Selling Consumers Not Lists: The New World of Digital Decision-Making and the Role of the Fair Credit Reporting Act

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ABSTRACT

This Article explores the new world of financial decision-making, which draws on a range of Internet techniques. While some practices are regulated as traditional credit reports under the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x, credit bureaus and other financial firms are expanding into currently unregulated areas, including online marketing and sales. Does the FCRA need to be updated to address the growing use of real-time database scoring and decision-making on the Internet? Where is the line drawn between when an online, real-time decision-making score is used simply to serve as advertising for a financial product or to make a decision about establishing a consumer's eligibility for credit? When companies use a consumer's online profile for establishing his or her eligibility for credit, does it become a consumer report? As financial firms use powerful digital tools to precisely identify and market to potential customers in real time, are they compiling prescreened lists actionable under the FCRA?

I. INTRODUCTION

Recently, the Federal Trade Commission (FTC) warned a little-known company, Social Intelligence Corporation, that its use of social-networking data to develop reports for employment purposes made it a consumer reporting agency (CRA) under the FCRA. While you may not have heard of this firm, you probably have heard of some of the other companies engaged in collecting and selling consumer information on the Internet. Those firms include the major CRAs: Equifax, Experian, and TransUnion, as well as Fair Isaac Corporation (FICO), the leading aggregator of information from CRAs into credit scores.

A new world has emerged for the marketing of financial products and services. The promotion and sale of credit cards, mortgages, investments, retirement funds, loans, and banking are increasingly taking place online.

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Financial-services companies are taking full advantage of multichannel opportunities to reach and drive consumer action wherever they are. From mobile phones, to social media, to online video; financial-services companies are deploying the latest digital tools to identify and retain customers, generate a variety of scores on them, sell products, and create new forms of loyalty and revenues.

Historically, the "Big Three" CRAs (Trans Union, Equifax, and Experian, also colloquially known as "credit bureaus") and FICO, led credit decision-making. The primary activities of the CRAs and scoring firms are regulated under the FCRA.[1] Yet the big CRAs have also long had unregulated marketing-list affiliates. In 1997, one of the Big Three, Equifax, spun off a data-broker firm, ChoicePoint (acquired in 2008 by Reed-Elsevier), specifically to avoid regulation as a CRA under the Act.[2] Many other firms operate as data brokers in the marketing-list business, or are regulated as CRAs. A growing number of firms sell ostensibly separate products in both markets, but the question remains: Do full firewalls separate databases from decisions or are these distinct lines of business morphing together?

The interplay of traditional CRAs, lenders, online data brokers, and interactive digital financial advertisers has blurred the line between the traditional definitions of CRAs and target marketing. The emergence of instantaneous online consumer-credit evaluations, which use traditional and new forms of scoring, coupled with an explosion of Internet-based profiling and lead-generation techniques, requires regulators and advocates to closely examine this new consumer landscape. The growing reliance on mobile phones, including "mobile wallets" (such as Google's) for financial transactions, makes the need for an examination of the contemporary marketplace even more imperative.[3]

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1. *See* 12 C.F.R. pt. 1090 (2013). Under the authority of section 1024 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5514 (2012), the Consumer Financial Protection Bureau has issued a new rule granting itself the authority to supervise, or examine, larger credit bureaus and other large firms in that marketplace, including credit-scoring companies, otherwise known as "analyzers," that "apply statistical and other methods to consumer reports and other account information to facilitate the interpretation of such information and its use in decisions regarding other products and services." Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42,873, 42,875 (July 20, 2012) (codified at 12 C.F.R. pt. 1090).

2. *See Choicepoint*, ELECTRONIC PRIVACY INFO. CENTER, http://www.epic.org/privacy/choicepoint (last visited Nov. 11, 2013); *The Federal Trade Commission's Settlement with ChoicePoint*, FTC, http://www.ftc.gov/bcp/cases/ChoicePoint/index.shtm (last visited Nov. 11, 2013). In 2004, Chris Hoofnagle of the Electronic Privacy Information Center (EPIC), and Professor Daniel Solove of George Washington University Law School filed a detailed complaint with the FTC arguing that, in fact, more of ChoicePoint's activities should be regulated under the FCRA. While the FTC did later fine ChoicePoint for selling consumer reports to identity thieves, to the authors' knowledge, the FTC has never formally responded to the allegations made by Hoofnagle and Solove, although EPIC reported at the time that the FTC was investigating ChoicePoint and other data brokers. *See Choicepoint*, *supra.*

3. *See* GOOGLE WALLET, http://www.google.com/wallet (last visited Nov. 11, 2013) (constituting one example).

The use of digital channels for financial services reflects the new realities of a younger generation of consumers—those who have grown up using the Internet and cell phones to conduct nearly all aspects of their lives. These consumers are at ease banking online, making mobile payments, and using the Internet to find offers for credit cards and home loans.[4] In 2011, banks, credit-card companies, and loan companies spent nearly $5.9 billion to advertise financial and credit services online, and greater spending is expected in the next several years as the digital-marketing system becomes increasingly formidable.[5] All of the major online marketing companies, including search engines like Yahoo, Bing, and Google, are significantly involved in generating revenue through online financial marketing.[6] For example, Experian, Capital One, State Farm, Allstate, Bank of America, and J.P. Morgan Chase were among the top buyers of search ads on Google in 2011.[7] Bank of America, Citibank, American Express, and other leading banks are targeting consumers through state-of-the-art digital advertising, focusing on, among other areas, consumer cell phone and Facebook use.[8] In addition to direct marketing via search engines and display advertisements, the financial industry uses online lead-generation techniques to identify prospects and produce sales. In 2011, advertisers spent $1.5 billion using forms of this little-known practice.[9]

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4. *See* Susan Kuchinskas, *Financial Mobile Ad Spend Up 314%*, CLICKZ (May 9, 2012), http://www.clickz.com/clickz/news/2173273/financial-mobile-spend-314.

5. Press Release, Interactive Adver. Bureau, *Internet Ad Revenues Hit $31 Billion in 2011, Historic High Up 22% over 2010 Record-Breaking Numbers* (Apr. 18, 2012), http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-041812. In 2010, online advertisements generated more revenue than newspaper advertisements. *See* Kristen Schweizer, *U.S. Web Advertising Exceeds Newspaper Print Ads in 2010, eMarketer Says*, BLOOMBERG (Dec. 20, 2010), http://www.bloomberg.com/news/2010-12-20/u-s-web-ads-exceed-newspaper-print-ads-in-2010-emarketer-says.html.

6. *See Audiences*, AOL ADVERTISING, http://advertising.aol.com/audiences (last visited Nov. 11, 2013); *MSN Money*, MICROSOFT ADVERTISING, http://advertising.microsoft.com/en-us/msn-money (last visited Nov. 11, 2013); *Rich Media Gallery*, DOUBLECLICK, http://www.richmediagallery.com/ (last visited Nov. 11, 2013); *Solutions for Financial Services*, GOOGLE ADWORDS, http://www.google.com/ads/metrics_fin.html (last updated Nov., 2005); *Yahoo Finance*, YAHOO! ADVERTISING SOLUTIONS, http://advertising.yahoo.com/article/yahoo-finance.html (last visited Nov. 11, 2013). As Google explains to potential financial advertisers, "Google users search daily for mortgages, bill payment, banking, home equity, credit cards, debt consolidation, life insurance, investment banking, and brokerage services to name a few. Search marketing is your opportunity to speak with these potential customers exactly when they're looking for your financial products and services." *Solutions for Financial Services*, *supra*; *see* Press Release, Interactive Adver. Bureau, *Internet Ad Revenues Hit $31 Billion in 2011, Historic High Up 22% Over 2010 Record-Breaking Numbers* (Apr. 18, 2012), http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-041812 (revealing 2011 online-advertisement revenues, including financial and lead-generation marketing).

