ACLU

AMERICAN CIVIL LIBERTIES UNION

May 18, 2017

<u>**VIA ELECTRONIC SUBMISSION**</u>

Consumer Financial Protection Bureau
1275 First Street NE
Washington, DC 20002

Re: **Docket No. CFPB-2017-0005**

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Dear Director Cordray:

The American Civil Liberties Union writes to provide the Consumer Financial Protection Bureau ("CFPB") with a response to its Request for Information ("RFI") regarding the use of alternative data in the credit process. In particular, this comment focuses on the impacts of alternative data on the marketing of consumer credit.

The American Civil Liberties Union ("ACLU") is a non-profit, non-partisan organization committed to protecting the rights and liberties guaranteed by the United States Constitution and by state and federal legislation. The ACLU works both to safeguard individuals' rights to privacy and to ensure full equality for members of historically marginalized groups, including people of color, women, immigrants, the disabled, and lesbian, gay, and transgender people. Our work on privacy issues includes advocacy aimed at regulating and securing the vast quantities of data about individuals generated as we move through the digital landscape. The ACLU centers questions of equality in this work. We crafted and signed, along with other civil rights groups, the Civil Rights Principles for the Era of Big Data[1]; we advocate directly to private companies to enact policies that will prevent violations of the civil rights laws online[2]; and we are litigating a case aimed at securing the right to conduct anti-discrimination testing online.[3]

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[1] The Leadership Conference on Civil and Human Rights, *Civil Rights Principles for the Era of Big Data* (2014), http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html.
[2] *See. e.g.*, Sapna Maheshwari and Mike Isaac, "Facebook Will Stop Some Ads From Targeting Users by Race," *N.Y. Times* (Nov. 11, 2016), https://www.nytimes.com/2016/11/12/business/media/facebook-will-stop-some-ads-from-targeting-users-by-race.html; Ben Rosen, "Airbnb adopts new anti-discrimination policies: Do they go far enough?," *Christian Science Monitor* (Sept. 8, 2016), http://www.csmonitor.com/Business/2016/0908/Airbnb-adopts-new-anti-discrimination-policies-Do-they-go-far-enough.
[3] *Sandvig v. Lynch*, No. 1:16-cv-01368 (D.D.C. filed June 29, 2016).

Discriminatory Marketing Using Alternative Data

The ACLU is particularly concerned about the ways in which the use of behavioral data to target advertisements online has the potential to deny individuals vital information about housing, employment, and credit opportunities and thereby to facilitate discrimination. We have raised these issues in prior comments to the Federal Trade Commission[4] and the Equal Employment Opportunity Commission.[5] Because we believe that the use of behavioral data for marketing purposes on the internet has enormous consequences for civil rights and that this impact has, to date, been insufficiently explored by regulators, we are glad to see that this RFI explicitly seeks information on alternative data and marketing.

The RFI seeks information about the risks to consumers of alternative data use. We believe that marketing of credit on the basis of alternative data significantly increases the risk of discrimination, per **Question 13(f)**. Online behavioral targeting driven by such data makes it possible for a lender to show mortgage advertisements featuring a higher interest rate to Black or Latino users, or to those who live in neighborhoods where residents have, on average, lower credit scores, or to individuals with limited English proficiency.

As **Question 18** notes, the Equal Credit Opportunity Act (ECOA)[6] and its Regulation B[7] are deeply relevant to these questions in the context of lending.[8] The ECOA prohibits creditors from discriminating against applicants for credit with respect to "*any aspect* of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age…"[9] Intentional discrimination and practices that disproportionately impact protected classes are equally impermissible under the ECOA, as implemented by Regulation B.[10] In other words, creditors may not use race-based criteria to screen or target certain applicants, nor may they use "outwardly neutral . . . practices" that lead to "a significantly adverse or disproportionate impact

