



Chairwoman Edith Ramirez  
Federal Trade Commission  
Room 438  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairwoman Ramirez:

The American Civil Liberties Union appreciates the opportunity to file this comment in follow-up to the FTC's recent workshop, "Big Data: A tool for inclusion or exclusion?" We write to urge the Federal Trade Commission ("FTC"), as well as the Consumer Financial Protection Bureau (CFPB) and other federal agencies to enforce existing anti-discrimination law in the area of online credit marketing. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. 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 transgendered people. Our work on privacy issues, in recent years, has centered on the importance of regulating and securing the vast quantities of data about individuals generated as we move through the digital landscape. The ACLU has also worked at the junction of these privacy and equality issues before, most recently as a signatory, along with other civil rights groups, to the Civil Rights Principles for the Era of Big Data.<sup>1</sup>

In considering the implications of big data, we are particularly concerned about the behavioral targeting, which has the potential to significantly reinforce existing economic disparities between racial groups. Such targeting causes individuals to see different advertisements, potentially offering them different products or different prices. Because decisions about which advertisements to display are in some cases based on data about race or factors closely linked to race, we are in danger of segregating the consumer experience on the web. Yet the web has enormous potential as a marketplace free from the history of segregation and disparity that plagues geographical space, and the agencies should help ensure that online commerce harnesses that potential.

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<sup>1</sup> *Civil Rights Principles for the Era of Big Data*, The Leadership Conference on Civil and Human Rights <http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html> (last visited Oct. 14, 2014).

AMERICAN CIVIL  
LIBERTIES UNION  
WASHINGTON  
LEGISLATIVE OFFICE  
915 15th STREET, NW, 6<sup>TH</sup> FL  
WASHINGTON, DC 20005  
T/202.544.1681  
F/202.546.0738  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

LAURA W. MURPHY  
DIRECTOR

NATIONAL OFFICE  
125 BROAD STREET, 18<sup>TH</sup> FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT REMAR  
TREASURER

## I. The Equal Credit Opportunity Act Prohibits Discriminatory Online Marketing Practices.

The Equal Credit Opportunity Act (“ECOA”)<sup>2</sup> provides the agencies with powerful tools to combat discriminatory marketing of credit products. 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 . . .”<sup>3</sup> Intentional discrimination and practices that disproportionately impact protected classes are equally impermissible under the ECOA, as implemented by Regulation B.<sup>4</sup> 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 on persons of a particular [race] produced by the defendant’s facially neutral acts or practices.”<sup>5</sup>

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,”<sup>6</sup> including the marketing that leads to the initiation of that application or extension. Certain targeted marketing practices—like pushing harmful products toward protected groups, or beneficial products away from them—can constitute intentional discrimination.<sup>7</sup> Additionally, marketing practices that

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<sup>2</sup> 15 U.S.C. § 1691; *see also* 12 C.F.R. § 202.1.

<sup>3</sup> 15 U.S.C. § 1691(a).

<sup>4</sup> “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 CFR Pt. 1002 Supp. I Sec. 1002.6(a)—2 (2014) (official staff interpretation).

<sup>5</sup> *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 Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 539-40 (7th Cir. 2011) (recognizing disparate impact claim under ECOA); *Haynes v. Bank of Wedowee*, 634 F.2d 266, 272 n.5 (5th Cir. 1981) (noting that ECOA regulations endorse use of the disparate impact test) (citing 12 CFR § 202.6(a) n.7); *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (noting that many circuit and district courts have concluded that disparate impact claims are permissible under the ECOA) (citing *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982); *Bhandari v. First Nat’l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989); *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005) (dictum); *Miller v. Countrywide Bank, N.A.*, 571 F.Supp.2d 251 (D. Mass. 2008)), *reconsidered on other grounds sub nom, Barrett v. Option One Mortgage Corp.*, 2012 WL 4076465 (D. Mass. Sept. 18, 2012); *M & T Mortgage Corp. v. White*, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) (noting that ECOA claims may be prosecuted on the basis of disparate impact) (citing *LeBlanc–Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995); *Powell v. American General Finance, Inc.*, 310 F.Supp.2d 481, 487 (N.D.N.Y. 2004)); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20-23 (D.D.C. 2000) (recognizing disparate impact claim under ECOA); CFPB Bulletin 2012-04 at 2 (April 18, 2012), *available at* [http://files.consumerfinance.gov/f/201404\\_cfpb\\_bulletin\\_lending\\_discrimination.pdf](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.”).

<sup>6</sup> 12 C.F.R. § 202.2(m) (emphasis added).

<sup>7</sup> *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 African-American 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

unjustifiably cause disproportionate harm to protected groups violate the ECOA.<sup>8</sup> 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.”<sup>9</sup>

The ECOA governs online marketing and advertising with no less force. In fact, as data-based advertising techniques allow for new forms of targeted marketing, the risk of discrimination grows. Data brokers use information from “public records, social media sites, online tracking, and retail loyalty card programs to build ‘modeled’ profiles of individuals, which include inferences and predictions about them.”<sup>10</sup> 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.”<sup>11</sup> Some segments are explicitly race-based, such as “African-American Professional”<sup>12</sup> or “Native American Lifestyle.”<sup>13</sup> 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.”<sup>14</sup> Data brokers also offer the ability to ‘append’ additional information about consumers for retailers and other clients including race, age, gender, religion and ethnicity.<sup>15</sup>

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in heavily minority neighborhoods could show some degree of 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).