7. VICTOR RODRIGUES, EXPERIAN MKTG. SERVS., THE 2011 DIGITAL MARKETER: BENCHMARK AND TREND REPORT (2011), *available at* http://www.slideshare.net/victori98pt/the-2011-digital-marketer-benchmark-and-trend-report-by-experian.

8. *See* Giselle Abramovich, *Visa's Social Strategy Follows Behaviors, Not Platforms*, DIGIDAY (May 11, 2012), http://www.digiday.com/brands/visas-social-olympics-follows-behaviors-not-platforms; *Citibank US*, FACEBOOK, http://www.facebook.com/Citibank (last visited Nov. 11, 2013).

9. *See* PRICEWATERHOUSECOOPERS & INTERACTIVE ADVER. BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT: 2011 FULL YEAR RESULTS 12 (Apr. 2012), http://www.iab.net/media/file/IAB_Internet_

While the FTC has recently signaled that the FCRA would continue to regulate certain activities in the new world of Internet-based financial services, many other practices affecting consumers on a daily basis may not be, unless additional regulatory or legislative action is taken. This Article provides an overview of the new marketplace and points out that many firms and activities presumed not to be regulated under the FCRA, upon further review, should either be regulated under the Act, or under a similar, parallel regulatory regime.

A. The Blurring of the Line Between Credit Offers and Marketing

Contemporary digital-marketing practices are blurring the boundary separating marketing credit from offering it to a consumer. Interactive marketing techniques employ powerful new ways to influence consumer decision-making. Financial-services and credit-card companies stealthily "shadow" individual consumers across cyberspace, watching every click they make and engaging in predictive modeling to help the firm more precisely segment and identify customers to target. The capabilities of online tracking enable the creation of "rich audience profiles," based on an analysis of a user's on-site behavior, which can be combined with an abundance of outside information. This includes intent data captured online that enables marketers to identify whom they consider better qualified prospects, sending consumers advertising shaped by their unique profiles. Armed with a digital dossier of a consumer's interests, background, and behaviors and an arsenal of powerful analytical tools, financial-services companies can unleash sophisticated and highly personalized marketing campaigns. Round-the-clock and automated audience-buying techniques allow companies to offer real-time sales and financial advertisements to consumers at critical points in their decision-making process.[10]

Advertising_Revenue_Report_FY_2011.pdf. The Interactive Advertising Bureau (IAB) defines online lead generation as:

> Fees advertisers pay to internet advertising companies that refer qualified purchase inquiries (e.g., auto dealers which pay a fee in exchange for receiving a qualified purchase inquiry online) or provide consumer information (demographic, contact, behavioral) where the consumer opts into being contacted by a marketer (email, postal, telephone, fax). These processes are priced on a performance basis (e.g., cost-per-action, -lead or -inquiry), and can include user applications (e.g., for a credit card), surveys, contests (e.g., sweepstakes) or registrations.

Id. at 22; *see Finance Leads Verticals in Mobile Ad Spending*, EMARKETER (June 11, 2012), http://www.emarketer.com/Article/Finance-Leads-Verticals-Mobile-Ad-Spending/1009107 (forecasting growing role of mobile marketing and online lead generation for financial marketers).

10. *See generally* ADEXCHANGER, http://www.adexchanger.com (last visited Nov. 11, 2013); EXCHANGEWIRE, http://www.exchangewire.com (last visited Nov. 11, 2013). One online publication provides a useful example:

> How do advertisers decide when to bid on an ad? Real-time bidding (RTB) platforms buy data

The convergence of "Big Data" computer techniques enabling the monetization of insights, combined with advances in online ad technologies, permits financial marketers to make instantaneous decisions about consumers' creditworthiness, the types of products to be offered, and the rates they might pay.[11] New forms of data analytics are used to predict consumers' economic future prospects and to decide whether they are valuable enough, over the long term, to offer attractive credit-card rates or other favorable terms.[12] Computer-assisted behavioral analysis enables marketers to more accurately predict how consumers spend money and whether they can safely manage debt. Through prediction and optimization engines, companies can probe deeply into consumers' personal behaviors to understand not only what they are doing, but how they might behave under different circumstances. An ad for an offer can be placed instantly after an individual has been evaluated as a prospect. Offers can be customized based on a consumer's online activity, which includes directing ads at consumers seeking, for example, payday loans. These digital-data techniques permit effective consumer prescreening.[13]

> about users from across the web. The data is usually in the form of behavioral data gathered from tracking cookies. This information is then fed into the real-time bidding platform, giving advertisers insight into who is about to be served the ad.
>
> Here's a simplistic example of how real-time bidding (RTB) would work in the real world: A user spends a lot of time on financial websites, checking stocks and looking up Morningstar ratings. They arrive on a webpage that uses Real-Time Bidding to serve ads. On the back end, a major financial services provider has specified that they are interested in users that like stocks. A luxury carmaker has also indicated interest in this audience. The RTB system matches these advertisers with the user profile and they bid on the ad. Whoever has the highest bid wins, and their ad gets served.
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> Of course, all this happens in the blink of an eye.

Adage-Six Things You Need To Know About Real-Time Bidding, SOC. MEDIA CIRCUS (May 9, 2012), http://shanecrombie.com/2012/05/adage-six-things-you-need-to-know-about-real-time-bidding (last visited Nov. 11, 2013).

11. *See generally* MATT BECK & GERALD FAHNER, FICO WORLD 2011, PRACTICAL TECHNIQUES FOR IMPROVING CUSTOMER ENGAGEMENT THROUGH ANALYTICS (on file with author).

12. *See generally* HAVAS DIGITAL INSIGHT, LATTITUD, INDUSTRY OVERVIEW: BANKING IN LATIN AMERICA, AN ONLINE PERSPECTIVE (May 2011), http://www.lattitud.com/wp-content/uploads/5-HD_Banking LatinAmerica_Generic-May11.pdf. A recent panel at Adobe focused on bank use of such online data: "While marketers have been doing personalized direct mail and email campaigns for years, most marketing organizations are not offering targeted experiences based on customer behavior across channels. Even companies that are adept at gauging customers' online preferences usually cannot incorporate offline data into their personalized campaigns." *Behavior-Based Marketing: Solutions and Best Practices, Driving Conversion Through Personalized, Multichannel Targeting*, ADOBE SYS., INC. (Feb. 2012), http://lb.ec2.nxtbook.com/nxt books/crmmedia/crm0212/index.php?startid=WP4.

13. *See* BECK & FAHNER, *supra* note 11; Jesse Haines, *Esurance Uses Google Mobile Ads with Click-to-Call To Reduce Cost Per Acquisition by 30%*, GOOGLE MOBILE ADS BLOG (Aug. 6, 2010, 9:47 AM), http:// googlemobileads.blogspot.com/2010/08/esurance-uses-googlmobile-ads-with.html; *TruAudience Syndicated Segment: Underbanked Consumers*, TRUSIGNAL (2013), http://www.tru-signal.com/sites/default/files/file/data _sheets/TruSignal-TruAudience_Underbanked.pdf [hereinafter *TruAudience Syndicated*].

