GEORGETOWN LAW

December 18, 2015

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

VIA ELECTRONIC FILING

Re: Comments of Alvaro Bedoya and Clare Garvie,[1] Center on Privacy & Technology at Georgetown Law, on "Follow the Lead: An FTC Workshop on Lead Generation."

I. Introduction: What is steering African Americans to online payday lenders?

Payday loans hurt people. Often billed as escape valves[2] for emergencies or unexpected expenses, these loans are for most borrowers grinding debt traps that ensnare families struggling to pay the regular costs of everyday life: rent, prescription medicine costs, the heating bill.[3] At the FTC workshop on lead generation held on October 30, 2015, these and other harmful effects of payday loans were a recurring theme in panel discussions.

But one issue was never raised in any of the discussions—the fact that payday loans do not hurt equally. More than all other races or ethnicities, payday loans disproportionately impact African Americans. Black people make up roughly 13% of the total American population, yet they constitute 23% of all storefront payday loan borrowers.[4] One might assume this is due to greater poverty rates in the black population. In fact, African Americans are more than twice as likely as other races or ethnicities to take out a payday loan—*even after controlling for income*.[5]

Why is this? For payday loans made by storefronts, part of the answer lies in where those outlets are located, and where traditional banking institutions are scarce.

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[1] The views expressed here are provided in an individual capacity and do not necessarily reflect those of the Center on Privacy & Technology or of Georgetown Law.
[2] *See, e.g.*, *3 Times Payday Loans Make Sense*, THE HUFFINGTON POST BLOG, April 15, 2015.
[3] *See* PEW CHARITABLE TRUSTS, *Who Borrows, Where They Borrow, and Why*, July 2012, at 14 ("*Who Borrows*").
[4] *See* PEW CHARITABLE TRUSTS, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*, Oct. 2014, at 26 ("*Fraud and Abuse Online*").
[5] *Who Borrows,* at 9.

The Center for Responsible Lending found that payday lending outlets in California are more than twice as concentrated in African American and Latino neighborhoods than in white neighborhoods, irrespective of neighborhood income.[6]

When we look at *online* payday loans, however, we see a strange trend: the percentage of borrowers who are African American either stays the same or increases. While African Americans make up 23% of storefront payday borrowers, they constitute 26% of online borrowers.[7] This is a puzzling statistic: African Americans have the lowest Internet access rates of any racial or ethnic group in the United States.[8] One would expect the proportion of black borrowers to *drop* from storefronts to online sources. Instead, the opposite is true. Something is steering African Americans to online payday lenders—and it is likely costing low-income black families many millions of dollars in the aggregate.

The answer, we suspect, lies in the lead generation ecosystem. Data brokers and lead generators compile lists of individuals to target for payday loans segmented by race and ethnicity. Traditional television and radio ads for online payday loans contain messages aimed at minority audiences.[9] Digital advertising networks provide granular ad targeting by ethnicity and racial proxies such as "hip hop culture."[10]

This comment examines the role of online lead generation in creating and perpetuating the disparate impact of payday loans on African American borrowers. We examine how lead generators, an integral component of the online payday lending industry, purposefully target African American and other minority borrowers in advertising. Next, we look at how minority borrowers may be indirectly targeted in disproportionate numbers through the direct targeting of under-banked communities for payday loan ads. Finally, we examine how the automated systems that are responsible for determining when and to whom ads are displayed may create or magnify race-based targeting.

There is persuasive evidence to suggest that the practices of lead generators contribute to the disparate impact of payday loans. In light of these findings, we urge the FTC to use its authority under the Equal Credit Opportunity Act (ECOA) and

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[6] *See* Wei Li, Leslie Parrish, Keith Ernst & Delvin Davis, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, 2, CENTER FOR RESPONSIBLE LENDING, March 2009 (*"Predatory Profiling"*). *See also* Kelly Poe, *Auburn study: payday lenders target African-American neighborhoods*, ALABAMA MEDIA GROUP, Oct. 15, 2014.
[7] *Fraud and Abuse Online* at 28. Nick Bourke, the report's director, has clarified that the increase is not statistically significant. This is why we state that the percentage "either stays the same or increases."
[8] PEW RESEARCH CENTER, *Americans' Internet Access: 2000–2015*, June 26, 2015.
[9] *See infra* section III.
[10] Jeffrey Chester, *Testimony for the Hearing on Behavioral Advertising: Industry Practices and Consumers' Expectations*, at 11–13, note 75, June 18, 2009 (*"Testimony on Behavioral Advertising"*).

