FTC Big Data: A Tool for Inclusion or Exclusion? Workshop
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Segment 5
Transcript

KATHERINE WORTHMAN: Colleague, Patrick Eagan-Van Meter, who's a program specialist also in the Division of Financial Practices. Panel three is titled Surveying the Legal Landscape, and today, we are going to look at the various anti-discrimination and consumer protection laws that impact big data. Let me first quickly introduce the panel.

To my immediate left is Leonard Chanin, who is currently a partner in the law firm of Morrison & Foerster, who in a previous life also was head of regulations at the Federal Reserve and at the Consumer Financial Protection Bureau. Then, there is Carol Miaskoff, my apologies, who is in the Office of Legal Counsel at the Equal Employment Opportunity Commission. Montserrat Miller, who's a partner in the Privacy and Consumer Regulatory Immigration and Government Affairs Practice Groups and Arnall Golden Gregory, and Lee Peeler, who is president and CEO of the Advertising Self-regulatory Council and executive vice president, National Advertising Self-regulation Council of Better Business Bureaus. And then, last but definitely not least is Peter Swire who's a professor of law and ethics at the Georgia Institute of Technology as well as senior fellow at the Future of Privacy Forum and the Center for American Progress.

And with that, I will ask Patrick to open up the panel with the first question.

PATRICK EAGAN-VAN METER: Panel two teased us a little bit with the laws that might apply to the big data space. I wanted to ask all of you what you think the federal laws that touch on the collection and use of big data are.

KATHERINE WORTHMAN: Leonard?

LEONARD CHANIN: Yeah. We'll go down the line. So I was asked to give a little background on the Equal Credit Opportunity Act and Regulation B just to do some level setting in terms of how that all may apply to big data, marketing, and those sort of things. So I'll spend just a couple minutes talking about that. So the Equal Credit Opportunity Act administered by Regulation B, the Federal Reserve Board administered that regulation for many years. And it was recently, a couple years ago, transferred to the CFPB.

So interestingly enough, the Equal Credit Opportunity Act doesn't apply to marketing activities. Regulation B does to a limited extent. And the reason is the law says it's illegal to discriminate against an applicant in connection with a credit transaction. An applicant is defined as someone who is applying for credit. So if you have not applied for credit, technically speaking, the law does not apply to you. That is, the equal Credit Opportunity Act does not apply to pre-application activities.

The Federal Reserve Board, though, many years ago applied Regulation B to certain activities at the pre-application stage. But it's pretty narrow or focused, if you will. So first of all, the law says you cannot discourage a person from applying for credit on a prohibited basis. And that means something like, you cannot make statements to a person, you can't use advertisements, radio, newspapers, so forth that would put forth symbols or text that would discourage a reasonable person from applying for credit.

The second way that Regulation B might cover marketing activities is if you're an existing account holder. So there, you have a credit transaction with a lender, and the lender cannot make statements that would discourage you from using your credit or provide different terms to you since you are indeed someone part of a credit transaction. So generally speaking, Regulation B applies to transactions or applies to marketing in those relatively focused ways. But it's not a new issue that we're talking about in terms of marketing.

In fact, the Federal Reserve in 1985 looked at marketing activities, decided at that time not to expand the regulation scope to cover marketing activities. It again looked in 1998 when it was reviewing Regulation B and solicited comment on whether pre-screening activities should be covered by Regulation B. In 1999, the Federal Reserve Board decided that it was not appropriate to apply Regulation B in its full context to pre-application activities, marketing activities, because it did not have evidence that suggested that lenders were using, in any significant way, prohibited bases for marketing.

The Fed also said, though, it had anecdotal evidence suggesting that some lenders were using age, that some were using geographical information in terms of marketing activities, but balanced those anecdotal information against the benefits of marketing. That is, that pre-screening in particular makes credit available to individuals. There was evidence that the Fed cited that said that allowing lenders to engage in pre-screening without coverage by Reg B could make credit available to more individuals. The Federal Reserve also noted that, of course, lenders could use information to discourage people from applying, could use the information to provide products to some areas and not to, if you will, disadvantage products.

So in 2003, the Federal Reserve Board actually adopted a rule dealing with pre-screening marketing activities coming out of a 1999 proposal. That rule is still in place today. It basically requires creditors to retain information about pre-screening activities. That is, activities where a creditor uses or is governed by the Fair Credit Reporting Act, uses credit report information. And a creditor must retain the information used to market-- that is, the criteria. So today, and since about 2004, if a creditor uses information-- race, ethnicity age, gender, et cetera-- to engage in pre-screening, it must under the law retain that information.

The Fed at the time of adopting this rule said that enforcement agencies could use this information to determine whether or not pre-screening was being engaged in by lenders in an inappropriate fashion. Whether that data has been provided by the Fed or the CFPB in the last few years is questionable. But there is some law in place now that will at least arguably provide some more data to various agencies in terms of pre-screening and marketing activities. So that's a very long answer to your short question.

KATHERINE WORTHMAN: But one thing also is that the Equal Credit Opportunity Act applies in what space?

LEONARD CHANIN: So the Equal Credit Opportunity Act applies only to credit transactions, but it applies quite broadly, that is to all credit transactions-- consumer credit, business credit, credit to corporations, to sole proprietorships, partnerships, and the like. It is not limited to consumer transactions. It is quite broad in its applicability. There are obviously, in addition to the anti-discrimination provisions, rules dealing with adverse action notices. If you decline credit to people, you have to give them a notice, and those sort of things. So it's quite broad in terms of its scope.

KATHERINE WORTHMAN: Carol, in the Title VII context?

CAROL MIASKOFF: Right, in the context of the Civil Rights Act of 1964, as well as the other federal EEO laws, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act, not to miss that, we have really very settled law-- it's the 50th anniversary of the Civil Rights Act this year. But settled law with some basic principles that I think can definitely be translated into the big data space.