B. Financial Marketing in the Facebook Era

Advocates and policymakers need to address these changes in financial marketing, especially given the realities of today's Internet-based consumer financial marketplace. Indicative of how consumer behaviors have dramatically changed, social networks and mobile phones are the new go-to place for consumers searching and applying for mortgages, credit cards, and college loans. As a 2011 Mortgage Bankers Association presentation explained, "[m]obile makes online lending accessible anywhere, anytime," and because "[l]oan applicants are online all day . . . loan officers need to be mobile too."[14] Mortgage companies describe a typical day for a loan applicant checking her Facebook page while simultaneously checking on interest rates and the status of her application. They note that consumers will "update [their Facebook] status to Homeowner" when their mortgage is approved (which they confirm online), and then might connect to LinkedIn and "apply for new job to pay [their] mortgage."[15]

Banks, credit-card firms, and loan companies scour Facebook pages to glean insight into potential targets. They also establish pages on Facebook, promoting the ubiquitous "Like" button, and engage in marketing campaigns to gain access to consumer data. Consumers are urged to "like" credit bureaus and banks on Facebook, triggering access to some or all of the data associated with a user's account.[16]

The growth of real-time marketing and online decision-making presents both opportunities and risks to financial-products consumers.[17] While on one hand a consumer can now easily obtain more information to better evaluate a specific company or service and engage in comparison shopping, on the other hand, the powerful digital-targeting techniques designed to influence decision-making may actually *limit* the ability of consumers to make reasonable choices. Today, the average consumer would need a Ph.D. in data mining and psychology to

14. Mortg. Bankers Ass'n, *Online, Mobile and Social Media: The Emerging Trends*, SLIDESHARE, at slides 8, 10 (Oct. 10, 2011), http://www.slideshare.net/jdahleen/2011-mba-online-mobile-and-social-mediathe-emergingtrends-final#bthNext.

15. *Id.*

16. *See Gallery*, FACEBOOK STUDIO, http://www.facebook-studio.com/gallery (select "Financial Services" under "Brand Category" dropbox) (last visited Nov. 11, 2013); *see also Barclaycard Introduces First Crowdsourced Social Media Credit Card*, THE FINANCIAL BRAND (Apr. 18, 2012), http://thefinancialbrand.com/23680/barclays-social-media-credit-card-community (demonstrating credit card example). Financial institutions can use listening platforms to monitor social media users. *See Visible Insights: Financial Services*, VISIBLE, http://www.visibletechnologies.com/blog/solutions/financial-services/ (last visited Nov. 11, 2013).

17. Press Release, Adobe Sys., Inc., *Adobe Digital Marketing Suite Tackles Big Data with Predictive Marketing* (Mar. 21, 2012), http://www.adobe.com/aboutadobe/pressroom/pressreleases/201203/032112AdobePredictiveMarketing.html. For example, Adobe's Digital Marketing Suite benefits from "approximately 23,500 servers and networked devices in 19 data center co-location sites. Adobe captures more than six trillion transactions per year for its 5,000+ digital marketing customers. Collectively, these transactions represent more than 27 petabytes of data." *Id.*

effectively navigate the financial landscape in the digital era.[18]

II. Online Lead Generation—A Twenty-First Century Update to Prescreening

Online lead-generation companies play a crucial role in the digital marketing of financial services. "Leads," potential customers for products or services, and "hot leads," people deemed ready to buy or to sell, are valuable commodities. One payday lead generator (which to the average consumer appears to be *offering* the loans), for example, sells leads to the actual payday lenders for $9 each.[19] Companies use a variety of advertising and search-engine-optimization techniques to lure consumers into providing their information so their profiles can be sold as prospects to financial and other marketers. Lead generation ensures that online consumers confront websites expressly designed to trigger real-time interactions such as "chat" capabilities, call-me-back features, sign-up forms, special offers, and more. In addition to capturing the names of prospects, consumers' online behavior can be analyzed, and their personal economic statuses assessed.[20]

A. The Role of Online Marketing and the Big Three in the Financial Meltdown

Lead generation played a critical, but largely invisible, role in the recent subprime-mortgage debacle, and was used to identify candidates for subprime loans. Google and Yahoo, among others, raked in substantial revenues during the housing-loan frenzy, charging as much as $30 to $50 per click for keywords such as "mortgage" and "refinance."[21] From 2005 to 2007, the height of the boom in the United States, mortgage and financial-services companies were among the top spenders for online ads. Countrywide Mortgage and LowRateSource significantly increased their online spending from $18.3 million to $35.5 million, and from $17.9 million to $51.7 million, respectively.[22] As users clicked on these ads, they were transported into lead-

18. *See Financial Services Research 2011*, DG MEDIAMIND, http://origin.www.mediamind.com/resource/financial-services-research-2011 (last visited Nov. 11, 2013). There is an overview of the digital marketing system, including how it uses "engagement" strategies to reach consumers in new ways. *See generally Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age—Reports*, DIGITALADS.ORG, www.digitalads.org/how-youre-targeted/publications/interactive-food-beverage-marketing-targeting-children-and-youth (last visited Nov. 11, 2013).

19. *See* PAYDAY-LEADS.COM, http://www.payday-leads.com (last visited Nov. 11, 2013).

20. *See Lead Generation*, IGNITIONONE, http://www.ignitionone.com/en/on-site-optimization/lead-generation.php (last visited Nov. 11, 2013).

21. Cory Doctorow, *Most Expensive Google Ad Keywords Listed*, BOING BOING (Mar. 26, 2006), http://boingboing.net/2006/03/26/most-expensive-googl.html.

22. *See Behavioral Advertising: Industry Practices and Consumers' Expectations: Hearing Before Subcomm. on Commerce, Trade, and Consumer Prot. and Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 11 (2009) (testimony of Jeff Chester, Executive Director, Center for Digital Democracy), *available at* http://www.democraticmedia.org/doc/cdd-testimony-

generation sites that helped produce the lists of prospects that financial marketers used.

LowerMyBills.com, a lead generator acquired by Experian in 2005 for $330 million, was one of the larger firms advertising in the run-up to the financial collapse.[23] LowerMyBills.com also became known for its "innovative" use of Internet display ads featuring various dancing figures, including cowboys.[24] LowerMyBills.com was the "nation's largest online financial services advertiser" in 2005.[25] To date, the role online marketers have played in what became a global economic crisis has not received the proper scrutiny or regulatory response.[26]

B. Prescreening Consumers

Prescreening—the sale of lists generated from consumer credit reports—is a longtime credit-bureau practice based on a series of somewhat tortured regulatory interpretations, and ultimately codified in 1996.[27] Under its original 1973 interpretation, the FTC determined that a nexus existed between prescreening and the FCRA's credit permissible purpose, allowing prescreening if "the invasion of consumer privacy involved in prescreening was offset by the fact that *every consumer* received an offer of credit."[28]

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23. *See Acquisition of LowerMyBills.com by Experian for $330m Plus Earn-Out*, EXPERIAN (May 5, 2005), http://www.experianplc.com/news/company-news/2005/05-05-2005.aspx; *Experian AcquiresLower MyBills.com for $330M*, SOCALTECH.COM (May 5, 2005), http://socaltech.com/experian_acquires_lowermy bills_com_for_33_m/s-0001900.html.

24. *See* Brad Stone, *Don't Like the Dancing Cowboys? Results Say You Do*, HEARTBEAT OF NEW MEDIA BLOG (Jan. 18, 2007), http://heartbeatofnewmedia.blogspot.com/2007/01/dont-like-dancing-cowboys-results-say.html.

25. Mickey Alam Khan, *Experian Buys LowerMyBills.com for $330M*, DIRECT MARKETING NEWS (May 5, 2005), http://www.dmnews.com/experian-buys-lowermybillscom-for-330m/article/87501.