Section 5 of the Federal Trade Commission Act (FTC Act) to investigate and bring enforcement actions against lead generation companies contributing to this disparity.

II. The Problem: African Americans represent a disproportionate number of payday loan users.

The long-term and harmful impacts of payday loans are disproportionately borne by African American borrowers. Despite accounting for approximately 13.2% of the national population, African Americans comprise 23% of storefront payday loan borrowers, and 26% of online borrowers.[11] Compare this to white borrowers, who make up 77.7% of the population, but represent only 57% of storefront and 49% of online borrowers.[12] Twelve percent of African Americans have reported using a payday loan, compared with four percent for white respondents.[13]

One might think that this trend stems from long-standing racial and ethnic wealth disparities. It is true that borrowers turn to payday loans when they cannot afford to make recurring expenses on everyday necessities, such as rent, utilities, or groceries.[14] It is also true that those that cannot afford these payments are typically from lower-income households. And in the United States, poverty and race are highly correlated. In 2011, the median income for an African American household was just 59% of that reported for a white household.[15] Today, African American children are four times as likely as their white counterparts to live in poverty.[16]

When we look at who uses payday loans, however, statistics on income disparities do not provide the full answer. Lower income is undoubtedly correlated with a higher likelihood of payday loan use. But it is not the only—or even the strongest—predictor.[17]

In a recent analysis by the Pew Charitable Trusts, the demographic characteristic that most strongly predicts whether someone will take out a payday loan, even after controlling for other characteristics such as income, is whether that person is African American. Put in other terms, after factoring out income from the

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[11] *Fraud and Abuse Online,* at 28.

[12] *Ibid.* Latinos, who make up approximately 17% of the U.S. population, represent 14% of storefront borrowers and 12% of online borrowers. *Ibid.*

[13] *Who Borrows,* at 10.

[14] *Ibid.* at 9.

[15] *See* Vauhini Vara, *Race and Poverty, Fifty Years After the March*, THE NEW YORKER, Aug. 27, 2013.

[16] *See* Eileen Patten & Jens Manuel Krogstad, *Black child poverty rate holds steady, even as other groups see declines*, PEW RESEARCH CENTER, July 14, 2015.

[17] *Who Borrows,* at 9.

equation, the odds of payday loan usage are still 105% higher for African American borrowers than for members of any other racial or ethnic group.[18]

Factors quite apart from wealth disparities appear to be driving this disproportionate reliance by African American borrowers on predatory payday loans. The question is: What are they?

III. Lead generators are purposefully targeting African Americans for online payday loans.

One explanation for this trend is that the online payday lending industry may directly and intentionally target African Americans and other minority groups in their advertising.

Brick-and-mortar payday loan providers traditionally have been concentrated in predominately minority neighborhoods, skewing the market towards certain ethnic groups.[19] This brick-and-mortar trend may have followed payday lending into the growing *online* market in at least two ways. First, there is ample evidence to suggest race- and ethnicity-based targeting occurs in *offline* advertising for *online* payday lending products. Second, online lead generators advertise their ability to target Internet advertisements by race and ethnicity as well.

To the first point, companies frequently target African Americans and other minorities in their offline advertising for payday loans including through radio and television ads, billboards, and calling campaigns. For example, lead generators create, use, and sell email and calling lists of potential consumers that are segmented by race and ethnicity.[20] NextMark, a lead generator that provides tools to advertise companies' products and services to their target markets, sells mailing lists with names like: "Hispanic Cash Advance / Payday Loan Applicants Mailing List" and "African-American Payday - Cash Advance Mailing List." These lists are described as including "consumers who are struggling to make their bills and are looking for fast quick cash and have chosen a payday cash advance to do so."[21]

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[18] *See* UPTURN, *Led Astray, Online Lead Generation and Payday Loans*, Oct. 2015 ("*Led Astray*"). *But see* Donald P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, LIBERTY STREET ECONOMICS BLOG, Feb. 8, 2012 (arguing that after controlling for debt-to-income ratio, past credit delinquency, and credit availability, the racial gap that exists in payday loan usage rates becomes statistically insignificant). The authors acknowledge, however, that the factors they control for might be the product of payday loan usage in the first place. *Ibid.*

[19] *See Predatory Profiling*, at 10 (finding that "payday lenders are nearly eight times as concentrated in neighborhoods with the largest shares of African Americans and Latinos . . . .").