Now, how do these employment nondiscrimination laws reach over? How does employment meld with the big data? I think it does in the spaces of recruitment, clearly, for the kind of advertising issues we've been seeing discussed here, and in areas of screening people for jobs once they have been recruited and making that ultimate selection decision. There's a real potential here, I think, to gather information about successful employees and then turn around and use that to screen people for employment.

With the screening piece, I think the issue really is about what prejudices are built into the data and therefore would be built into any rules deduced from the data, and therefore be used to select people who meet those same rules. So would it exacerbate, perpetuate, past discrimination? I think that's the big concern. In recruitment, it's the same issue around advertising that we've seen in the commercial space.

And I think about LinkedIn and all the jobs that may be referred to you there. And you always wonder, who's getting which jobs? Are they equitably distributed or not? Are they targeted? So I think that's the big picture. In terms of the law, I just want to make a few quick points.

It's been interesting to me because everyone's been talking about disparate impact and adverse impact a lot. In the employment space, those are very precise legal terms. And there's a cause of action for disparate impact. And I would say that that's the one, frankly, that's most suited to big data. Because what that's about is taking a neutral, i.e. like race neutral, gender neutral, et cetera, term that nonetheless disproportionately excludes members of the protected group and-- this is the critical piece here-- and is not job related consistent with business necessity.

Now, in terms of big data, I think this is the rub. This is really what's very fascinating, that the first step is to show and look at what is the tool. Now, this would apply to recruitment or to selection, but probably perhaps more to selection. What is the tool? Does it cause a disparate impact? And once you get there, just because it causes a disparate impact doesn't make it illegal discrimination under the employment laws. It's only illegal if it does not predict, accurately predict, success in the job.

So this raises all kinds of fascinating issues with big data analytics because, indeed, if you do possibly have prejudices built into the data, something might be validated as predicting success on the job. But it might just be predicting that white guys who went to Yale do well in this job. So there's going to be a lot of interesting thought that needs to be done and technology work, really, around understanding how to validate these kind of concerns.

KATHERINE WORTHMAN: Montserrat, with respect to the Fair Credit Reporting Act?

MONTSERRAT MILLER: Sure. So I am going to talk a little bit about the Fair Credit Reporting Act and try to weave that into big data and how certain reports are used in that context. So FCRA, enacted in early 1970s, a consumer friendly statute. And what it seeks to regulate or who it seeks to regulate are consumer reporting agencies, so credit bureaus or background screening companies. And it's very specific in what it seeks to regulate and how it seeks to regulate it so that consumer reporting agencies operate in an environment in which they-- with respect to confidentiality, accuracy, and then also the legitimate use and permissible use of data.

And when you're talking about the FCRA or the Fair Credit Reporting Act, we're looking at consumer reports, consumer reporting agencies, users of the consumer reports, and also furnishers of the data for the consumer reporting agencies. So it's an ecosystem in which these companies operate under the Fair Credit Reporting Act. With respect to the reports themselves, and this is where you begin to get into obviously the data, the reports could include credit. They could include criminal history information. And obviously, that's something that comes up with employment. In both of those, they could include drug testing information, employment education verification, public records information. So these are reports that are put together by consumer reporting agencies provided to, for instance, employers, landlords, and others, all within the confines of the Fair Credit Reporting Act.

And the information contained within those reports, the data contained within those reports, goes to credit worthiness, standing, capacity, and it also goes to character, general reputation, or mode of living. And when Commissioner Brill covered some of these points already, so I won't belabor them. But as she mentioned, they're certainly looking at the use of that data for credit or insurance or employment purposes or other purposes, but all purposes which are defined and regulated under the Fair Credit Reporting Act and permissible purposes.

So I would say, with respect to the Fair Credit Reporting Act, you're looking at, as I said, permissible purposes, due diligence of end users who are going to be looking at the data. Consumer reporting agencies must operate with maximum possible accuracy. And there's always, and most important for consumers, whether it's for employment or tenancy or credit, insurance, other purposes, there's always the right to essentially appeal and challenge the accuracy and completeness of any consumer report.

FCRA over the years has not operated on its own. We've certainly seen the states coming into this space and especially, I think, aggressively over the last few years when you talk about the potential discriminatory impact of the data that's in those reports, and really with respect to credit and criminal history. So you have not only the the FCR, which is enforced by the FTC and the CFPB, and also there are private rights of action. But you have the state analogs, which are essentially their own mini FCRAs, and you have California, Colorado, Maine, Minnesota, New Mexico, New York, Oklahoma, and Washington state. So you can see there are a lot of people, a lot of different entities, government entities, enforcers that are operating in the space of using this big data with respect to permissible purposes.

And then, you also have other states which have gone in a more limited but important area. And consider whether the use of credit for, say, employment or tenancy may have, that in certain settings, the use of credit could be considered an unlawful or discriminatory practice. And the same applies with criminal history information. So certainly, there are examples of states that are very active in this space of data, big data, and how it's used in these reports and seeking to protect arguably, and I think certainly, some individuals in certain communities.

KATHERINE WORTHMAN: Thank you. And Lee, could you speak a little bit about Section Five.

LEE PEELER: Sure, I would love to. Although I do think I was targeted as the legal historian on this panel. And I do want to also just commend the FTC's leadership on this. Data is now the economic lubricant of a lot of our economy. And looking at this issue was in the finest tradition of the Federal Trade Commission. In fact, if you're looking for historical analogies in the 1960s, the FTC launched a groundbreaking review of inner city retailers' marketing practices. And that led, under the Federal Trade Commission Act, that I'll talk about in two seconds, to a whole wave of initiatives that really changed a lot of what we traditionally thought about credit practices, debt collection practices, and merchandising.

