesses to direct data-driven marketing offers to consumers that will be more interesting to them and more relevant to their needs. Such offers direct consumers to businesses that provide the products and services that they desire at competitive prices. As a result, consumers have more information about the marketplace which empowers them to choose the business that can provide them with the best product at the best price. As discussed in more detail below, low-income consumers in particular benefit from receiving targeted advertisements because these advertisements provide them with information that helps identify the businesses that can offer them the goods and services that interest them at prices that will allow them to maximize the value of their earnings.

Predictive analytics based on big data can also be used to protect the safety and security of consumers and for countless other socially beneficial applications. To take fraud prevention as one example, big data can be modeled to detect patterns of fraud across a business or industry and to craft solutions to prevent future fraud. Technological platforms can analyze data in real time to detect irregularities or abnormalities in transactions, while other techniques can evaluate historical data to predict future fraud attempts or enhance authentication and verification measures. 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.⁴ The use of predictive analytics for fraud prevention has yielded tangible, positive results for business and consumers across the economy. This success is due to advances in technology that permit the analysis of large and diverse data sets from multiple sources.

⁴ Steve 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/>.



c. Benefits for Businesses

The goal of marketing has always been to connect consumers with the products and services they desire, when they desire them. The analysis and use of big data by marketers has not altered this goal, but has made this task more efficient. The use of predictive analytics allows marketers to group consumers according to their predicted or self-reported preferences and interests so that marketers can more efficiently direct offers and advertising towards those consumers that have an interest in their products or services. Ultimately, with businesses and consumers having more information about each other, the marketplace functions more efficiently because it is easier for businesses to identify potential customers and for consumers to identify the businesses that can provide them with the best deals.

Businesses benefit from predictive analytics because it allows them to boost engagement with existing customers. In this sense, predictive analytics can serve as a customer relationship management tool. Businesses can learn about their current 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 and reach new customers at a lower cost. 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.

Predictive analytics further allows businesses, non-profits, and other organizations to 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' expressed preferences as they change over time, instead of being limited to a static snapshot of a consumer.

II. The Value of Self-Regulation

The current regulatory framework designed to address concrete harms associated with the misuse of data, which is complemented by enforceable self-regulatory codes of conduct, appropriately fosters market innovation while protecting and providing great value to consumers. Under this framework, consumers have enjoyed both meaningful privacy protections and the benefits of data-driven marketing.



The *DMA Guidelines for Ethical Business Practice* (“*DMA Guidelines*”) are one example of longstanding and successful self-regulatory principles that provide meaningful controls and accountability to ensure that marketing data is used responsibly for marketing purposes.⁵ The *DMA Guidelines* include, among other items, standards for offline and online data practices. Specifically, the *DMA Guidelines* require choice and transparency regarding responsible collection and use of marketing data. For example, Article #31 of the *DMA Guidelines* provides for consumer choice with respect to the collection, use, and transfer of personally identifiable data.⁶ The *DMA 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.

For more than four decades, DMA has helped ensure that data is used responsibly through the robust and proactive enforcement of the *DMA Guidelines* against both DMA members and non-member companies across the Data-Driven Marketing Economy. The *DMA Guidelines* have been enforced in hundreds of data-driven marketing cases concerning deception, unfair business practices, personal information protection, and other ethical issues. In addition, companies that represent to the public that they are DMA members but fail to comply with the *DMA Guidelines* could be subject to enforcement under Section 5 of the Federal Trade Commission Act and comparable state laws.

DMA receives matters for review in a number of ways: from consumers, member companies, non-members, and consumer protection agencies. Complaints referred to DMA’s Ethics Operating Committee are reviewed against the *DMA Guidelines* and if a potential violation is found to exist, the offending organization is contacted, investigated, and advised as to how it can come into full compliance. Most companies work with the Ethics Operating Committee voluntarily to cease or change the questioned practice.

The Committee works with both member and non-member companies to gain voluntary cooperation in adhering to the *DMA Guidelines* and to increase good business practices for data-driven marketers. However, if a company does not cooperate and the Ethics Operating Committee believes there are ongoing violations of the *DMA Guidelines*, it can recommend that action be taken by the Board of Directors including making case results public and referring cases to federal and state law enforcement authorities for review when appropriate. For example, in the period spanning February 2012 through June 2013, DMA’s Corporate & Social Responsibility Committee reviewed 55 cases and 12 of these were made public, including 3 referred to the FTC. Additional Board actions could include public censure, suspension or expulsion from DMA membership.

With the rise of the online advertising ecosystem, DMA joined with other leading advertising and marketing trade associations to spearhead the establishment of the Digital Advertising Alliance (“DAA”) in 2009. The DAA administers *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

⁵ Direct Marketing Association, *Guidelines for Ethical Business Practice* (Jan. 2014), available at http://thedma.org/wp-content/uploads/DMA_Guidelines_January_2014.pdf.