[20] Initial leads, which may include only a person's name and address, are "enriched" by adding information about a potential consumer's "gender, age, household income, household demographic information, education level, and more," which makes the lead more valuable. *Ibid.* at 7–8.

[21] *See Led Astray*, at Section 1. Examples of NextMark lists targeting African American and Latino consumers include: Payday - Cash Advance - Hispanic Mailing List; Hispanic Cash Advance / Payday

AFRICAN-AMERICAN PAYDAY - CASH ADVANCE Mailing List

The AFRICAN-AMERICAN PAYDAY – CASH ADVANCE consumers here take advantage of getting cash today instead of having to wait for payday. Eligibility requires these consumers to use their paychecks as a way of temporarily borrowing money.

SEGMENTS		COUNTS THROUGH 11/30/2015
292,500	TOTAL UNIVERSE / BASE RATE	$95.00/M
24,375	MONTHLY HOTLINE	+ $10.00/M
	PRE-PAID PHONE CARD BUYERS	+ $5.00/M
	NO PRESENCE OF BANK CREDIT CARD	+ $5.00/M
	NO PRESENCE OF RETAIL STORE CREDIT CARD	+ $5.00/M
	NO PRESENCE OF GAS/OIL CREDIT CARD	+ $5.00/M
	BUYS FROM CATALOGS WITH PRE-APPROVED CREDIT	+ $5.00/M
	NEW PHONE CONNECT	+ $5.00/M

DESCRIPTION

The ***AFRICAN-AMERICAN PAYDAY – CASH ADVANCE*** consumers here take advantage of getting cash today instead of having to wait for payday. Eligibility requires these consumers to use their paychecks as a way of temporarily borrowing money. They must also have a valid active bank account, direct deposit and a job. In just a matter of one hour or less, the advanced funds will be deposited into their accounts. When life dishes unexpected surprises in the form of unforeseen expenses like a car repair or a household emergency; a payday loan can resolve a potential financial set back. Some of these individuals need to bridge a short-term cash flow problem between paychecks, avoid bounced check fees, late payment penalties, or other financial emergency. The ***AFRICAN-AMERICAN PAYDAY – CASH ADVANCE*** file is great for offers designed to consolidate debt, credit repair, high interest credit cards, secured credit cards, catalog credit with purchase offers and many others. Consider using the ***AFRICAN AMERICAN PAYDAY – CASH ADVANCE*** for multi-channel marketing offers in addition to direct mail. E-mail names are available!

MARKET:	CONSUMER
CHANNELS:	
SOURCE:	MULTI SOURCED, DIRECT RESPONSE, CREDIT CARDS, INTERNET/ON-LINE, OPT-IN E-MAIL
PRIVACY:	CONFIRMED OPT-IN
DMA?:	YES - MEMBER
STATUS:	PREFERRED PROVIDER
GEO:	USA
GENDER:	60% FEMALE 40% MALE

SELECTS	
AGE	$5.00/M
GENDER/SEX	$5.00/M
GEO SELECT	$5.00/M
INCOME SELECT	$10.00/M
LIFESTYLE	$20.00/M
PHONE NUMBER	$20.00/M
RECENCY	$10.00/M
RUSH CHARGE	$150.00/F
SHIPPING - 2 DAY	$15.00/F
SHIPPING - OVERNIGHT	$30.00/F

ADDRESSING	
KEY CODING	$5.00/M
CD ROM	$50.00/F
DISKETTE	$50.00/F
EMAIL	$50.00/F
FTP	$50.00/F

RELATED LISTS

- AFRICAN AMERICAN MASTERFILE
- AFRICAN AMERICAN CREDIT APPLICANTS
- APPAREL BUYERS
- GET CREDIT TODAY
- MOOREHOUSE AFRICAN AMERICAN BUYER

Image Source: Screenshot from NextMark Mailing List Finder

Loan Applicants Mailing List; Infomortgage - Hispanic Cash Advance / Payday Loans Mailing List; African-American Payday - Cash Advance Mailing List. It is not completely clear that these mailing lists are used exclusively to promote online payday loan sources, and not brick-and-mortar lenders as well. However, the lists are not segmented by geographic location, and information about the recipients' location is sold separately. This indicates that purchasers of the list are likely online loan vendors, who are location-independent. *See, e.g.,* Infomortgage - Hispanic Cash Advance / Payday Loans Mailing List.