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[4] ACLU, COMMENT TO FTC (Oct. 27, 2014),
https://www.aclu.org/sites/default/files/assets/141027_ftc_comment.pdf. This concern was reflected in the final FTC report. FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* 10 & n. 50 (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.
[5] ACLU, COMMENT TO EEOC (Oct. 28, 2016),
https://www.aclu.org/sites/default/files/field_document/aclu_letter_to_eeoc_re_big_data_10.28.16.pdf.
[6] 15 U.S.C. § 1691.
[7] 12 C.F.R. § 202.1.
[8] The Fair Housing Act also regulates the advertising of mortgages, and it prohibits"[M]ak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on" membership in a protected class. 42 U.S.C. § 3604(c). FHA regulations make explicit that "[s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of" protected class status constitutes prohibited discrimination. 24 C.F.R. § 100.75(c)(3).
[9] 15 U.S.C. §§ 1691(a) & (a)(1) (emphasis added).
[10] "The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact." 12 C.F.R. Pt. 1002 Supp. I § 1002.6(a)–(2) (2014) (official staff interpretation).

on persons of a particular [race] produced by the [defendant's] facially neutral acts or practices."[11]

Advertising and marketing practices are subject to regulation under the ECOA. The ECOA's prohibition against discriminatory credit transactions extends beyond the approval or denial of credit applications, to include "*every aspect* of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit,"[12] including the marketing that leads to the initiation of that application or extension of credit. Certain targeted marketing practices—like pushing harmful products toward protected groups or beneficial products away from them—can constitute intentional discrimination.[13] Additionally, marketing practices that unjustifiably cause disproportionate harm to protected groups violate the ECOA.[14] Separately, Regulation B makes clear that creditors may not use advertising or marketing to "discourage on a prohibited basis a reasonable person from making or pursuing an application."[15]

Targeting Latinos online for mortgages with higher interest rates, then, would constitute impermissible intentional discrimination. Similarly, showing users particular credit card offers based in part on their apparel purchase history, such that creditworthy Black users end up receiving credit on less favorable terms than their similarly-situated white counterparts, would

[11] *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 268 F.R.D. 627, 640 (N.D. Cal. 2010) (quoting *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008) (internal marks omitted); *see also* CFPB Bulletin 2012-04 at 2 (April 18, 2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf ("The applicability of disparate impact doctrine, also known as the 'effects test,' to credit transactions is reflected in the legislative history of the ECOA.").

[12] 12 C.F.R. § 202.2(m) (emphasis added).

[13] *U.S. ex rel. Cooper v. Auto Fare, Inc.*, No. 3:14-CV-0008-RJC, 2014 WL 2889993, at *3 (W.D.N.C. June 25, 2014) (placing car dealerships in predominately Black neighborhoods provided some evidence of intentional discrimination); *M & T Mortgage Corp. v. White*, 736 F. Supp. 2d 538, 576 (E.D.N.Y. 2010) (advertising in heavily minority neighborhoods could show intentional targeting); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000) (evidence regarding, *inter alia*, defendants' advertisements in Black communities supported intentional discrimination claim); *United States v. Am. Future Sys., Inc*., 571 F. Supp. 551, 562 (E.D. Pa. 1982) (credit card marketing program targeting white female college students discriminated on the basis of race, in violation of the ECOA), *aff'd*, 743 F.2d 169 (3d Cir. 1984).