<sup>8</sup> See, e.g., *Alleyne v. Flagstar Bank, FSB*, No. CIV.A. 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); *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); *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.*, 2002 WL 448991, at \*4 (N.D. Ill. Mar. 22, 2002) (Facts indicated that the defendant “target[ed] 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).

<sup>9</sup> 12 C.F.R. § 202.4(b). See also CFPB Consumer Laws and Regulations: ECOA at 3 (June 2013), available at [http://files.consumerfinance.gov/f/201306\\_cfpb\\_laws-and-regulations\\_ecoa-combined-june-2013.pdf](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.”).

<sup>10</sup> Robinson + Yu, *Civil Rights, Big Data, and an Algorithmic Future* 8 (Sept. 2014), available at [http://bigdata.fairness.io/wp-content/uploads/2014/09/Civil\\_Rights\\_Big\\_Data\\_and\\_Our\\_Algorithmic-Future\\_2014-09-12.pdf](http://bigdata.fairness.io/wp-content/uploads/2014/09/Civil_Rights_Big_Data_and_Our_Algorithmic-Future_2014-09-12.pdf).

<sup>11</sup> FTC, *Data Brokers: A Call for Transparency and Accountability* 20 (May 2014), available at <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”].

<sup>12</sup> *Id.* at 21. See also *id.* at Appendix B-3 (listing demographic data considered by brokers, including “Race & Ethnicity”).

<sup>13</sup> *Id.* at Appendix B-5.

<sup>14</sup> *Id.* at Appendix B-6.

<sup>15</sup> *Id.* at 24.

This kind of data creates significant potential for discriminatory marketing practices, and, in the field of lending, such practices violate the ECOA.<sup>16</sup> For instance, if a bank were to show mortgage advertisements featuring a higher interest rate to users that, as a result of data, it believed to be African-American, that targeting would constitute impermissible intent-based discrimination. Or, if advertisers were to show website viewers individualized advertisements based in part on neighborhood-level credit score data,<sup>17</sup> such that creditworthy African-Americans end up receiving credit on less favorable terms than their similarly-situated white counterparts, that marketing practice would have a disparate impact in violation of the ECOA. Similarly, if direct marketers of credit offers remove individuals living in certain neighborhoods from their lists,<sup>18</sup> 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.

In short, providers of credit are prohibited from using race or factors closely linked to race to market lower quality products to members of protected racial groups, or to exclude them from the marketing of higher quality products. Evidence exists that data brokers hold and sell lists that enable this kind of discrimination.<sup>19</sup> More investigation of how lenders use that data in marketing is sorely needed, and the FTC and CFPB should take the actions described below to address and prevent violations.

## **II. The FTC and the CFPB Have the Tools to Investigate and Enforce the ECOA's Prohibition on Discriminatory Online Marketing.**

We commend the FTC for using its authority under Section 6 of the Federal Trade Commission Act ("FTCA") to study data broker practices and to issue its report this spring.<sup>20</sup> Through that process, the FTC has already gathered significant information relevant to determining whether extant marketing practices violate the ECOA. For instance, the FTC has obtained information concerning which types of personal data are collected, generated, or stored by data brokers, including racial or ethnic information; how this data is sold in products and services, and what those products and services look like; which customers buy these products

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<sup>16</sup> Indeed, as the Senate Commerce Committee has warned, some data brokers' products "likely appeal to companies that sell high-cost loans and other financially risky products." U.S. Senate Committee on Commerce, Sci., and Trans., *A Review of the Data Broker Industry: Collection, Use and Sale of Consumer Data for Marketing Purposes* 26 (2013), available at [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=0d2b3642-6221-4888-a631-08f2f255b577](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0d2b3642-6221-4888-a631-08f2f255b577).

<sup>17</sup> Pam Dixon & Robert Gellman, World Privacy Forum (WPF), *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future* 37 (2014), available at [http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF\\_Scoring\\_of\\_America\\_April2014\\_fs.pdf](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).

<sup>18</sup> *What Information Do Data Brokers Have on Consumers, and How Do They Use it?*, S. Comm. on Commerce, Sci., and Transp., 113th Cong. 3 (2013) (testimony of Pam Dixon, World Policy Forum), available at [http://www.worldprivacyforum.org/wp-content/uploads/2013/12/WPF\\_PamDixon\\_CongressionalTestimony\\_DataBrokers\\_2013\\_fs.pdf](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.").

<sup>19</sup> See *supra* notes 12-15.