The "Hispanic Cash Advance" list could conceivably be used to help lead generators and lenders effectively communicate with potential Hispanic borrowers whose dominant language is Spanish.[22] It is much harder to explain the reasons behind payday loan target lists for African Americans.

Perhaps the most aggressive example of racial targeting in offline advertising is found in the campaigns run by MoneyMutual, an online lead generator that appears to operate no brick-and-mortar outlet. MoneyMutual has spent millions of dollars on radio and television ads steering potential borrowers to their website,[23] and has prominently used African American TV personality Montel Williams as its spokesperson in English-language commercials.[24] Williams has been considered a role model within African American communities.[25] His program, *The Montel Williams Show*, was part of a broader trend of television programming geared towards increasing viewership of African Americans, with reruns airing on Black Entertainment Television.[26] As a high-profile personality, Williams' endorsement of MoneyMutual has been seen as giving the company "instant credibility for some borrowers."[27] Given his show's target viewership, it is likely that this credibility—and thus receptiveness to the lead generator's messaging—is higher within the African American population.

The existence of lists targeted by race and ethnicity, combined with radio and television ads targeted to African Americans, suggests that a higher percentage of African American and Latino consumers are served with offline ads for online payday loan products. This system of targeting, in turn, helps explain why minority borrowers are ultimately more likely to use these detrimental financial products.

These offline targeting trends may well be replicated online. Online payday lenders heavily rely on lead generators to identify and target potential borrowers;[28]

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[22] Note however that neither of the Hispanic mailing lists cited above indicate that the preferred or dominant language of the list's target recipients is Spanish. *Ibid.*

[23] *Fraud and Abuse Online,* at 6 (noting that from June 2012 to May 2013, MoneyMutual spent approximately $211 million on TV and radio advertising to promote payday loans).

[24] *See, e.g., Money Mutual TV Commercials*, ISPOTTV (showing that all of MoneyMutual's English-language Television commercials feature Montel Williams).

[25] *See e.g.* Sarina Fazan, *Getting to know talk show host Montel Williams with this week's "10 questions,"* ABC NEWS, Apr. 6, 2014. Montel Williams was also the first African American enlisted marine to graduate the Naval Academy Prep School and Annapolis. *Ibid.*

[26] *See* Joshunda Sanders, HOW RACISM AND SEXISM KILLED TRADITIONAL MEDIA: WHY THE FUTURE OF JOURNALISM DEPENDS ON WOMEN AND PEOPLE OF COLOR, 99, ABC-CLIO, Aug. 11, 2015; *see* The Montel Williams Show (1991) Online, WATCH ONLINE (referencing the show's reruns on BET).

[27] *See* Chris Morran, *Montel Williams-Endorsed MoneyMutual To Pay $2.1M Penalty*, CONSUMERIST, Mar. 10, 2015, (noting that Williams' tagline in ads was that MoneyMutual was "the only source you can trust for finding a short term loan quickly and easily").

[28] *See Led Astray,* at 1.

lead generators supply as much as 75% of online borrowers to payday loan providers.[29] And just as they do with mailing and call lists, companies that provide lead generation and marketing services have the ability to segment online ad audiences by race and ethnicity. These companies sell products and services that enable corporate clients to micro-segment audiences for their ads based on highly personal information gathered about target consumers.[30] AdGroups, for example, a digital advertising network specializing in identifying consumer sub-groups by culture and race, has marketed products to target consumers based on "ethnicity, gender, location, age, income status, entertainment interest, blogs, and 'hip hop culture'."[31] Strategies used to identify these demographics include analyzing names for ethnic identifiers and zip codes for information about a person's race or socioeconomic standing based on community makeup.[32]

Just as they do offline, lead generation companies tailor the content and message of their online ads by race and ethnicity. For example, some lead generation companies have established advertising landing websites in Spanish. PrestameDinero.com is marketed as an "organic lead generation Spanish-language website" that is designed for "consumers who feel more comfortable executing short-term loans in Spanish."[33] In addition to his appearance in television and radio programming, Montel Williams features prominently in MoneyMutual's online ads as well.[34]

In sum, there is strong evidence to suggest that online lenders and lead generators use offline advertising to target potential borrowers by race and ethnicity, and that marketing and lead generation companies provide payday lenders with the ability to target their online audience by these same characteristics.