So I think this is really, again, in the greatest tradition of the commission. I do want to go back to some remarks that were made this morning, though, and say, I think you can't just look at the application of the FTC Act broadly on big data. I think the remarks that were made this morning really say, you have to look at where big data is being used and how it's being applied. So one critical distinction that I think has been talked about a little bit this morning, but I think is really important for what I'm about to talk about, is the distinction between decision making, granting or denying credit, granting or denying a job, and advertising and marketing.

And decision making for credit, longstanding prohibitions going back to 1974 on using marital status or race in the decision making. In advertising, the traditions are the opposite. In advertising, it is necessarily about targeting your products to markets. And you just look at cosmetic ads. If you look at ads for shavers, if you look at ads for music, for books, all of those ads, you're going to find targeted and probably the best example of ongoing massive targeting is in selling political candidates right now.

So how does the FTC Act apply to those areas? And again, my background is advertising. So I want to focus on advertising and talking about the application of the FTC Act. The first piece of the FTC Act is deception, whether an act or practice would mislead a consumer acting reasonably under the circumstances. And there are two basic applications. One is well established legal principle. If you're narrowly targeting an audience, you're responsible for the reasonable interpretation that audience would have. So if you're targeting your ads to cancer patients, in a well-known FTC case, you are liable for what the interpretation of that ad would be and what information that consumer would need if you're narrowly targeting.

The other one example that I think will be important as the FTC goes down the road is data brokers are responsible for the accuracy of what they tell consumers and tell marketers they're providing them. So they're responsible for the accuracy of the representations they make about their database. The second core aspect of FTC jurisdiction is unfairness. There is a long history of fairness, and that led to its codification in 1994. But it's a provision that's been in the Federal Trade Commission act since the Consumer Protection Authority was created in 1934. The elements of an unfair practice under the 1994 codification are that the practice is likely to cause substantial consumer injury.

And that injury is not reasonably avoidable by consumers. And on that particular part of the analysis, you would need to look at whether the ad is targeted towards a specific group, but also, what's the consumer group's access to alternative products? How easily can the group go along and find alternative products at better prices or at better terms? Even if you met that analysis for advertising, the next challenge is to show that the harm, that net harm, is not outweighed by benefits to consumers or competition. And again, a flat ban on use of, for example, gender in advertising would probably fail under that approach because take for example an entrepreneur who wants to open a woman's shoe store. They will be targeting their ads based on sex and gender.

And then, the big issue for legal analysis under Section Five is what extent is well established public policy [INAUDIBLE]? We have a very well established public policy in the United States for not treating people differently. The statute that created the codification is quite clear that you can use public policy in weighing the costs and benefits. But it cannot be the primary basis for the conclusion that the practice causes net consumer injury.

And then, two last pieces of the FTC's authority that I think are really important for the discussion today is what you're doing right now, which is the ability to use your 6(b) authority to collect information and issue reports and inform the public about what's really going on in the marketplace, invaluable. And the last is not a specific provision of the Federal Trade Commission Act, but the FTC's programs of educating consumers, and as commissioner Brill said earlier today, really encouraging industry to step forward and educate consumers themselves.

And then, the very last point I want to make is that I thought commissioner Brill and Montserrat did a great job of summarizing the Fair Credit Reporting Act. But because I'm an industry self-regulator, when I first got to the FTC, I took the Fair Credit Reporting Act as it existed then. And you could almost-- it was almost verbatim from a pretty well established set of industry self-regulatory principles that had pre-existed the act by several years. And the only lesson, the important lesson, I think, to learn from that is that by looking at what the industry is doing on a self-regulatory basis, you can come up with-- you're more likely to come up with workable solutions to issues than if you just try to create it yourself. So that's my summary.

KATHERINE WORTHMAN: I'd like to turn a little bit, Peter, to an example that was used this morning on panel one. And it was the Maserati example where apparently, Maserati, a sports car, the example that was used by Mallory Duncan, was that the dealership has information that the Maserati is most likely to be sold to this list of people. There's a 30% chance that people who get any type of offer will come in and purchase the Maserati. And the list happens to be 95% male. So the question is, does that, if you send a flier advertising a free test drive to this list that's 95% male, does that implicate the ECOA fair marketing purposes? Does it matter if it's a Maserati credit finance company? And I know that you've released a paper recently on fair marketing.

PETER SWIRE: OK, thanks. And so I'll briefly say, then, I can make a couple of other points that were in the paper, perhaps. One of the things in the disparate impact test, which is the way Equal Credit Opportunity Act has been applied, is [INAUDIBLE] neutral. But then, if there is a different impact on the protected class, is there a business necessity, and is there any less restrictive way to do it? And you could certainly imagine where the act applies that advertising to women's shoes, or for the Maserati, if those facts are there, there'd be an argument that there's business necessity, then there'd be a question of, are there less restrictive alternatives? So that's the way I think it's been done in the fair lending context. I would like to, just from the paper, make a couple of points because I think we've heard some reasons for caution in thinking that there's claims here from the plaintiff side. And there's also some reasons to think existing law has some teeth that haven't been brought out.

And so the first one, I think, is in interviewing people who do fair lending compliance, there are huge fair lending compliance programs. And the level of effort in the major financial institutions in this area. is very large. And at least part of the reason is related to a CFPB case in June this year where GE Capital was ordered to provide, or did consent to agree to provide $169 million in remedies for fair lending violations in advertising. And that's just a big number compared to what we're used to in consent decrees and such.

And the fact that we're about advertising to existing customers, as Leonard pointed out, it's especially clear the law applies to existing customers. But according to the facts in the complaint, GE Capital had offered a nice credit deal. You can reduce your back amount that you owe. But it did not extend those offers to any customer who indicated they preferred to communicate in Spanish or at a mailing address in Puerto Rico. And so the violation was that you only advertise in English. You did not advertise in Spanish. You're excluding Spanish speaking consumers from this very attractive offer. And as a result, $169 million consent decree.