26. Consumers were unaware of the role online behavioral marketing—a digital form of data collection—and online lead generation played in the marketing of subprime mortgages. Few consumers searching for a mortgage back in 2006, for example, were told that when they used an online calculator at a website, or read an article about mortgages, a tracking cookie was placed on their browser. Bankrate.com, which describes itself as the Web's "leading aggregator of financial rate information" for loans and credit, sold access—otherwise known as leads—to its users through its "Behavioral Targeting Network." *About Bankrate*, BANKRATE, INC., http://www.bankrate.com/coinfo/default.asp (last visited Nov. 11, 2013). These consumers were then shadowed across the Web, targeted for mortgage ads and offers. *See* Jeffrey Chester, *Digital Dollars: Why the Marketing and Ad Industry Are Afraid of New Regulatory Watchdogs*, ALTERNET (Dec. 7, 2009), http://www.alternet.org/story/144416/digital_dollars%3A_why_the_marketing_and_ad_industry_are _afraid_of_new_regulatory_watchdogs; Jeff Chester, *Role of Interactive Advertising & the Subprime Scandal: Another Wake-up Call for FTC*, DIGITAL DESTINY (Aug. 28, 2007, 11:00 AM), http://www.democraticmedia .org/jcblog/?p=349; Press Release, FTC, *Consumer Groups Renew Call for FTC Action To Protect Consumers from Harmful Interactive Marketing Practices, Including Behavioral Profiling* (Oct. 31, 2007), http://www.democraticmedia.org/news_room/press_release/FTCSupplementalFiling.

27. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, sec. 2404, §1681b(d), 110 Stat. 3009, 3431-34 (codified as amended at 15 U.S.C. § 1681a(d) (2012)).

28. FTC, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS 15 n.59 (July 2011), www.ftc.gov/os/2011/07/110720fcrareport.pdf

> Those guidelines required every consumer on any list resulting from the use of consumer reports to receive a firm offer of credit—i.e., the offer must be unconditional; all the consumer had to do to receive the credit was to accept the offer. The Commission's prescreening guidelines were incorporated in 1990 comment 604(3)(a)-6.[29]

The following year, however, bank regulators modified in favor of creditors the concept that *every consumer* must receive an offer of credit; the terminology used for the new, weaker offer was the Orwellian phrase "firm offer of credit."[30]

In 1991, the council of bank regulators stated that while prescreening by banks could not be based on a "conditional offer"—that is, one that could be unilaterally withdrawn—a so-called "firm offer" could be withdrawn under certain circumstances, such as a consumer report showing charge-offs or bankruptcy.[31] As finally codified in the 1996 amendments, what had been a mandatory offer to every consumer who replied to a prescreen in 1973, became no more than a right to apply for credit subject to a full postscreening process following that application. A postscreen could now result in a denial of credit, or an increase in the charge for credit, for almost any reason.

To compensate for an actual offer of credit no longer offsetting the invasion of privacy, the 1996 amendments established the consumer's countervailing right to opt out of prescreening uses of his or her credit reports.[32] The 1996 amendments also expanded legitimate prescreening purposes to include either credit or insurance offers.[33]

While the FTC's original interpretation, allowing credit reports to be used for prescreened credit marketing was lax (although tougher than that of the bank regulators), the FTC has vigorously opposed the use of credit reports for

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[hereinafter 40 YEARS OF EXPERIENCE] (emphasis added).

29. *Id.* at 15.

30. *See* Mary L. Azcuenaga, Comm'r, FTC, Prescreening Under the Fair Credit Reporting Act and Other Current Issues that Affect Credit Bureaus 7 (Jan. 17, 1991) (transcript available at www.ftc.gov/speeches/azcuenaga/ma11791.pdf). Former FTC Commissioner Mary Azcuenaga's 1991 speech to the Associated Credit Bureaus, predecessor to the current CDIA, further explains the early history and theories behind prescreening leading to the 1990 commentary. *See id.*

31. *See FFIEC Policy Statement—Prescreening by Financial Institutions and the Fair Credit Reporting Act*, FED. DEPOSIT INS. CORP. (Dec. 13, 1991), http://www.fdic.gov/regulations/laws/rules/5000-2900.html.

32. *See* Omnibus Consolidated Appropriations Act of 1997 sec. 2404(e). The FCRA includes the following provisions related to prescreening uses: "firm offer of credit or insurance" is the term used in the FCRA for prescreened solicitations; section 603(l) defines the parameters of a firm offer; section 604(c) provides permissible purposes for prescreening, and imposes some limitations on the information that a CRA may provide for the purpose of making prescreened offers; section 604(e) discusses the consumer's right to opt out from prescreened lists; section 615(d) sets forth the disclosures that users of prescreening services must make to consumers on written solicitations. *See* 40 YEARS OF EXPERIENCE, *supra* note 28, at 36, 53-54, 87.

33. *See* 15 U.S.C. §§ 1681-1681x (2012).

other, more general, target marketing. In a long battle with TransUnion Corporation throughout the 1990s, the FTC successfully defended the FCRA's strict prohibition of the use of consumer reports (specifically financial information in consumer reports) for noncredit-marketing purposes, which the D.C. Circuit later upheld.[34]

> [W]e have reviewed what is now a full record in this case and find that the existence-of-tradeline information, as well as other information Trans Union disclosed in its target marketing lists, meets the Section 603 (d) definition of a consumer report. We therefore conclude [that] Trans Union violated the FCRA by selling consumer reports to target marketers who lacked a statutorily permissible purpose.
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> In reaching this conclusion, we examined Trans Union's various target marketing lists—the Master File/Selects, proprietary models, and reverse append products—and find that information disclosed through these products is the type of information that is "used" and/or "expected to be used" in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for credit. Accordingly, these products are consumer reports and Trans Union cannot lawfully sell them for target marketing purposes[.][35]

This further excerpt from the FTC's *Trans Union* opinion in February 2000, describes data models and information uses that are parallel to those described later in this Article as commonly used in the as-yet-unregulated Internet ecosystem:

> Trans Union fully expected lenders to use information in Trans Union's proprietary models to find the most eligible and profitable targets for the lenders' promotions. In addition, each of the models provides information about the consumer's income—a significant factor "used" in credit eligibility decisions. For E-Val and SOLO in particular, the record shows that lenders used the model scores or categories to make such decisions.
>
> Consequently, we [find] that Trans Union's proprietary models were "used or expected to be used" in credit eligibility decisions, and thus constitute consumer reports within Section 603 (d) of the FCRA. By disclosing these reports to target marketers which do not have a permissible purpose under the Act, Trans Union has violated the FCRA.[36]

34. *See In re* Trans Union Corp., 116 F.T.C. 1334 (1993), *rev'd*, 118 F.T.C. 821 (1994), *rev'd*, 81 F.3d 228 (D.C. Cir. 1996).

35. *In re* Trans Union Corp., No. 9255, 2000 WL 257766, at *12 (F.T.C. Feb. 10, 2000) (footnotes omitted).

36. *Id.* at *20–21 (footnotes omitted).

Despite the FTC's vigilance against noncredit target-marketing from credit reports, bank regulators, and then Congress, broadened the FTC's original narrow decision to allow credit prescreening. When CRAs began pushing the envelope even further, the FTC stood idly by.

C. The Rollout of Trigger Lists

Prescreening under the 1970-1990 regime was a slow, orderly practice. Creditors gave the bureaus a list of positive (or negative) criteria to match against consumer reports. The credit bureaus then sold a prescreened marketing list of names and addresses derived from the reports. Buyers used mail houses or telephone-fulfillment firms to make the pitches. Under that system, purchasers of prescreened lists generally obtained the names of only those consumers who affirmatively replied to the offer. They were then allowed to look at the respondents' full credit reports to postscreen them. With the development of trigger lists in the next decade, this process changed dramatically.