[14] *See, e.g.*, *Nat'l Ass'n for Advancement of Colored People v. Ameriquest Mortgage Co.*, 635 F. Supp. 2d 1096, 1104 (C.D. Cal. 2009) (plaintiff's allegation of marketing policy leading to disparate impact was sufficient to state cause of action under the ECOA); *Alleyne v. Flagstar Bank, FSB*, No. 07-12128-RWZ, 2008 WL 8901271, at *5 (D. Mass. Sept. 12, 2008) (claim that Black borrowers were more likely than white borrowers to obtain mortgages through higher-cost brokers because of defendant's choices regarding the location of its offices sufficiently articulated a causal connection between the challenged policies and the disparate impact alleged); *Jackson v. Novastar Mortgage, Inc.*, 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) (allegation that company targeted minority sub-prime borrowers via advertisements, in combination with other policies alleged, was sufficient to state cause of action under ECOA); *Matthews v. New Century Mortgage Corp*., 185 F. Supp. 2d 874, 883 (S.D. Ohio 2002) (finding that plaintiffs sufficiently alleged cause of action under the ECOA by claiming defendants "target[ed] single, elderly women for allegedly predatory loans."); *Johnson v. Equicredit Corp. of Am.*, No. 01-c-5197, 2002 WL 448991, at *4 (N.D. Ill. Mar. 22, 2002) (Facts indicated that the defendant "target[ted] neighborhoods comprised primarily of minorities and impose[d] predatory credit terms on them, which result[ed] in discrimination based on race and color" thus plaintiff sufficiently pled a cause of action under the ECOA).

[15] 12 C.F.R. § 202.4(b). *See also* CFPB, Consumer Laws and Regulations: ECOA at 3 (June 2013), http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf ("For example, 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.").

constitute illegal disparate impact discrimination. We also know that data brokers make it possible to remove individuals living in certain neighborhoods from their lists;[16] this practice may impermissibly discourage a reasonable person from making an application for credit on a protected basis, and it may also create an illegal disparate impact.

How Alternative Data are Used in Targeting Online

Question 2(l) seeks comment on, among other things, how data are used in identifying targets for online marketing. We focus here on how that process facilitates racial segmentation and discrimination.

To target users online, data brokers use information from "public records, social media sites, online tracking, and retail loyalty card programs . . . [to] build 'modeled' profiles about individuals, which include inferences and predictions about them."[17] As the FTC has observed, some of these models "primarily focus on minority communities with lower incomes, such as 'Urban Scramble' and 'Mobile Mixers'…which include a high concentration of Latino and African-American consumers with low incomes."[18] Some segments are explicitly race-based, such as "African-American Professional"[19] or "Native American Lifestyle."[20] Other factors considered by data brokers are less explicit, but serve as proxies for race—such as "purchase behavior data" sorted by consumers interested in "Kwanzaa/African-Americana Gifts."[21] Data brokers also offer the ability to 'append' additional information about consumers for retailers and other clients including race, age, gender, religion and ethnicity.[22]

People of color will also be uniquely impacted when targeting is driven by various alternative data that are facially race-neutral. Such data will almost inevitably reflect and encode existing segregation and discrimination. For example, neighborhood-level credit score[23] cannot be properly understood independent of residential segregation in the United States. CFPB's own

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[16] *What Information Do Data Brokers Have on Consumers, and How Do They Use it?*, S. Comm. on Commerce, Sci., and Transp., 113th Cong. (Dec. 18, 2013) (testimony of Pam Dixon, World Policy Forum) 3, http://www.worldprivacyforum.org/wp-content/uploads/2013/12/WPF_PamDixon_CongressionalTestimony_DataBrokers_2013_fs.pdf ("Data brokers sell lists of people who live in or near trailer parks so that these undesirable consumers can be targeted for suppression.").

[17] David Robinson and Harlan Yu, *Civil Rights, Big Data, and Our Algorithmic Future* 8 (Sept. 2014), http://bigdata.fairness.io/wp-content/uploads/2014/09/Civil_Rights_Big_Data_and_Our_Algorithmic-Future_2014-09-12.pdf.

[18] FTC, *Data Brokers: A Call for Transparency and Accountability* 20 (May 2014), http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (hereinafter "FTC Data Brokers Report").

[19] *Id.* at 21. *See also id.* at Appendix B-3 (listing demographic data considered by brokers, including "Race & Ethnicity").

[20] *Id.* at Appendix B-5.

[21] *Id.* at Appendix B-6.

[22] *Id.* at 24.