And I think when you talk to fair lending people, they're aware of ways the law may or may not apply. But they're aware of that level of enforcement, and it gives them a different level of seriousness. And so from seeing cases like that over the last 20 years, that was an unusual one of cases that have been brought in.

I have three very quick points. The first is the FTC has unusual enforcement power under the Equal Credit Opportunity Act. So the statute specifically says the FTC can enforce compliance with it irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the FTC Act. So for those of you who've been aficionados of the FTC enforcement jurisdiction, this is a sort of spectacularly interesting moment in the law that I think it's worth noticing. It doesn't have to be somebody engaged in commerce. And so there are some important FTC powers here that are not familiar from other statues.

The next one, as we wrote this paper and tried to think about fair lending and its history, which is something I worked in a while back, and how it makes sense to privacy people, many of whom are in the audience, the first point is that there's sectoral legislation in an anti-discrimination law. And that's really familiar to HIPPA, Gramm-Leach-Bliley, COPPA, sectoral regulation in privacy. And so we have ECOA, you have the Fair Housing Act, and you have Title VII. So there is existing substantial legal laws in place around lending, and housing, and employment.

And so for those areas, it's sort of like HIPPA and Gramm-Leach-Bliley. It's time to go do the research and see what those laws cover or don't. And then, the last point I'd make is similar again for privacy people. Those are the HIPPA, Gramm-Leach-Bliley, COPPA regulated parts. And then, what do those principles teach us about everyone else? And I think in privacy, those laws have been looked at as the structures that people use for a lot of their privacy policies in other areas.

They may or may not have all the strictness, but it's the same structures. And so I think the last 20 or 40 years of discrimination law, including fair lending law, provides a lot of useful insights about advertising and other practices related to big data. And instead of these issues being brand new-- and this is something Leonard said, they've been going back to the '80s and '90s-- we have decades of work that's been done here. And I think, along with figuring out what we think we ought to do, there's a legal research task about what the law has done, and talking of, among others, fair lending and employment and fair housing experts to see what's really done there is something that I think really would inform our debate a lot about what the legal rules are.

KATHERINE WORTHMAN: Now, going just a little bit into the-- not to beat the Maseratie example, but let's say that the list is based on aggregate data that has been prepared by the credit bureaus regarding, on a household level, not on an individual level, what are the implications in the FCRA context for a marketing list that has been prepared using previous purchasing history by consumers just by households? Does the FCRA apply in that context?

MONTSERRAT MILLER: Well, I think I'll punt on this one because marketing is not necessarily my expertise. It's more FCRA and consumer reporting agencies with respect to other permissible purposes.

KATHERINE WORTHMAN: Anyone else would like to take it?

LEE PEELER: Sure. Just as a general principle, and I actually had the opportunity to work on implementation of the Fair Credit Reporting Act, and I worked on Reg B when it was issued. And I think, just looking back at the structure that's there, if you're using information collected from a third party to make decisions about whether an individual can purchase or obtain a particular good or service, I think you do need some structure to provide an FCRA type noticing correction. As opposed to, if the issue is, are you sending an ad out? And I think one of the things that I think is true, [INAUDIBLE], is that pre-screening where you have exercised jurisdiction still involves making a firm offer of credit. Right?

PATRICK EAGAN-VAN METER: That's correct.

LEE PEELER: Yes. So again, just looking at the model that's been used for years and years in that industry, if you're making a decision about going to exclude somebody based on third party information, there ought to be some way to make sure that information is right. If what you're doing is just trying to make information available to consumers, I think that the cost of doing a fair lending type analysis for a wide variety of products gets to be very high, very unworkable.

And the exception to that, I think, are two of the areas that are represented up here. Housing, that's a limited commodity. If you miss the opportunity to apply for housing, you're not going to get the housing. Jobs, limited commodity, if you miss the opportunity to get your application in for that job, you're out of luck. You can't come back and get the extra one of those.

PATRICK EAGAN-VAN METER: So based on the research that Latanya presented today, with marketing at a high fee, high interest rate, low credit limit credit products on certain websites based on the consumers who frequent those sites implicate any of the statutes that we've discussed today or any others?

LEONARD CHANIN: So I'll take the first jab at that. If you're not talking about housing but you're talking about other credit, then I think generally speaking the answer is no. This all, at least my assumption is, that someone, anyone, can apply for credit. That is, if I market, that is not the sole way or the only way to get credit, because that would raise other issues fundamentally, whether you're discriminating if someone can't call you, go on your website, however you can apply.

But assuming that you market and people can contact you independently of that marketing activity, then I don't think that marketing and target marketing would raise fair lending issues, at least under the Equal Credit Opportunity Act. I think, as was alluded to by Lee and others, this is not a new issue. That is, people for years have been targeting marketing in radio, television, newspapers, subscriptions, and so forth in order to get people who might be interested in their products, whether they're credit products or other products, to respond to those. What we've got now is obviously far more data that people are able to use and manipulate in order to better target, if you will, to audiences that they think may be interested in their products.

The other thing I'll mention is that there's been-- I wasn't able to attend this morning-- but there's a lot of discussion about disparate impact. If you decide to apply the Equal Credit Opportunity Act to credit, you need to talk about disparate treatment. What the law would prohibit is, if I have for example, as was mentioned earlier, a retail shoe store predominantly or exclusively for women in terms of women shoes, and I offer credit product, it would be illegal for me to target-- that is, to send solicitations, to advertise-- solely to women regardless of disparate impact. That is, de facto discrimination against men would be illegal if you applied the Equal Credit Opportunity Act to marketing unless you have some kind of carve out or something.