IV. Lead generators may indirectly target minorities by directly targeting under-banked communities.

The direct and intentional targeting of minority borrowers for payday loans is paired with a range of indirect targeting as well. This takes place through the

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[29] *Ibid.*

[30] *See* Jeffrey Chester, *Cookie Wars, Real-Time Targeting, and Proprietary Self Learning Algorithms: Why Data Protection Regulators Should Swiftly Act to Protect the Privacy of Consumers and Citizens*, speech at the INT'L CONF. OF DATA PROTECTION AND PRIVACY COMMISSIONERS, Nov. 2009.

[31] *See Testimony on Behavioral Advertising,* at 11–13, Footnote 75.

[32] *Ibid.*

[33] *See* Ed Mierzwinski & Jeff Chester, *Selling Consumers Not Lists: The New World of Digital Decision-Making and the Role of the Fair Credit Reporting Act*, SUFFOLK UNIVERSITY LAW REVIEW, 846–880, 858; FIX MEDIA, *Fix Media Announces Launch of 100% Organic Lead Generation Spanish- Language Website* Oct. 25, 2011.

[34] *See, e.g.,* MoneyMutual Installment Loans Homepage (featuring an image of Montel Williams and a quote from him, stating that "MoneyMutual's installment loan lending network is an online cash source you can trust for finding funds quickly and easily").

industry's direct targeting of consumers based on other factors that correlate with race, including their status as "under-banked" and their negative perceptions of traditional banking institutions. Both of these factors are more likely to be found in minority communities.

Individuals identified as "under-banked," or those who maintain nontraditional banking relationships, are marketed to payday lenders by lead generators as consumers who will be highly valuable to companies providing money transfer services, short-term loans, and prepaid debit card products through online channels.[35] But marketing lists and other advertising strategies that target under-banked individuals will tend to select for black households at higher rates than for any other race or ethnicity. The Federal Deposit Insurance Corporation (FDIC) has reported that the highest rates of under-banked households persist in non-Asian minority communities.[36] A recent FDIC study found that in 2013, African American households reported the highest rates of under-banking, at 33.1%. Compare this with white households, at 15.9%, and total households nationwide, at 20%.[37]

Another mechanism by which indirect targeting may occur is through the targeting of consumers based on their negative perceptions of traditional banking institutions. ChoiceScore, by Experian, is a financial risk score that "helps marketers identify and effectively target under-banked and emerging consumers." The list is described as including "new immigrants" and "consumers who have a cultural or generational bias against the use of traditional banking services such as credit."[38] Studies have shown that this cultural bias against traditional banking is primarily held by individuals in minority communities.[39] African American consumers report more prevalent negative perceptions about financial institutions that provide mortgages, for example, at 37%, than white consumers, at 26%.[40]

In addition, these same consumers appear both to hold a bias that favors nontraditional banking services, and to trust advertising for financial products. African American borrowers are more likely to perceive marketing and advertising for

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[35] *Selling Consumers Not Lists,* at 867; *also see* *TruAudience Syndicated Segment: Underbanked Consumers*, TruSignal Data Sheet (Nov. 2014).
[36] *See* 2013 FDIC National Survey of Unbanked and Underbanked Households, FDIC, Oct. 2014.
[37] *Ibid.* at 16. Latino households were the second most under-banked, at 28.5%. American Indian households also have comparatively high under-banked rates 25.5%. *Ibid.*
[38] *See* Pam Dixon & Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future*, WORLD PRIVACY FORUM, April 2, 2014 (*"The Scoring of America"*), 43; *see* *ChoiceScore by Experian Underbanked and Emerging Populations, DIRECT* MARKETING, June 22, 2009.
[39] *See, e.g.,* Jose Diaz, *Feasibility Study for the Creation of a Latino Credit Union in Minnesota*, LATINO ECONOMIC DEVELOPMENT CENTER, Feb. 2006.
[40] *Two-Thirds of US Adults Believe Current Mortgage Product Advertising and Marketing Lacks Credibility*, Table 2, HARRIS INTERACTIVE, July 16, 2007.

mortgages, for example, as credible.[41] They are also more receptive to obtaining a loan from a non-bank lender.[42]

This holds true across income brackets and includes black borrowers who would have qualified for bank loans with better interest rates and terms than a typical payday loan.[43] That this trend persists irrespective of income is underscored by research showing that African American borrowers are more likely to underestimate their credit worthiness, regardless of income, and are therefore less likely to apply for certain types of loans from traditional banking sources.[44]

The sum of all these factors is a profile of the ideal consumer to target with nontraditional financial products. This is someone with: a) preexisting prejudice against traditional banking; b) lack of awareness about his potential eligibility for a bank loan; c) trusting of advertising content; and d) more willing than the average consumer to use nontraditional sources of credit. Targeting groups of such potential borrowers will probably increase the success of a given ad, measured by click-through and interaction rates. And, as detailed above, these potential borrowers are disproportionately likely to be black.