Preceding the financial collapse of 2008, credit bureaus accelerated the once slow prescreening business with the development of trigger lists. In 2006-2007, consumer advocates and mortgage brokers sharply criticized the FTC for allowing the sale of trigger lists as prescreened lists.

> Introduced by Experian in 2005, a basic trigger list includes the names and contact information of people who've recently applied for a mortgage. Deluxe lists also supply credit scores, credit card debt summaries and estimates of the equity in real estate owned by prospective borrowers. By late 2006, consumers were complaining to the FTC about phone calls from subprime lenders; some filed lawsuits accusing lenders of using trigger lists, coupled with bait-and-switch tactics, to lure them into onerous loans.[37]

Thus, a consumer could be negotiating with a lender for a mortgage refinancing, placing an inquiry on her credit report, thereby making her a hot lead for instant sale to other lenders, who would then "carpet bomb" her email or overload her phone lines.

Trigger lists are explained further on the Experian website:

> Prospect Triggers is the first preapproved marketing solution to target consumers nationwide based on their actual credit behavior within the past 24-

37. Byron Acohido & Jon Swartz, *FTC Under Fire as Credit Bureaus Sell Consumers' Data*, USA TODAY, Dec. 16, 2007, http://usatoday30.usatoday.com/money/companies/regulation/2007-12-16-ftc-chief-platt-majoras_N.htm. *See generally* Kenneth R. Harney, *FTC to Realtors and Mortgage Brokers: Can't Ban "Trigger List" Hot Leads*, REALTY TIMES (Mar. 26, 2007), http://realtytimes.com/rtpages/20070326_triggerlist.htm.

> 48 hours and deliver that data daily.
>
> . . . .
>
> When a qualified consumer is actively seeking credit, you need to be there with your marketing message. Using credit triggers, you can reach the right people at the right time, bringing a new level of precision and profitability to your credit marketing programs.[38]

The development of "trigger lists" by the Big Three in 2005 was an important bridge between traditional FCRA-regulated prescreening and the new system of lead generation. The Big Three credit bureaus continue to be important players in the lead-generation marketplace.

D. Calculating Lead-Generation Strategies on the Internet

The Internet is transforming prescreening and other practices to identify and influence consumers more precisely. Internet lead-generation companies provide financial marketers with a wide range of tools to help them capture a consumer's information. Online display and search-engine ads for financial products and services are used to generate leads, delivering such messages as "lower your monthly payments," "Free Life Insurance Quotes," or "Find Your Perfect Degree in 3 Steps!" where a "call-to-action" click will trigger the collection of data identifying a prospective customer.[39] One popular technique is the placement of online calculators that can be specially configured to promote credit cards, credit lines, college-planning services, insurance policies, and retirement products.[40] Consumers are unlikely to realize, as they investigate a loan offer on a website for example, that it has been purposely structured to ensure that they complete the transaction, including interacting with the calculator. Leadfusion, a major company in the online lead-generation market, advises its customers that "[b]y offering a pathway without easy exit points during the application process, conversion rates of qualified loan applicants increase. To accomplish this, a pathway should not include distracting animation or navigation to ensure the visitor self-initiates—continues clicking—through the credit application process."[41] Interactive online calculators are:

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38. *Prospect Triggers*, EXPERIAN, http://www.experian.com/consumer-information/prospect-triggers.html (last visited Nov. 11, 2013).

39. *See* GERRY BROWN, BLOOR RESEARCH, HOW REAL-TIME ONLINE SALES LEAD SCORING DRIVES A COMPETITIVE EDGE 5-6 (Feb. 2009), http://www.bloorresearch.com/research/white-paper/1021/how-real-time-online-sales-lead-scoring-drives-a-competitive.html.

40. *Premium Financial Tools*, LEADFUSION http://www.leadfusion.com/solutions/researching-solutions/premium-financial-tools (last visited Nov. 11, 2013).

41. SHERRI NEASHAM & JIM STERNE, LEADFUSION, BEST PRACTICES: ONLINE MARKETING STRATEGIES FOR LOAN PRODUCTS, *available at* http://www.scribd.com/doc/6573276/Best-Practices-Vol-2.

> designed to react to consumer calculations, based on real-time profiling and segmentation. . . . [C]alculators then guide consumers towards the appropriate actions defined by their individual profile as captured by data inputs.
>
> . . . Financial service providers can leverage the information . . . to make immediate offers . . . based on key profile data such as loan amount, income level or geographic location.[42]

Bankrate.com is one of the leading online lead-generation companies, providing content "across multiple vertical categories, including mortgages, deposits, insurance, [and] credit cards" and selling "leads to insurance agents, insurance carriers, and credit card issuers."[43] In 2011, Bankrate.com "generated more than 24 million offer clicks to issuers," making it one of the largest third-party online application sources for all major issuers.[44] It also sold 18 million leads to 20,000 agents and 75 carriers.[45] Leads are generated both within the Bankrate.com site and also through its extensive online network (including CreditCards.com, interest.com, and others).[46] In addition to its own tracking and analysis of its online users' behavior, Bankrate.com has worked with major, but little known, online scoring companies TARGUSinfo (now Neustar) and eBureau to more precisely identify leads for targeting.[47] When Apax Partners purchased Bankrate.com in 2009, it presciently told investors that despite the financial crisis,

> the market space in which Bankrate operates . . . [reflects] (a) . . . a secular shift by consumers to research financial products online . . . , (b) that financial institutions' advertising and marketing budgets would bounce back from the cyclically depressed levels seen in 2009 and (c) that the online share of marketing budgets would grow at an even faster pace than the overall bounce

42. LEADFUSION, PREMIUM FINANCIAL TOOLS 2 (2012), http://www.leadfusion.com/uploads/pdf/solutions/researching/Product_Brief_Premium_Financial_Tools.pdf. A consumer lead is also scored to help determine its value for marketers. Among the parameters that can be used to evaluate the worthiness of a prospect are whether she viewed a specific webpage, such as pricing and product reviews; whether she shared via social sharing; whether she searches for a company name; and whether she answered a question. "Bad Behaviors" can also be used to generate a negative score, including whether someone has not engaged in website activity for a long period of time, made a negative social media comment, or declined contract or warranty renewal. MARKETO, THE BIG LIST OF LEAD SCORING RULES: A CHECKLIST OF OVER 250 EXPLICIT AND IMPLICIT LEAD SCORING RULES 5 (2011), http://www.marketo.com/_assets/uploads/Marketo-Lead-Scoring.pdf.

43. *Profile: Bankrate Inc (RATE.N)*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=RATE.N (last visited Nov. 11, 2013).

44. Bankrate, Inc., Annual Report (Form 10-K) 8 (Mar. 12, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1518222/000119312512109829/d297865d10k.htm.

45. *Id.*

46. *See id.* at 43.