LEE PEELER: And the two quick clarifications on that, if a man comes in and applies for that credit card, he's got to be evaluated on the same criteria that everybody else is. And your credit portfolio and the credit card area is going to be evaluated against whether there's disparate impact. So the end results are important, and if you're a creditor, I'm assuming your marketing is going to get you to the place where you can survive an examination by lenders.

PETER SWIRE: Leonard has lived these issues at the CFPB in recent years, and I'm in the midst of getting up to speed again on some of it. But I would like to point out two things about marketing in the lending area. One is that in the fair lending area, there's a history of strongly encouraging targeted marketing to minority communities. So if you go and look at the remedies, the answer is you haven't been advertising on African American radio stations. You haven't been advertising to Hispanic radio stations. And you need to do that.

So instead of marketing being this bad thing that you sometimes hear in the privacy debates, it's been a required part of the remedy for fair lending. But along with that, there's a sort of split which, in the paper, is called the paradox of advertising and lending, which is that there's a prohibition on what's called steering when you lend. And this has been in the rules for a long time.

And at least in recent years, after the CFPB sort of saw the subprime crisis and whatever, targeted subprime loans and targeted other loans, I think, has raised CFPB concern. So here's a quote from its guidance. A creditor may not advertise its credit services and practices in ways that would tend to encourage some types of borrowers and discourage others on a prohibited basis. This is CFPB language.

In addition, a creditor may not use pre-screening tactics likely to discourage potential applicants on a prohibited basis. So there's at least language that's more, if you want to call it plaintiff friendly or enforcement friendly, than some sort of categorical idea that this is exempt from the ECOA. And it may be the CFPB is pushing past some of the previous ways that people thought about it at the Fed in earlier years. But there's language that's more pro-plaintiff than some of the categorical exclusions would suggest.

PATRICK EAGAN-VAN METER: So to push that a little bit further, if you had a high end credit card and a more subprime card and the subprime card was only marketed on sites frequented by minority groups and the prime card was on sites that were frequented by high income or other non protected classes, does that count as steering in that way if you're not turning someone off, but you're giving them a different offer that might not be as appealing?

LEONARD CHANIN: You raised this steering issue!

PETER SWIRE: I did. And in the pre-call with Leonard, I said, Leonard, even with the CFPB, when is it good to do a targeted marketing to make up for past problems and when is it bad to steer? Can you point me to the authoritative source on that? And we weren't able to identify an authoritative source.

I think this is a real puzzle that my paper suggest needs a lot more discussion than we've had to date. But maybe, Leonard, you have more?

LEONARD CHANIN: Yeah. I guess what I see is the fact of marketing those products to different either audiences or different websites, in my view, does not violate the Equal Credit Opportunity Act. However, as I think Lee alluded to earlier, if your portfolio, if you have data and sometimes lenders do not have this data, but if you have data that shows ethnicity or gender or age or race and so forth in those portfolios, then certainly there are going to be questions about why you have such a skew in terms of who has these credit products. Do you make them available to everyone? If someone calls up, goes on your website, and applies, do you steer them? That's going to raise very different issues.

But the fact that people respond to certain ads and other people respond to different ads I don't think raises that type of issue. Simply, what does the portfolio look like at the end of the day and how do you explain those if there are dramatic differences?

PETER SWIRE: Can I follow up? It was interesting what Leonard said, that if you have the data in your portfolio that indicates a skew, that's reminiscent of having HMDA data, Home Mortgage Disclosure Act data, that shows a potential skew. And then regulators historically have looked more carefully at it. The paper I wrote suggests that this data about likely demographics may well be available in online marketing in a lot of ways it wasn't historically for lending. So a lot of online marketers are pretty sure they have a pretty good fix on their markets. And so there may be data inside their big data sets that say, with some level of confidence, what are the demographic characteristics. And if you have that and you have a disparate impact in the data in your database, the history under fair lending has been that you might come under scrutiny, at least for the regulated industries, I think.

LEE PEELER: And I think one other risk would be if in the hypothetical you raise somehow the consumer goes back to that creditor, not in response to the ad, but goes back to the creditor's site. And somehow, the products that this consumer is able to access on the website are limited to products that fit a particular profile. Then, I think, you probably do start to have some serious issues.

PETER SWIRE: Let's call those landing pages that might be different for customers of different sorts.

KATHERINE WORTHMAN: Actually, following up a little bit on some of the panel discussions from one and two, they discussed aggregate credit scores. How is the industry applying the FCRA analysis to these scores?

MONTSERRAT MILLER: So I'll start that one. With respect to employment and the FCRA and the use of that data for employment screening purposes, there is a common misperception that credit scores are used for screening purposes, and they're not. And so therefore, if you were to request a report on an individual and you're a consumer reporting agency and you're providing that to an employer, it's not going to include a credit score. It may include credit information. But it's not going to include a score.

So taking that off the table, although I know that there's a lot of media reports at times that the scores are used for employment screening purposes. In fact, they're not used for that purpose.

Now, I think that if you have just the general aggregate scoring and you're looking at certain communities, I think then it would turn more to a discussion about the discriminatory impact of the use of that type of data.

KATHERINE WORTHMAN: So how is that implicated, Carol, with the fact that when somebody applies for a job, they can definitely give their consent to have the employer look at their credit history, but even if they're following the FCRA, how does it impact with Title VII?

CAROL MIASKOFF: Well, even if someone gives their consent to getting the credit background, if the employer uses it as a reason for excluding someone from employment, and if using that has a disparate impact and is not-- and the key is it's not job related and consistent with business necessity or even if it is, there could be a less discriminatory alternative. In that case, it's going to be discriminatory regardless of the consent. So that's the bottom line there.