V. Disparate impacts in payday lending may be the product of the algorithms behind targeted advertising.

One final explanation for the disturbing correlation between race and payday lending use is that discrimination may be in part the product of automated data-sorting processes employed by lead generators. There is an inherent subjectivity in the practice of parsing groups of people into marketing audiences.[45] Some people will be defined as more receptive, and some less so, to an advertisement's methods and messaging. This sorting process, undertaken by an automated system, may exacerbate racial biases in targeted marketing in two key ways.

First, the algorithm may reproduce prejudice already existing in the data that is being fed into its system. If an automated system for predicting likely borrowers

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[41] *Ibid.* at Table 1. Forty-four percent of African American consumers rated mortgage marketing and advertising content as credible, compared with 34% for white consumers and 33% for Latinos. *Ibid.*
[42] Ren Essene & William Apgar, *Understanding Mortgage Market Behavior: Creating Good Mortgage Options for All Americans*, 28, JOINT CTR. FOR HOUS. STUDIES AT HARVARD UNIV., Apr. 25, 2007.
[43] *Ibid.* at 28 (noting that a recent study shows that lower-income minority borrowers are more willing to obtain loans from a non bank lender, even though they would have qualified for a loan with better rates and terms at a CRA-regulated banking institution.)
[44] *Ibid.* at 26.
[45] *See* Salon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 3, 104 CALIF. L. REV., forthcoming 2016 (describing generally how data sorting algorithms run the risk of learning and replicating implicit societal biases, as well as creating and perpetuating new biases based on the data feedback loop that feeds machine learning).

learns from an existing, racially biased data model, it will replicate and institutionalize biased results.[46] A teaching hospital in the UK, for example, discovered that institutionalized bias was an unintended result of how it automated certain aspects of its admissions process.[47] The computer program used to sort applicants was based on statistical data from previous admission decisions. However, those prior decisions had consistently and disproportionately rejected qualified racial minorities and women—and so the automated system did as well.[48] If an algorithm for determining who is likely to click on a payday loan ad is based on data or models that emphasize the race and ethnicity of a likely borrower, it will preserve this bias.

Second, an algorithm may create or augment discriminatory data or outcomes through its machine-learning process. This can happen when a system draws inferences from the feedback it receives on partial or biased data, generalizes those inferences, and adapts future results to reflect what it has "learned."[49] A study of Google-hosted advertisements for arrest records illustrates this bias augmentation.[50] The study found that black-sounding names were more likely to return search engine advertisements for arrest records, despite the fact that this was not the goal of the data inputs behind the ads. Rather, the algorithm, which decided where and when to display the ads, had learned that the ads associated with black-sounding names were more likely to be clicked on by viewers. This taught the system to continue pairing the two together, creating and perpetuating an unintended advertisement bias.[51]

A process similar to this may be happening in algorithms behind payday loan advertising as well. If individuals living in a particular zip code are initially slightly more likely to click on a payday loan ad—perhaps because of the prevalence of brick-and-mortar providers in their neighborhood—an algorithm may "learn" this correlation, and begin serving these ads more prevalently to that neighborhood. As a consequence of the higher rates of payday loan ads, more individuals within that geographic area may subsequently see, and click on, these ads, further teaching the algorithm that such targeting is successful. If this zip code happens to represent a minority neighborhood, as would be likely if it had numerous payday lending outlets,[52] the algorithm will effectively have learned to target race by proxy.

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[46] *See ibid.* at 10.
[47] Stella Lowry & Gordon Macpherson, *A Blot on the Profession*, 296 BRITISH MEDICAL J. 657, 1988 (cited by *Big Data's Disparate Impact,* at 12).
[48] *Ibid.*
[49] *See Big Data's Disparate Impact,* at 10–11.
[50] Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56 COMM. OF THE ACM 44, 2013 (cited by *Big Data's Disparate Impact,* at 12–13).
[51] *Ibid.*
[52] *See supra* Section III.