47. Press Release, Bankrate, Inc., *Bankrate Announces Fourth Quarter and Full Year 2011 Financial Results* (Feb. 6, 2012), http://phx.corporate-ir.net/phoenix.zhtml?c=61502&p=irol-newsArticle&id=1657141.

back as financial institutions increasingly look to target customers in the cost-effective online channel.[48]

Leading online real estate and finance companies, such as Tree.com, Trulia, Zillow, and Realtor.com, are also involved in online lead generation. Internet leads called back within one minute of being received have a 391% higher probability of closing, according to industry reports.[49] Online lead-generation companies have also focused on the Spanish-language market. For example, in 2011, WeFixMoney.com created PrestameDinero.com, for "consumers who feel more comfortable executing short-term loans in Spanish."[50]

Equifax offers a variety of twenty-first-century lead-generation products based on credit reports, including TargetPoint Cross-Sell: "Utilizing your target marketing list or customer database file, matched against Equifax's industry leading credit marketing database, Equifax identifies consumers within your portfolio who have recently demonstrated interest in obtaining additional credit."[51] Equifax's InterConnect Online Prescreen product permits banks to "[d]eliver a prescreen offer within several seconds of a customer approaching the teller" and "[p]rescreen the consumer for up to 10 different products at a time."[52] The credit bureaus are using digital lead generation to supercharge the old prescreening business model, perfecting new ways to sell lists of consumers active in the credit marketplace. Lead lists appear to be no different from prescreened lists marketed for the intention of selling credit offers. Certainly no one would pay $5-$25 for someone's address to mail them an advertising brochure. "Clicks" (which lead to ad serving) may or may not cross the blurry line we have described, but leads certainly appear to do so.

III. FTC: SOME WEB ACTIVITIES, INCLUDING VIA SOCIAL NETWORKING AND MOBILE APPLICATIONS, MAY BE CONSUMER REPORTS

The FTC has already weighed in, defining how the development of online social-networking databases or certain mobile phone application (app) transactions may constitute consumer credit reports. For example, in the spring

48. APAX PARTNERS, RELEASING POTENTIAL: ANNUAL REPORT 2009, at 71 (2009), http://www.apax.com/media/11217/apax%20annual%20report%202009.pdf.

49. *See How To Convert Marketing Leads to Sales,* INBOUND SALES NETWORK, http://www.inboundsales.net/blog/bid/38074/How-to-Convert-Marketing-Leads-to-Sales (last visited Nov. 11, 2013).

50. Press Release, Fix Media, *Fix Media Announces Launch of 100% Organic Lead Generation Spanish-Language Website* (Oct. 25, 2011), http://hosted.verticalresponse.com/802111/dbd7525e5b/1473433137/0914c3032b.

51. EQUIFAX, TARGETPOINT CROSS-SELL 1 (2007), http://www.equifax.com/pdfs/corp/TargetPoint-Cross-Sell-S07.pdf; *see Financial Services*, EQUIFAX, http://www.equifax.com/financial-services/en_us (last visited Nov. 11, 2013).

52. EQUIFAX, ONLINE PRESCREEN CASE STUDY 1 (Sept. 2008), http://www.equifax.com/pdfs/corp/EFS-813-ADV_Online_prescreen_case_study_InterConnect.pdf.

of 2011, the commission concluded an investigation of Social Intelligence Corporation—a company that used Internet and social-media information as part of pre-employment background screenings for its clients:

> The reports sold by Social Intelligence include public information gathered from social networking sites. Our investigation aimed to determine the company's compliance with the Fair Credit Reporting Act (FCRA).
>
> Social Intelligence is a consumer reporting agency because it assembles or evaluates consumer report information that is furnished to third parties that use such information as a factor in establishing a consumer's eligibility for employment.[53]

The FTC made clear that companies collecting online information used for employment purposes must comply with the FCRA.[54] The FTC has also recognized that using data profiles to help determine life-insurance risk could trigger FCRA requirements. As a story in *The Wall Street Journal* noted:

> For insurers and data-sellers alike, the new techniques could open up a regulatory can of worms. The information sold by marketing-database firms is lightly regulated. But using it in the life-insurance application process would "raise questions" about whether the data would be subject to the federal Fair Credit Reporting Act, says Rebecca Kuehn of the Federal Trade Commission's division of privacy and identity protection. The law's provisions kick in when "adverse action" is taken against a person, such as a decision to deny insurance or increase rates.[55]

In 2010, the FTC also settled a complaint with Teletrack, a subprime CRA, regarding its sale of an online consumer-reports database for marketing purposes:

> The complaint alleges that Teletrack created a marketing database of information that it gathered through its credit reporting business. It then sold

53. Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Prot., Bureau of Consumer Prot., FTC, to Renee Jackson, Nixon Peabody LLP (May 9, 2011), *available at* http://www.ftc.gov/os/closings/110509socialintelligenceletter.pdf.

54. *See, e.g.*, Wendy Davis, *FTC: Data Mining Company Subject to Consumer Protection Laws*, ONLINE MEDIA DAILY (June 13, 2011), http://www.mediapost.com/publications/article/152343/ftc-data-mining-company-subject-to-consumer-prote.html; Anita Ramasastry, *Will Insurers Begin To Use Social Media Postings To Calculate Premiums?,* VERDICT (Jan. 3, 2012), http://verdict.justia.com/2012/01/03/will-insurers-begin-to-use-social-media-postings-to-calculate-premiums; Leslie Scism & Mark Maremont, *Insurers Test Data Profiles To Identify Risky Clients*, WALL ST. J., Nov. 19, 2010, http://online.wsj.com/article/SB10001424052748704648604575620750998072986.html.

55. *See* Scism & Maremont, *supra* note 54.

> the information in this database—including lists of consumers who had applied for non-traditional credit products—to marketers. . . . The FTC's complaint alleges that these marketing lists were credit reports under the FCRA because they contained information about a consumer's creditworthiness. The FTC charges that Teletrack violated the FCRA, which makes it illegal to sell credit reports without a specific "permissible purpose" under the statute; marketing is not a permissible purpose.[56]

Additionally, the FTC has looked at the mobile Internet. In 2012, the FTC sent warnings to several companies selling mobile apps used for background screening, indicating that the FCRA may cover their activities.[57] According to a commission release, "[t]he FTC warned the apps marketers that, if they have reason to believe the background reports they provide are being used for employment screening, housing, credit, or other similar purposes, they must comply with the Act."[58] These actions suggest that when firms cross a bright line, the FTC will act to enforce the FCRA.

The next question for the FTC involves whether new credit-scoring models on the Internet may cross a moving or blurry line, and become actionable under the FCRA. In addition to CRAs, many other online-data firms are engaged in credit-related practices that warrant scrutiny. For example, social-media information on those profiled as Internet "influencers" (individuals who can encourage their friends to buy products) and in the market for financial services, is available from BlueKai.[59] Another major seller of online "intent" and interest-targeting data is eXelate, a provider of financial information related to finance and insurance, job seekers, and those in the market for an automobile. EXelate also identifies consumers who are Spanish speakers ("data generated from Spanish language portals [and] social networks") and "Urban" consumers ("[v]isitors to African American social networks").[60] Although the FTC recently called upon Congress to enact legislation focused on online data-brokers, it has not yet found that online profiling companies using financial information are accountable under the FCRA.[61]

56. Press Release, FTC, *Consumer Reporting Agency To Pay $1.8 Million for Fair Credit Reporting Act Violations* (June 27, 2011), http://www.ftc.gov/opa/2011/06/teletrack.shtm.

57. *See* Press Release, FTC, *FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), http://www.ftc.gov/opa/2012/02/mobileapps.shtm.

58. *Id.*

59. *See* Press Release, BlueKai, *Largest Sharing Platform Partners with Largest Data Exchange To Deliver Social Audiences* (June 28, 2011), http://www.bluekai.com/newsandmedia_pressreleases_20110628.php; *Data Activation: The Audience Data Marketplace*, BLUEKAI, http://www.bluekai.com/bluekai-exchange.php (last visited Nov. 11, 2013).

60. *See Marketplace Data Segments*, EXELATE (on file with author).