MONTSERRAT MILLER: And I just wanted to piggyback off of that. Certainly consent is the first step in terms of pulling such a report for employment screening purposes. I will say also that credit is not as frequently used as one would believe that it is. There's other data in the reports that is more frequently used, and credit tends to be very specific to a position, which would blend nicely with Title VII and what Carol was talking about. But that's the baseline is you have to have the individual's consent.

CAROL MIASKOFF: I would just add that, as a very practical matter, there are probably not many employers out there looking at the whole landscape who understand how to read the kind of information they get when they get one of these financial reports about someone. And I think probably that's why everyone talks about credit scores, because that's something a lot of us can understand. But when they get a lot of other information, it's often hard for them to put it in context. And therefore, an employer might just say, oh, we got a hit. We have something, and then potentially exclude someone.

MONTSERRAT MILLER: Which I would say is why credit with respect to employment screening is used sparingly and scores are not used. In fact, there are contractual restrictions to the use of scores if your permissible purpose is for employment screening when working with one of the bureaus. And certainly, with the reports themselves, it is important to understand what they say. And there are also, even at the state level, quite a few restrictions on the use of credit if it is, in fact, for employment screening purposes. So I think credit is an area that is highly regulated, whether it's FCRA or state statutes.

KATHERINE WORTHMAN: Taking a question from the audience, Carol, you said earlier that big data has a disparate impact, but it's predictive of job related outcomes. That is not illegal. Does that mean that the better the data set, the more likely it is to comply with the law?

CAROL MIASKOFF: I guess more likely, yes. But whether or not it in fact complies is the actual question. And the issue is going to be, just to clarify, really whether or not the criteria used to screen someone out for a particular job is relevant for performing that particular job. And I guess I didn't mention before, but one of the ways in which you could say the EEO laws anticipated big data is that we have, at this point, from 1978 some guidelines in place about validating selection tools for employment. And they were written initially about tests. And the question was, if a test had a disparate impact, how do you know if it's job related for the position in question and the task in question? And it had three ways of validating. And I think it's really going to be interesting to see how those principles can be applied in the big data context. But it is for the job in question.

PETER SWIRE: Can I follow up on that? So there's a Sears case in employment about it turned out men were more likely to do certain high commission sales and women were more likely to be at the front of the store selling smaller items. And Sears was able to come up with a statistical study in the case that showed a business necessity that it was actually based on the choices of the individuals who'd picked these different jobs. In that case, Sears won. The defendant won. But it won after having a pretty substantial burden of proof to show the validation on the statistics.

And so I think, in the marketing area, in the fair marketing or whatever we call it, one of the changes if this law turns out to apply in these sectors may be that the practices meet business necessity. But there would be a compliance effort by the companies to show the validation. And I think up until now, that effort to do that validation has not been the industry standard in a lot of places. And to meet the laws, it might become or have to become the industry standard. I'm curious, on the employment side, does that match your understanding of the law, at least in the employment side?

CAROL MIASKOFF: I wouldn't say it's more of whether it matches my understanding of the way businesses are complying with the law or not. The reality out there is I think federal contractors, because of all of the requirements that come with a federal contract do a lot more validation now than companies that are not contractors. I know, from an EOC's perspective, we regulate all private sector employers with 15 or more employees. And one thing we really are pushing now is the kind of record keeping that can facilitate validation.

PETER SWIRE: But there may be a due diligence effort here expected from the companies that has not maybe been built in up until now.

CAROL MIASKOFF: And I think that could be a very positive thing actually.

KATHERINE WORTHMAN: Now, going to another example of the potential use of big data, so in 2008, the FTC brought a case against a credit card marketing company that was looking at the shopping habits of its consumers and actually, based on where the consumers were shopping, decided to lower the credit limits of certain consumers and actually then charged over limit fees as a result of that.

But now, since there is this proliferation of information of where you can purchase data of where people shop or use that, what are the implications, for example, if a creditor would offer credit terms, better credit terms, to people who shop at Walmart versus 7/11? Or if in the employment context, if an employer was relying on these marketing lists to determine who they would advertise jobs to or who they would hire?

CAROL MIASKOFF: Well, I'll just jump in starting with employment. The question would be whether-- look at the data. And is that causing a disparate impact on one of the bases protected by the Civil Rights Act or one of the other laws? And if it did, then if it were not related to a consistent business necessity, it would be discriminatory.

MONTSERRAT MILLER: And from the FCRA perspective, what I would look to in that type of the situation is just who's preparing the reports and what's been included in those reports. Because from the employment context, you have to have a consumer reporting agency whose assembling and evaluating the information, providing it to a third party. And then, it's for one of the seven factors. And it's being used for permissible purpose. So the question would be, do you meet all of those who fall within or outside of the FCRA? But certainly, those are questions that come up regularly when companies try to promote new products and whether it will be a fact of FCRA products or not. So you'd have to look at those factors.

LEE PEELER: It sounds like in your hypothetical, there actually is a decision being made about the customer in terms of what their rate is for their credit cards that's clearly covered by existing law. The one additional nuance that I would throw into the mix, though, is again talking about the need to segment the conversation about big data. If the information is collected online to support online behavioral advertising, the advertising industry self-regulatory guidelines say you can't use that for employment, insurance, or credit decisions period. You can use it for marketing. You cannot use it for decisions.

PATRICK EAGAN-VAN METER: So to follow up on that, how frequent are contractual disclaimers such as the prohibitions that you're referring to, banning the use of that type of data for FCRA purposes?

MONTSERRAT MILLER: Well, it didn't work out too well for Instant Checkmate. But certainly, it's something that you can't have a disclaimer, I would argue, and expect that the FTC wouldn't look at it very carefully, and especially if your disclaimer happens to be, even though we have-- and I'll just use big data because that's what we're talking about-- even though we happen to have big data and even though we happen to be selling it to you and even though you happen to be looking at it, and maybe perhaps kind of sort of you're looking at it for employment purposes or housing, we're not a consumer reporting agency. This is not an FCRA product. The FCRA, I think, is in fact very effective. And I think FTC is very effective at enforcing the FCRA.