⁶ See *Guidelines* at p. 20.



Principles”) in order to provide consumers with effective transparency and choice regarding the collection and use of web viewing information and data gathered from mobile devices including precise location data and personal directory data.⁵ DMA is one of two accountability programs enforcing the DAA program. The DAA program also prohibits the use of marketing data for credit eligibility, employment eligibility, healthcare eligibility, or insurance eligibility or underwriting purposes. In 2012, the DAA was commended by the White House, the Secretary of Commerce, and the Chairman of the FTC for its work.⁷

The DMA and DAA self-regulatory programs are examples of how the data-driven marketing industry effectively regulates its marketing data practices, delivering enhanced transparency and control to consumers. Informed by our experience with these self-regulatory programs, DMA strongly supports industry self-regulation as the most efficient and effective means of addressing both online and offline marketing and advertising information practices in a manner that takes into account consumer privacy considerations while allowing data-driven innovation to flourish. Legislation tends to be prescriptive and runs the risk of codifying practices that may become out-of-date even before a bill turns into law. Moreover, legislation is static because the uncertainties of the political process make it difficult to update. For example, the Electronic Communications Privacy Act has not been significantly updated since it was enacted in 1986, despite the advances in technology since then. In contrast, industry self-regulation is nimble by its very nature and thus better suited to provide protections in cutting-edge areas such as the information economy. Industry self-regulation is more flexible and adaptable than legislation, and therefore self-regulation can adapt quickly to changes in consumer expectations or available technologies.

III. Robust Laws to Protect Against Improper Discrimination

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 concretely harmed and regulating those areas. For example, the Health Information Portability and Accountability Act (“HIPAA”) protects the use of patient health data, the Fair Credit Reporting Act (“FCRA”) protects against the use of consumer data for credit 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 and enable the delivery of more relevant marketing, with clear limits on certain uses. 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.

It is important to distinguish between marketing uses of data and other potential uses. Marketers use predictive analytics to identify consumers that may be interested in purchasing

⁷ Speech by Danny Weitzner, *We Can’t Wait: Obama Administration Calls for A Consumer Privacy Bill of Rights for the Digital Age* (February 23, 2012), available at <http://www.whitehouse.gov/blog/2012/02/23/we-can-t-wait-obama-administration-calls-consumer-privacy-bill-rights-digital-age> (last visited June 3, 2014).



certain goods or services to include these consumers in their advertising efforts. Such categorization differs significantly from the use of consumer information for eligibility determinations, such as credit scoring, which serves to identify those consumers who should be excluded from a transaction. Because the use of predictive analytics is inclusionary, consumers are not harmed when it is used to place them in one category or another. Such categorization does not prevent consumers from obtaining information about other goods or services, nor does it prevent them from choosing to enter into a transaction for the goods and services that they need. Unlike the use of consumer information for marketing predictive analytics, Congress concluded that the use of information for lending eligibility determinations (and in certain other specific areas) presents a possibility for consumer harm because inaccurate categorization with respect to such determinations could inappropriately deny a consumer the opportunity to obtain important goods and services.

Because eligibility determinations can exclude consumers from certain transactions, such business decisions are more heavily regulated than marketing. For example, when a business uses a credit score to establish an individual's eligibility for a loan, the business must comply with the provisions of the FCRA. 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 when data is used for marketing purposes is that the substance of the ad, offer, or content might not be successfully tailored for that consumer.

A way to illustrate the distinction between credit scoring and marketing predictive analytics, and how this distinction impacts consumer inclusion, is to look at the example of a car purchase. 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. However, when a consumer is categorized as having a preference for a certain type of car, the use of predictive analytics does not prevent that individual from obtaining information about other vehicles through the Internet, by speaking with a dealer, or in any other way. The use of predictive analytics to tailor advertising does not deny a consumer access to a vehicle or prevent a consumer from purchasing a different vehicle. Even where predictive analytics are used, the use of data to drive marketing is inclusionary – it boosts consumers' ability to navigate the marketplace.

The act of purchasing a car, however, is a different matter. For many consumers, the ability to purchase a car depends on access to financing on fair terms. A consumer's ability to purchase a vehicle through financing is not contingent on the process used to deliver advertisements to the consumer, but instead depends on a separate process, governed by federal

law, to determine the consumer's eligibility for a loan. This decision is made by a different entity and is based on different information than what the marketer relied on originally to identify the consumer as someone who may have an interest in a particular type of car. Moreover, the loan process is highly regulated to protect consumers' interests and guard against the potential discriminatory exclusion of consumers from the auto marketplace. This stage of the process is very different from the use of predictive analytics for marketing, where there is no adverse impact on a consumer and no concern about market exclusion.