[23] Pam Dixon & Robert Gellman, World Privacy Forum (WPF), *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future* 37 (2014), http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf (including "Summarized credit score or modeled credit score by neighborhood" on list of consumer data available for purchase).

research has demonstrated that median FICO scores in majority minority zip codes are substantially lower, on average, than those for zip codes with low minority populations.[24] And middle-class and affluent Black Americans, those most likely to have high credit scores, live in neighborhoods that are poorer than those in which their white counterparts with similar incomes reside.[25] As a result, targeted credit marketing based on zip-code level assumptions will systematically deprive Black users, including creditworthy Black users, of information about prime credit.

Per **Question 13(g)**, such disparate impacts mean that using alternative data to target the marketing of credit also has significant potential to harden barriers to social and economic mobility, both for communities of color and more broadly.[26] Behavioral targeting based on geographically-linked data is, quite literally, the online version of redlining (sometimes called "weblining")—it separates users by neighborhood to determine whether they will be provided with offers for prime or subprime credit, or whether they will be targeted for offers of costly and potentially predatory credit.[27]

Need for Outcome Testing

Question 18(b)–(d) seeks information about how market participants are testing for ECOA compliance when employing alternative data and alternative models in the lending sphere. The ACLU believes that it is absolutely crucial for any lender using such alternatives to engage in robust self-testing to determine whether these choices lead to a disparate impact on members of any protected group. Even for lenders with full access to the source code behind models, it is impossible to understand the impact of these models without testing their interaction with real-world data and observing the results, and self-testing must be comprehensive in this fashion.

However, this kind of testing does not appear to be standard in the FinTech industry. For example, the Frequently Asked Questions section of one algorithmic underwriting tool's website, in describing its compliance with lending regulations, states "we specifically exclude from analysis any data that might proxy for a protected class. In our model, we don't know or care about the gender, age, race, religion, zip code, sexual preference, or ethnicity of applicants. We strongly believe that these attributes are fundamentally NOT predictive of credit worthiness."[28] We have seen this misguided sentiment appear repeatedly. Given that practices with a disparate

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[24] Consumer Financial Protection Bureau, *Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores* 18 (Sept. 2012), http://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf; *see also* Matt Fellowes, Brookings Inst., *Credit Scores, Reports, and Getting Ahead in America* 9–10 (May 2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060501_creditscores.pdf.

[25] *See, e.g.*, John Eligon and Robert Gebeloff, "Affluent and Black and Still Trapped by Segregation," *N.Y. Times*, (Aug. 20, 2016), https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html; Sean F. Reardon, Lindsay Fox, and Joseph Townsend, *Neighborhood Income Composition by Household Race and Income, 1990–2009*, 660 Annals Am. Acad. Pol. & Soc. Sci. 78 (July 2015).

[26] For an illustration of how targeting impacts social mobility, *see* Alvin Chang, "How the internet keeps poor people in poor neighborhoods," *Vox* (Dec. 12, 2016), https://www.vox.com/2016/12/12/13867692/poor-neighborhoods-targeted-ads-internet-cartoon.

[27] *See* Noa Yachot, "Your Favorite Website Might Be Discriminating Against You," *ACLU Speak Freely Blog* (June 29, 2016), https://www.aclu.org/blog/speak-freely/your-favorite-website-might-be-discriminating-against-you.

[28] "FAQ," *Underwrite.ai*, https://www.underwrite.ai/faq (accessed May 2, 2017) (screenshot on file with ACLU).

impact violate the ECOA, excluding protected class information from an algorithm is insufficient to ensure compliance. In fact, a company creating and deploying an algorithm to make underwriting decisions can likely ensure ECOA compliance only by performing self-testing using protected class information or, if unavailable, using the best approximation thereof.

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In sum, behavioral targeting employing alternative data significantly increases the opportunity for marketing discrimination in the lending realm. The ACLU supports CFPB in its attempts to protect consumers from this form of twenty-first century lending discrimination, and we appreciate the opportunity to comment. Please contact Rachel Goodman, Staff Attorney in the ACLU Racial Justice Program, at rgoodman@aclu.org or (212) 549-2663 with any questions.

Sincerely,

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