VI. Recommendation: The FTC should use its authority under ECOA and the FTC Act to bring action against lead generators facilitating the harmful disparate impacts of payday loans.

The FTC has the authority under ECOA and Section 5 of the FTC Act to pursue investigations into where the actions of lead generators may contribute to the discriminatory impacts of payday loans. ECOA makes it unlawful for creditors—and business that regularly refer borrowers to creditors—to discriminate against borrowers, with respect to any aspect of a credit transaction, on the basis of protected categories including race, color, and national origin.[53] ECOA provides that the FTC is authorized to enforce the requirements it places on industry actors—a violation of an ECOA requirement is considered a violation of the FTC Act.[54] The FTC is additionally empowered to enforce any rule prescribed by the Consumer Financial Protection Bureau pursuant to ECOA in the same manner as if the violation had been of an FTC rule.[55]

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[56] An act or practice is unfair where it causes or is likely to cause substantial injury to consumers, which cannot reasonably be avoided, and is not outweighed by countervailing benefits to consumers or to competition.[57]

This combined authority places the FTC in an ideal position from which to lead investigations into and enforcement actions against actors in the payday lending industry, including lead generators.

ECOA traditionally applies to creditors, defined as "any person who regularly arranges for the extension, renewal, or continuation of credit."[58] Lead generators, while typically not providing the loans themselves, are responsible for arranging as much as three-quarters of the online payday loan transactions.[59] This places them well within the definition of a creditor subject to ECOA's prohibitions. Indeed, the Federal Reserve Board has clarified in Regulation B—over which the FTC has enforcement

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[53] ECOA, 15 U.S.C. § 1691 *et seq*.
[54] 15 U.S.C. § 1691c(c).
[55] 15 U.S.C. § 45(n). *See* Peter Swire, *Lessons From Fair Lending Law for Fair Marketing and Big Data*, Sept. 11, 2014 (outlining the reach of the FTC's jurisdiction under ECOA and over regulations promulgated by the CFPB).
[56] Federal Trade Commission Act (FTC Act) § 5, 15 U.S.C. § 45.
[57] 15 U.S.C. § 45(n) (standard of proof; public policy considerations).
[58] 12 C.F.R. § 202.2(l).
[59] *See Led Astray*, at 1.

authority[60]—that ECOA's prohibitions include "person[s] who, in the ordinary course of business, regularly refer[] applicants or prospective applicants to creditors."[61]

This is precisely the role that is performed by lead generators in the online payday lending industry. In fact, many of these companies actually describe their own services in these terms. The landing page for CashAdvance.com, for example, states that it: "is not a lender and does not provide short-term loans *but refers consumers to lenders who may provide such loans*."[62] MoneyMutual similarly indicates that it is not a lender, "*but can help get you matched with a participating lender* in one of the largest lending networks in the U.S."[63]

It is important to note that the FTC has recognized that violations of ECOA can arise through disparate impact, which permits claims based on statistics showing that otherwise neutral policies have a discriminatory effect on minority borrowers.[64] This comment has illustrated that, at a minimum, the practices of lead generators likely contribute to a disparate impact on minority borrowers, particularly African Americans.

Disparate impact focuses on an end discriminatory result regardless of what policies or practices contributed to it. For the purposes of applying ECOA, it should not matter whether the discriminatory impact of payday loans stems from actions by lenders during the time the credit relationship was formed—the zone of activity traditionally under ECOA jurisdiction—or prior to that time through the advertising and marketing of the products by lead generators. If the existence of disparate impact is established by the facts, including the demonstrated effects of a policy or practice on the applicant pool,[65] this should provide sufficient grounds for the FTC to take action under ECOA to remedy this discrimination.

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[60] Under the Dodd-Frank Act, which restructured the financial services regulatory system, the FTC retained its authority to enforce both ECOA and Regulation B. *See* FTC v. Golden Empire Mortgage, Inc., 09-CV-02337 (2009).

[61] Regulation B, 12 C.F.R. § 202.2(l). This expanded definition applies for the purposes of 12 C.F.R. § 202.4(a), discrimination in any aspect of the credit application on the basis of a prohibited category, and § 202.4(b), discouragement of certain applicants on a prohibited basis through advertising or other means. 12 C.F.R. §§ 202.4(a)–(b).

[62] CashAdvance.com, text under "Representative APR Range" (emphasis added).

[63] MoneyMutual homepage (emphasis added).