<sup>20</sup> FTC Data Brokers Report, *supra* note 11, at ii.

and services; and how agreements with those customers may limit the use of the data.<sup>21</sup> Thus, the FTC is well-equipped to determine whether the data brokers it investigated are enabling marketing practices that violate the ECOA.

The FTCA arms the FTC with unfairness authority, allowing it to bring enforcement actions against entities within its jurisdiction that use unfair practices in commerce.<sup>22</sup> The FTCA specifically states that “[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as [relevant] evidence.”<sup>23</sup> The ECOA, with its discriminatory effects test, is one such policy.<sup>24</sup> Thus, the FTC may use its unfairness authority to take action against a data broker that sells a product which enables lenders to violate the ECOA. The FTC can bring such an action despite the fact that data brokers are not themselves creditors under the ECOA.<sup>25</sup> Further, the FTC can also enforce the ECOA directly against non-bank lenders, and it should do so where the online marketing practices of these lenders violate the ECOA.<sup>26</sup>

The CFPB is also empowered to gather information about potential violations of the ECOA in this arena. It can issue civil investigative demands<sup>27</sup> seeking information, and, like the FTC, it can require the entities it regulates to submit reports or answers in writing to specific questions.<sup>28</sup> But the CFPB can also monitor and prevent such practices through its supervision of the banks within its jurisdiction.<sup>29</sup> In order to make clear to banks that discriminatory online marketing practices violate the ECOA, the CFPB should amend the ECOA baseline review modules contained within its examination manual<sup>30</sup> to specifically seek information about the

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<sup>21</sup> *Id.* at Appendix A.

<sup>22</sup> 15 U.S.C. § 45(a)(2).

<sup>23</sup> 15 U.S.C. § 45(n).

<sup>24</sup> 12 CFR Pt. 1002 Supp. I Sec. 1002.6(a)—2 (official staff interpretation); *see also* Md. Code Ann., Com. Law § 12-704.

<sup>25</sup> *See F.T.C. v. Accusearch, Inc.*, 06-CV-105-D, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007) (finding website selling telephone records illegally-obtained by others to be proper target of unfairness action because business depended on illegal actions) *aff'd*, 570 F.3d 1187 (10th Cir. 2009)

<sup>26</sup> 15 U.S.C. § 1691c(c). *See also* Letter from J. Reilly Dolan, Associate Director, Division of Financial Planning Practices, Federal Trade Commission, to Patrice Alexander Ficklin, Assistant Director, Fair Lending & Equal Opportunity, Consumer Financial Protection Bureau at note 3 (Mar. 4, 2014), *available at* <http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-activities-related-compliance-regulation-b-equal-credit/140603cfpbicklin.pdf>.

<sup>27</sup> 12 C.F.R. § 1080.6.

<sup>28</sup> 12 U.S.C. § 5512(c)(4)(B)(ii).

<sup>29</sup> 12 U.S.C. § 5515(b)(1) (“The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis of [insured depository institutions and credit unions with more than \$10,000,000,000 in assets] for purposes of (A) assessing compliance with the requirements of Federal consumer financial laws; (B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and (C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.”); 12 U.S.C. § 5516(b) (“The Director may require reports from [insured depository institutions and credit unions with less than \$10,000,000,000 in assets] as necessary to support the role of the Bureau in implementing Federal consumer financial law, to support its examination activities . . . and to assess and detect risks to consumers and consumer financial markets.”). *See also* CFPB Depository Institutions Based on 6/30/14 Total Assets, *available at* [http://files.consumerfinance.gov/f/201409\\_cfpb\\_depository-institutions-list.pdf](http://files.consumerfinance.gov/f/201409_cfpb_depository-institutions-list.pdf) (list of depository institutions and depository affiliates under CFPB supervision as of June 30, 2014).

<sup>30</sup> CFPB Examination Procedures: Equal Credit Opportunity Act (July 2013), *available at* [http://files.consumerfinance.gov/f/201307\\_cfpb\\_ecoa\\_baseline-review-module-fair-lending.pdf](http://files.consumerfinance.gov/f/201307_cfpb_ecoa_baseline-review-module-fair-lending.pdf).

use of protected class data in online marketing of credit products. If information obtained through investigation and compliance review reveals ongoing violations of the ECOA, the CFPB should take immediate enforcement action. The CFPB can and should bring suit against any bank or non-bank entity, like a payday lender or auto lender, that violates the ECOA with its online marketing practices.<sup>31</sup>

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In sum, the agencies are currently equipped with the authority and the tools to fight marketing discrimination as it plays out in new and pernicious ways online. They should act now in order to prevent discrimination from contaminating access to credit in the digital realm. Please contact Naureen Shah, legislative counsel at the ACLU Washington Legislative Office, at [nshah@aclu.org](mailto:nshah@aclu.org) or (202) 675-2327 with any questions.

Sincerely,



Laura W. Murphy  
Director  
ACLU Washington Legislative Office



Rachel Goodman  
Staff Attorney  
ACLU Racial Justice Program

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<sup>31</sup> 12 U.S.C. § 5564(a); § 5514(a)(1).