So disclaimers are certainly something that don't bode well for the company, especially if you're trying to say that you're not an FCRA product when, in fact, you meet all the elements of it, whether it's employment or tenant screening or if you're using, as I said, the data for-- and you fall under the elements of what is a consumer reporting agency. But on the other hand, that is one of, some would argue, that the FCRA covers consumer reporting agencies. But it leaves a bit of a hole when it comes to employers who may be using that information themselves and not operating or using the services of a consumer reporting agency. So in that situation, we'd have a different analysis.

I wowed everybody into silence.

KATHERINE WORTHMAN: What about the use though, again, going back to some of the more aggregate data, nontraditional credit information that's being used, whether it's government records, social media, shopping habits, web tracking, location data? If that is being used in a marketing context both in the credit and non-credit space, is that something that is-- is there a gap there with the statutes and the regulations?

LEONARD CHANIN: I'll take a try at it. I guess question is where to start with. So if you think about amending the various laws, the question to me first would be, is there injury? Is there harm to consumers? Because you need to balance that against countervailing benefits.

If someone is sending marketing materials based on whatever information, targeting to individuals, presumably there is some benefit to those individuals who receive it. Requiring that information to be sent to every individual, many of whom have no interest in it, is probably not going to be very beneficial. It also is going to increase ultimately the price of the product, lead to other techniques to market, and so forth.

So to me, the question is, is there injury? Seems to be there would be injury if, for example, I market through one channel or multiple channels if the terms, as Lee I think alluded to, if the terms of that credit are only available through that channel, and someone contacting me through a website, the telephone, in person, mail, cannot get those terms. They get terms that are less desirable. Then that certainly could raise questions of injury. If that's not the case, then the question to me is fundamentally, are there consumers being harmed by not receiving a particular offer?

LEE PEELER: And if you expand it beyond credit, you get pretty quickly to examples where it doesn't make any sense, which would be in the cosmetics and shavers and music. And you also probably get very quickly to some areas where it would be unconstitutional, like birth control marketing, political material.

MONTSERRAT MILLER: And I think there's a very interesting and fascinating intersection with the use of social media. We talked about that a lot today, between the FCRA and consumer reporting agencies who are providing social media information for, say, employment purposes, and then just EEO laws because, certainly, employers are using social media, whether it's private employers, whether it's government. Social media is used.

And so there's this split between what happens when an employer looks at it, and Google is a candidate? And then, what happens when a consumer reporting agency prepares a report that includes social media information, and if it's a consumer reporting agency, it's going to be very restricted, if you will, and very calculated and carefully synchronize with what the Fair Credit Reporting Act would say with respect to reporting that information. But they're only going to be looking at certain things. It's a much smaller universe, whether it's illegal activity or racist comments or explicit photos. That's what a consumer reporting agency that would look at and provide a report that includes social media would look at because what they want to factor out for their sake and for employer's sake are the discriminatory elements that one could see if, for instance, whether it's religion or certainly gender that you would see if you were just an employer who was Googling it. So certainly I think that's an area where FCRA provides a lot of protections for consumers if an employer is in fact going to request a report that includes social media.

PETER SWIRE: Here's just one distinction that hasn't been brought up in the panel. Under ECOA, you don't usually think of there being different loans to women or men. And in fact, one big reason why Equal Credit Opportunity Act exists was to correct for history where unmarried women didn't get their own credit history. It was just the husband's credit history, and divorced woman turned out not to have a credit history and couldn't get a loan once they were divorced. So in the credit area, we don't expect there to be men's loans and women's loans, or black loans and white loans. We'd be extremely skeptical of that in a credit relationship.

The shavers and cosmetics categories, though shavers I believe are used by both sexes--

[INAUDIBLE]

Well, I don't know the facts on that. And cosmetics, you can get into your own discussion, but I think for some universe where it does seem credit related, and there's some uncertainty about what sort of things are going to be credit related, it might turn out there's advertising that's directed more towards one sex or another, one national origin group or whatever. And where one of these statutes applies, it doesn't mean that you can't under the law turn out to have a women-targeted ad or men-targeted ad. If one of the discrimination statutes applies, lending, housing, employment, my understanding is then, it's a business necessity defense. You get to do it because we have to do that in order to sell the cosmetics or whatever it is.

But there's a prior question of, when are these statutes going to apply? And once they do, you can have a defense of necessity. But then, the company has to come forward and show the facts supporting that.

KATHERINE WORTHMAN: Building be a little bit more on the social media comment, what about employers who look at social media to determine hiring eligibility? They're also in some lending context, where people look at how many friends you have or who your friends are in determining whether or not you're eligible for credit.

CAROL MIASKOFF: Well, just looking at employers who look at social media as part of the screening of applicants, frankly it puts them, I would think, at a vulnerable position vis-a-vis the EEO laws. Because obviously, with many social media, you take one glance at it. And you learn a plethora of information about various protected statuses of the person they have. And once the employer has that information, if they deny the job to the individual, they deny the promotion, or the training, and the person's trying to think, gee, why didn't I get this, and they happen to find out perhaps that social media was looked at, they may well bring a charge to challenge it. And so from an employer's perspective, you really have to step back and think, am I going to get something that's really related to job performance and worth my while here for taking that risk?

MONTSERRAT MILLER: And I would also say with employment and bringing it back to the FCRA, the biggest challenge with social media is just accuracy. Which is why consumer reporting agencies would just look at user generated content, as opposed to any content that's out there. And then, the other question, of course, which is not so much the FCRA just as its terms of service or their privacy policy is depending on how you capture that social media, a consumer reporting agency would look at just what's publicly available. You have to be careful not to go beyond the bounds of companies like a Google or a LinkedIn or an Instagram's either privacy policy or terms of service and capture information that is in violation of either of those.