[64] *See* Interagency Policy Statement on Discrimination in Lending, Fed. Reg. Apr. 15, 1994 (describing that the courts have found three methods of proof of lending discrimination under ECOA and the Fair Housing Act, including "evidence of disparate impact, when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by a business necessity). Page 7–8.

[65] *See ibid.* at 9. A policy or practice having a disparate impact on a prohibited basis may be justified by business necessity. However, "it still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect." *Ibid.*

With respect to Section 5, payday lead generators may attempt to argue that they are not directly responsible for the harmful effects of payday loans, and that the lenders that actually make the predatory loans are instead to blame. This argument is invalid. Courts have long held that "consumers are injured for the purposes of the [FTC] Act not solely through the machinations of those with ill intentions, but also through the actions of those whose practices facilitate, or contribute to, ill-intentioned schemes if the injury was a predictable consequences of those actions."[66]

In *FTC v. Neovi*, for example, the Ninth Circuit held that Qchex, an online check creation and delivery system, could be held liable for causing substantial injury to consumers stemming from the fraudulent use of its services.[67] Despite the fact that Qchex did not directly commit the fraudulent acts, the company was responsible for providing the means and instrumentalities through which the harms to consumers were committed. The facilitation of fraud was in itself a behavior that was injurious to consumers, and thus a violation of Section 5 of the FTC Act.[68]

In the case of the payday lending industry, in arranging as much as 75% of online payday loans made, lead generators provide lenders with crucial means and instrumentalities with which to offer these predatory loans. This role should be viewed as encompassing both the more formal arrangement of loans and the targeted advertising strategies undertaken by lead generators.

Through these actions, lead generators may be responsible for Section 5 violations—facilitating the provisions of loans that cause or are likely to cause substantial injury to consumers, *and* ECOA violations—the disproportionate targeting of certain protected categories of borrowers for those harmful loans.

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[66] FTC v. Neovi, Inc., 604 F.3d 1150, 1156 (2010, as filed), citing FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922). Moreover, the FTC has in the past brought successful actions under Section 5 of the FTC Act against payday lead generators. In *U.S. v. Teletrack*, 111-CV-260 (2011), the FTC brought action against the lead generator Teletrack for compiling and selling to third parties lists of target consumers, including individuals who had previously sought a payday loan. The complaint focused on Teletrack's actions as constituting the sale of consumer reports under the Fair Credit Reporting Act (FCRA), to enable the FTC to recover civil penalties. *Ibid.* The FTC similarly obtained an order against Equifax in 2013 for violating Section 5 and the Fair Credit Reporting Act by selling lists of millions of consumers who were late on their mortgages. In re. Equifax Information Services, LLC, No. C-4387 (2013). The final order prohibited Equifax from, among other things, furnishing prescreened lists to anyone that did not have a permissible purpose for receiving them, as well as selling these lists in connection with offers for debt relief and mortgage assistance relief products, when advance fees are charged. *Ibid.*

[67] *Ibid.* at 1157.

[68] *Ibid.* at 1157–58.

VII. Conclusion: The disparate impact of payday lending potentially extends far beyond the negative effects of the industry.

A recent report published by the World Privacy Forum explored how online consumer scores—the scores given to individuals to predict their actions as future consumers—affect the ads they see, the offers and opportunities they receive, and overall how the Internet marketplace appears to them.[69] The raw data that go into these consumer scores, which come from a diverse range of sources, include financial non-credit information such as a person's past use of a payday loan. Specifically, the report found "payday loan purchaser" was a data point among the financial and credit information that was included in the "consumer data available for purchase and use in analytics."[70]

What this means is that someone's prior use of a payday loan has a chance of affecting not just whether he is likely to see ads for them in the future, but also what opportunities he will qualify for and ads he will or will not see for other, unrelated products, through its inclusion in his consumer score.

In other words, the presence of race or ethnicity—both as a factor that plays into who is targeted for payday loan advertising and consequentially a demographic feature of those who take out payday loans—thus feeds a vicious cycle that likely has negative repercussions far beyond the market for payday loans. It is therefore of paramount importance that the FTC begin identifying and bringing enforcement actions against lead generation companies engaged in practices that violate ECOA and Section 5 of the FTC Act. In addition, the FTC should be sure to encompass the practices of lead generators in future regulation of the payday lending industry.

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69 *The Scoring of America.*
70 *Ibid.* at 37.