61. *See* Cecilia Kang, *FTC Urges Transparency Law for Internet Data Brokers*, WASH. POST, Mar. 26, 2012, http://www.washingtonpost.com/business/technology/ftc-urges-transparency-law-for-internet-data-brokers/2012/03/26/gIQA21okcS_story.html; Press Release, FTC, *FTC Issues Final Commission Report on Protecting Consumer Privacy* (Mar. 26, 2012), http://www.ftc.gov/opa/2012/03/privacyframework.shtm.

IV. NEW MODELS OF CREDIT SCORING AND DECISION-MAKING ON THE INTERNET: THE NEXT FRONTIER

In the new frontier of Internet decision-making, digital scores (including online profiles) may be used to deliver advertisements and drive transactions. Increasingly, in the authors' view, the bright line that once separated such advertising and transactions subject to the FCRA is blurring. One reason is that the marketing lists are based on massive amounts of financial information. This information is integrated with a wide range of other data measures, helping tailor these online scoring profiles more specifically to an individual consumer. These scores and other new, little-known measures allow financial companies to evaluate the risks and rewards in providing financial products to particular consumers, and then to "micro-target" them.[62]

In the FTC's February 2000 order against Trans Union for illegal target-marketing, it reviewed a variety of products, algorithms, and models, repeatedly stating findings such as the following:

> [We] find that information disclosed through these products is the type of information that is "used" and/or "expected to be used" in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for credit. Accordingly, these products are consumer reports . . . .
>
> . . . .
>
> [W]e [find] that Trans Union's proprietary models were "used or expected to be used" in credit eligibility decisions, and thus constitute consumer reports within Section 603 (d) of the FCRA. By disclosing these reports to target marketers which do not have a permissible purpose under the Act, Trans Union has violated the FCRA.[63]

The challenge for policymakers at the FTC and the Consumer Financial Protection Board (CFPB) will be to evaluate the new landscape and determine answers to the following questions about the ways that landscape is related to its order in *Trans Union*:

- At what point does an Internet profile or consumer dossier containing information bearing on any one of the FCRA's seven factors, from creditworthiness to mode of living, make a profile into a consumer report if it is compiled to serve as a "factor in establishing the consumer's eligibility for credit . . ."?[64]

62. *See Financial Services*, FRACTAL ANALYTICS, http://www.fractalanalytics.com/financial-services/overview (last visited Nov. 11, 2013).

63. *In re* Trans Union Corp., No. 9255, 2000 WL 257766, at *12, *21 (F.T.C. Feb. 10, 2000).

64. 15 U.S.C. § 1681a(d)(1)(A) (2012).

- At what point does the collection and sale, or sharing, of those dossiers make a firm a CRA?
- When does a decision derived from a profile acquired through serving an ad tied to a financial offer become an offer based on a decision affecting a consumer's eligibility for credit, insurance, or employment?
- When does a decision selecting some consumers for different higher or lower cost, or more or less desirable products, become an "adverse action" or a "risk-based pricing" selection subject to the FCRA?[65]
- Where is the line between a score calculated simply to serve a targeted ad and a score used to determine a consumer's eligibility for credit?

The remainder of this section does not attempt to answer these questions; it simply provides an overview of a new digital marketplace that needs to be viewed in light of these questions. In this marketplace, consumers are instantaneously profiled and then those profiles are sold. In the authors' view, there is a very good case to be made that, today, the prescreening and decision-making marketplace is a lot different than it was in 1971. Regulators and consumer-protection advocates must seriously scrutinize these changes, and consider whether to extend the FCRA or FCRA-like protections to the uses of information described in this Part.

A. The Line Between Credit Offers and Marketing Is Blurring

The relationship between marketing and making a distinct offer of credit to a consumer is becoming less distinct. Data collected via online tracking and analysis permits the effective prescreening of consumers. An ad tied to a decisional offer can be placed instantly after the individual has been evaluated as a prospect. In a recent paper, Experian discusses "[s]ome of the key strategies lenders are evaluating on a large scale and more limitedly implementing to meet portfolio growth objectives," including using the Internet for "prequalifying consumers online to manage risk of prospects being evaluated for underwriting; [and] utilizing email campaigns to communicate offers to consumers."[66] Experian underscores why the Internet has transformed the consumer-credit marketplace:

> In today's marketplace, lenders seek to quickly respond to consumers who are in the market for credit products . . . .
>
> The strategy to . . . capture "new entrants" and "credit seekers" consists of the following:

65. *See id.* § 1681a(k) (defining adverse action).

66. EXPERIAN, EXPANDING THE MARKETABLE UNIVERSE 12 (2011), https://www.experian.com/assets/consumer-information/white-papers/universe-expansion-white-paper.pdf.

- Implementation of a "continuous" prospect monitoring process, using propensity scores, triggers and attributes that identify consumer credit migration behavior
- Integration of a propensity model into prescreen programs by conducting a vintage campaign overlay to determine score cut strategy . . . .[67]

This is exactly what the data collection and targeting capabilities of the digital marketing system precisely permit. Experian also explained that:

> Forward-thinking credit marketers who choose to expand into the online channel have integrated tools that assess a prospect's risk prior to the application process. This reduces the volume of prospects who go through the full application process, resulting in better approval rates and ROIs for this channel. This is part of the full point-of-contact strategy that most lenders have developed to address how to best acquire new customers and cross-sell existing customers at each point of contact with their institutions—from Websites to call centers. A point-of-contact strategy expands the acquisition efforts outside of direct mail while managing risk and using tools that provide insight during interactions.[68]

B. The "Traditional" Credit-Scoring Model Needs To Be Broadened

The CFPB, in its initial report on what may soon be called the traditional credit-scoring model, estimates that:

> In light of the important role of credit scores in consumer credit markets, there is a great deal of interest on the part of consumers in obtaining their credit reports and credit scores. The market for providing credit reports and scores [directly to consumers] has grown in recent years to more than $1 billion in revenue, and sales to consumers make up roughly a quarter of the U.S. revenues of the CRAs and their affiliates.[69]

67. *Id.* at 13.

68. *Id.*

69. CONSUMER FIN. PROT. BUREAU, THE IMPACT OF DIFFERENCES BETWEEN CONSUMER- AND CREDITOR-PURCHASED CREDIT SCORES: REPORT TO CONGRESS 9 (2011), http://files.consumerfinance.gov/f/2011/07/Report_20110719_CreditScores.pdf [hereinafter CFPB REPORT TO CONGRESS]. Another reason that market channel has grown so large is that in the early 1990s, under industry pressure, the FTC withdrew a proposed rule that would have made credit scores part of credit reports. Absent that rule, the credit bureaus now have a market to sell both reports and scores directly to consumers. *See* Kenneth R. Harney, *FTC Ready To Open Credit-Risk Ratings to Borrowers*, BALT. SUN, July 24, 1994, http://articles.baltimoresun.com/1994-07-24/business/1994205207_1_credit-scores-reporting-agencies-credit-files.

Consumer reports provide a list of "trade lines" and public records about a consumer's bill-paying habits. Using algorithms, firms such as FICO, which provides the well-known FICO score, and more recently the credit bureaus through their joint venture VantageScore, offer numerical summaries of those credit reports. In the early 1990s, the FTC issued a proposed guideline requiring the inclusion of credit-risk scores as part of credit-report disclosures to consumers. Industry pressure caused the FTC to rescind that proposal. In 1996, Congress then codified that scores were not part of reports.[70] In 2010, Congress finally increased consumer access to actual lender-used scores, making them part of adverse-action notices.[71] These credit-risk scores ostensibly predict the risk of default on credit or insurance, yet are widely criticized for both possible discriminatory impact and for use in circumstances—such as car insurance ratings or employment decisions—where a causal relationship has not been shown.[72]

But scoring has migrated from the Big Three's databases to the Internet. Companies trafficking in the creation and sale of scoring products used online have emerged. Other forms of scoring involve assessing a consumer's intent through online tracking, where one is identified as being "in-market" for a product or service. Such information is placed in a profile linked to a cookie or another online record.