PETER SWIRE: Question for Joan, whether there be another concern about social media being used in recruitment, for instance, for employment. It may well be that people have a lot of friends who come from the same ethnic, racial, whatever background as themselves. And so if you're trying to have diverse recruitment and it turns out you're going down a path that's very dependent on one group, that could raise EEO questions as well.

CAROL MIASKOFF: It does raise EEO questions. And the answer to it is that you have to recruit through many different sources and avenues and tools to counter balance that. There's also just an issue in terms of computer access, period. Smartphone access, which many more people have now, but still, there are people who don't have it. And you certainly can't access as well some things on the smartphone as well as on a computer.

But I'd also add with the social media, as you may be aware, there are many states now that have laws that prohibit employers from requiring people to give them their social media passwords to check it out. There was pending federal legislation, but that has not gone anywhere. I've certainly heard stories that, despite that legislation, you have employers saying, I'm going to turn my back so I don't get the password, but log in now, and I want to see it.

KATHERINE WORTHMAN: And in a credit context, Leonard? Social media?

LEONARD CHANIN: I think you've got a divide between the marketing based on that information versus customers. So there's nothing in Regulation B that prohibits use of the information. But I'd be very careful because, as was suggested before, what's on that website? If you have gender, racial information, ethnicity, age, and so forth. If you look at that, then there's going to be certainly an allegation or potential allegation that you've considered it either certainly if you have an existing customer in terms of that customer relationship, potentially with marketing, if you have that. Certainly there'll be questions to follow. So I'd be very careful about using it, even though there's nothing that directly prohibits use of social media, at least in the context of credit transactions.

CAROL MIASKOFF: And I would just add with social media and employment, although I think probably the rule rather than the exception is people tend to have as their friends people from similar backgrounds as themselves, I know sometimes I have a variety, I'm just using myself as an example, a variety of friends. And as a result of that, I get some very interesting suggestions from Facebook as to what group I might want to join or whatever, what publication I might want to follow. And were an employer to look at that, they could then draw conclusions about me. So there's really a lot of vulnerability for employers.

PATRICK EAGAN-VAN METER: Are current categories or protected groups under anti-discrimination and consumer protection laws sufficient? Panels one and two discussed victims of crime or domestic violence as well as people with particular health statuses.

CAROL MIASKOFF: I would jump in. I think basically, yes. In terms of health status, with the expanded definition of disability that came into effect in 2009, there are a lot of health statuses that are covered by the ADA now. I think societally, the big categories that are covered are the ones that our society has had major, major problems with. And I think that's sort of an appropriate focus for these laws. In terms of abused women, I think possibly gender could capture that, possibly disability in some ways.

PATRICK EAGAN-VAN METER: How effective are adverse action notices under ECOA in conveying an adverse credit decision where the decision might be based on thousands of big data variables?

[INTERPOSING VOICES]

PATRICK EAGAN-VAN METER: Who's taking that one?

PETER SWIRE: You have an audience member replying to that.

PATRICK EAGAN-VAN METER: I'll stall on that and let them have time to think but only because Katie has told me that we are going to discuss big data and the NSA before we leave today. Right? How can you have a discussion about big data without discussing the NSA?

LEONARD CHANIN: I think the answer to that question is, at least in my knowledge, we don't know. Adverse action notices, you either have to give automatically the reasons for the denial, they have to be specific, or the consumer has the right to get those specific reasons. They have to be pretty detailed. So if you use credit report information or any other information, you have to give enough information so that a typical consumer can understand exactly what it is. So if the person's been late in making payments, if he or she has a charged off account, filed for bankruptcy, all of those sort of things have to be clearly communicated.

What's not clear is, or at least not I'm not aware of any data that have studied what consumers do with that information to the extent they can. Are they able to correct the information moving forward, or how they use that information. Might be an interesting research topic. But I'm not aware of any data on that.

MONTSERRAT MILLER: And I'd just say that under FCRA, certainly adverse action notices are built into the FCR. It's an important part of it whenever you're using a consumer report, and it's for one of the purposes, whether it be employment or tenancy or credit. You have to provide the adverse action if any information from the report, including maybe if it's credit information, is used in whole or in part, to make an adverse decision. And then, take it one step further, you have employment.

And if there is an additional pre-adverse action step, it needs to be followed if information in a report is going to be used adversely against an individual. They must be provided notice of that in a copy of the report and a summary of their rights. So certainly, adverse action is built into FCRA.

PETER SWIRE: One other thing about adverse action notices is it's not just whether that individual cures their problem. Another role of them is in an enforcement regime overall. So if there's an adverse action notice, that might end up with an advocacy group or plaintiff's lawyer realizing there's some practice that should be challenged and maybe a complaint to a regulator. And if they're not being issued, the adverse action notices, that can get detected within the company and lead to enforcement. So it's part of an overall structure to detect things that might turn out to be troublesome. And it's not just the individual fixing their own credit.

LEE PEELER: And again, as the historian of the panel, just a little context on that discussion. The adverse action, ECOA, Fair Credit Reporting Act structure created a dynamic where you have greatly expanded-- where big data greatly expanded credit availability to consumers, made the decision, made it a whole lot more objective, and built in some checks and balances. So one of the big challenges that was alluded to this morning for big data and the credit area was to expand that model, to consumers that currently can't be credits scored.

KATHERINE WORTHMAN: Lee, you have to let the last word on that. I'd like to thank all of our panelists for the discussion. Very informative.

[APPLAUSE]

And we are now going to take a break and return at 3:15. Thank you.