Another important distinction between data used for marketing purposes as opposed to eligibility decisions is that there is no one static "marketing score" for a consumer; predictive analytics reflect the fact that consumer propensities are dynamic, based on factors that evolve over time, all of which contribute to consumers' various preferences and propensities and cannot be captured in a single valuation. For example, a car dealership wants to advertise its cars to an audience of consumers that are likely "in market" for a new car. Using predictive analytics, a dealer can more likely reach an audience of "auto intenders" with its advertising. This practice helps make the dealer more efficient with its resources and provides information to consumers in a timely manner that is relevant to their interests. However, once a consumer purchases a new car and is no longer "in the market", it would be inefficient, and likely ineffective, for the dealer to continue to advertise its cars to that consumer. 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. Predictive marketing data therefore evolves at a much faster rate than regulated credit scores. 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.

IV. Big Data Is a Tool for Inclusion

Specific concerns have been raised about the impact of big data practices on consumers with lower incomes and those who are members of groups that have traditionally faced discrimination. Such low income and underserved populations benefit from the use of big data to perform marketing predictive analytics in the same manner as other consumers. Specifically, the receipt of more relevant marketing information helps empower these individuals to make decisions in the marketplace that will maximize their purchasing power and more closely meet their needs. More and better data sets may actually help to enhance market participation by ensuring that advertising messages are tailored, rather than directed to broad audiences.

At the same time, the use of big data to provide more relevant marketing information also does not prevent any populations from obtaining information about other goods and services that may interest them or from participating in the marketplace. Where marketers advertise to audiences that are not interested in the product, the result is that members of these populations could receive irrelevant advertising. And, where potentially interested consumers do not receive advertising, they remain able to seek out and purchase the goods. Indeed, the data-driven Internet makes it easier than ever for consumers to find and compare products, and targeted advertising means that consumers' expressed interests will soon be translated into more relevant advertising messages.



Big data also helps businesses that serve these populations to tailor their offerings over time, through market research and product development, to better meet the needs of these populations. Thus, when big data is used to facilitate communication between businesses and low income and underserved populations, such consumers are able to find better deals, businesses are able to reach new customers, and the marketplace functions more efficiently.

The DMA believes that the current regulatory framework, which balances legislation to address concrete harms associated with the misuse of data, with complementary self-regulatory codes, provides the necessary flexibility to protect members of low income and underserved populations while also ensuring that they are able to take advantage of the consumer benefits that flow from the use of big data for predictive marketing. Specifically, the current framework provides clear guidance and structure around the collection and use of consumer information in areas that could result in concrete harm to consumers while giving businesses the ability to innovate in areas where such harm is considerably more remote. This room for innovation is important because it allows businesses to provide beneficial products and services at lower cost, making them more accessible to all populations, and it provides businesses with the opportunity to gather the information that they need to identify problems that need to be fixed in successive iterations of the product or service. Because businesses operate in a competitive marketplace, they are sufficiently motivated to regularly monitor and improve their products in light of the information that they collect to make sure they reach all potential customers.

Alternatively, legislation and regulation create greater costs to develop new products and services, which may result in the product or service never being brought to the market or may place it out of reach of lower income populations. As a result, businesses may not be able to collect information about the needs and interests of diverse populations, and therefore may not be able to provide the same benefits to low income individuals that other consumers enjoy through their participation in the Data-Driven Marketing Economy. This increases the possibility of creating “data deserts”⁸ – areas of the country characterized by a lack of access to high-quality data that may be used to generate social and economic benefits – in communities with a significant low income population. Without information about the needs of these populations, the business community may refrain from investing in these areas due to the increased cost of identifying customers and reaching them with information about the products or services that the business offers. The result would be that low income customers will have fewer options and less information about where to find the best offers for the goods and services that they need.

The DMA also believes that regulatory requirements mandating transparency of the algorithms that businesses use when performing predictive marketing analytics is not appropriate. Businesses that provide marketing predictive analytics compete against each other on the basis of the quality of the information that they provide to their customers. This information is derived by filtering the raw data that the business collects through its proprietary algorithms. Thus, requiring these businesses to disclose their algorithms fundamentally undermines the basis on which they compete with each other. Already companies provide

⁸ Daniel Castro, *The Rise of Data Poverty in America*, Center for Data Innovation (September 10, 2014), available at <http://www2.datainnovation.org/2014-data-poverty.pdf> (last visited September 30, 2014).



transparency around the types of data they use and the purposes for which it is used. In addition, market forces provide substantial incentive for businesses performing marketing predictive analytics to identify accurate sources of raw data and to develop algorithms that provide accurate results. The more accurate the information that these businesses are able to provide to their customers, the more value the customers derive from the transaction which increases the potential for continued business.

V. 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 including the availability of big data have improved the field in ways that have benefited all parts of the economy and society and can promote inclusiveness in the consumer marketplace. 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 continuing our dialogue with the FTC on these important matters. Please do not hesitate to contact me with any questions at (202) 861-2420.

Sincerely,

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