C. Online Real-Time Scoring Systems

On-Demand "consumer insight" companies, such as TARGUSinfo, can use their vast databases not only to determine if an individual is real or an

70. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, sec. 2408(a)(1), § 1681b(d), 110 Stat. 3009, 3436-39 (codified at 15 U.S.C. § 1681g(a)(1)(B)).

71. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1100F, § 615(a), 124 Stat. 1376, 2112 (2010) (codified as amended at 15 U.S.C. § 1681m (2012)). In 1992, the FTC amended, but under industry pressure never enforced, its commentary on the FCRA, stating that a credit-report disclosure to a consumer must include any "risk score." Commentary on the Fair Credit Reporting Act, 57 Fed. Reg. 4935 (Feb. 11, 1992). In 1994, it proposed a rule interpreting this action, but ultimately withdrew it, again under industry pressure. *See* Commentary on the Fair Credit Reporting Act, 59 Fed. Reg. 31,176 (proposed June 17, 1994) (suggesting amendment to commentary). A 1996 amendment did not require that scores be included in reports. *See* Omnibus Consolidated Appropriations Act of 1997 sec. 2408(a)(1). The Fair and Accurate Credit Transactions Act of 2003 amendments made it easier for consumers to obtain scores from furnishers in several ways. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952. Section 1100F of the Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1100F, 124 Stat. 1376, 2112 (2010) amends section 615(a) of the FCRA, 15 U.S.C. § 1681m (2012), to require the disclosure of a credit score when an adverse action is based in whole or in part on a numerical credit score. *See* 16 C.F.R. pts. 640, 689 (2013).

72. *See* CHI CHI WU & BIRNY BIRNBAUM, NAT'L CONSUMER L. CTR. & CTR. FOR ECON. JUST., CREDIT SCORING AND INSURANCE: COSTING CONSUMERS BILLIONS AND PERPETUATING THE ECONOMIC RACIAL DIVIDE 4 (2007), http://www.cej-online.org/NCLC_CEJ_Insurance_Scoring_Racial_Divide_0706.pdf. *But see* Robert B. Avery et al., *Does Credit Scoring Produce a Disparate Impact?* 12 (Fed. Reserve Bd. Fin. & Econ. Discussion Series No. 2010-58, 2010), *available at* http://www.federalreserve.gov/pubs/feds/2010/20105 8/201058pap.pdf.

imposter,[73] but also to evaluate and rank that person as a potential customer, all in real time.[74] Its database includes 220 million verified mobile phone numbers and 8 billion records on consumers.[75] Neustar's "On-Demand Scoring" service "utilizes all the essential components needed to create and deliver scores," including phone numbers, names, address data, household demographics, and predictive behavioral attributes.[76] The company provides "Prospect Scoring," "Lead Scoring," and "Customer Scoring" services, which enable marketers to make real-time decisions about the products and services they offer to a particular individual. Very few consumers likely recognize that when they are speaking to a customer service representative on the phone, or even applying online, Neustar helps financial companies to pinpoint high-value prospects.

The company says its real-time scoring network performs nearly 100 billion interactions a year at sub-second speed.[77] Through what it calls its "Buying Power Score," Neustar "accurately quantifies your best customers and evaluates your best prospects."[78] Among Neustar's data partners are a "who's who" of online data collection and profiling, including Admeld, Appnexus, Bluekai, DataXU, Demdex, Rubicon, TURN, and Tribal Fusion, among others, and they reflect the new realities of digital marketing, in which tremendous amounts of information can be compiled about an individual.

One of the company's new partners is Xaxis, the real-time targeting system operated by the world's largest ad firm—WPP. Xaxis, unveiled in 2011, operates the world's largest database of individual profiles for online targeting, including "demographic, financial, purchase, geographic, and other information that's been collected from peoples' Web activities and physical transactions."[79]

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73. *See* 16 C.F.R. pt. 681 (2013). These firms, and many others, provide real-time identity-verification software and other products in response to the "Red Flags" rule implementing section 114 of the Fair and Accurate Credit Transactions Act of 2003, which amended section 615 of the FCRA. *See id.*

74. Press Release, TARGUSinfo, *Bankrate, Inc. Strengthens Longstanding, Trusted Partnership with TARGUSinfo* (Jan. 19, 2012), http://www.prweb.com/releases/2012/1/prweb9121593.htm [hereinafter TARGUSinfo Press Release]. Bankrate, Inc. is one of TARGUSinfo's clients, and TARGUSinfo is a Neustar company. *See id.*

75. NEUSTAR INFO. SERVS., NEUSTAR ACCOUNTLINK 1 (2012), http://www.neustar.biz/information/docs/pdfs/solutionsheets/accountlink-solutionsheet.pdf.

76. *On-Demand Lead Scoring*, NEUSTAR, http://www.neustar.biz/infoservices/engage-customers/scoring/on-demand-scoring#.UoGkS43Cr0I (last visited Nov. 11, 2013).

77. *Our Data: Authoritative Customer Data for Your Marketing Analytics Needs,* NEUSTAR, http://www.neustar.biz/infoservices/technology/our-data#.UTLWknz5mDA (last visited Nov. 11, 2013). The company's suite of multichannel consumer information solutions includes products for "Identification, Verification, Scoring, Location, Caller ID and Real-Time Analytics solutions." TARGUSinfo Press Release, *supra* note 74.

78. *See On-Demand Lead Scoring, supra* note 76.

79. Emma Bazilian, *WPP Unit Targets Consumers with 'World's Largest' Profile Database: Xaxis To Create Personalized Ads, ADWEEK* (June 27, 2011, 11:20 AM), http://www.adweek.com/news/advertising-branding/wpp-unit-targets-consumers-worlds-largest-profile-database-132956. The company also helps payday-loan businesses like Money Mart, which serves the "unbanked and underbanked consumers" and conducts "on-demand verification" of a consumer's identity. *See* NEUSTAR INFO. SERVS., DOLLAR FINANCIAL GROUP 1 (2012), http://www.neustar.biz/information/docs/pdfs/casestudies/dollarfinancial_casestudy.pdf.

Xaxis also works with Bankrate, Inc.

EBureau is another little-known company that seeks to impact financial prospects through a real-time scoring system available to online marketers.[80] EBureau explains that "[m]uch like the FICO score in the consumer credit markets, online lead scoring allows marketers to utilize a simple 3-digit number, around which clear policies or decisions can be made."[81] Its "eScores utilize over 50,000 pre-built modeling variables in order to generate custom models around individual, household or neighborhood (9-digit zip code) characteristics."[82] Among the data that can be used to generate an eScore are information on a consumer's past purchases, credit history, assets, street and email address, mobile phone number, and online activity. Using a "[m]assive [d]ata [w]arehouse," "eScores leverage eBureau's vast data network that seamlessly integrates billions of records across thousands of databases that cover nearly all US adults and households."[83] The company also says that it "adds over 3 billion new records each month," and contains information on a consumer's summarized credit data and various public records, such as bankruptcy records, deceased files, real property records, asset records, name, address, telephone number, date-of-birth information, and Internet, catalog, and direct-marketing purchase histories.[84]

For the financial-services industry, eScores are used to identify customers for credit card companies, banks, stockbrokers, mortgages, and online retail firms. A consumer's eScore can identify how much revenue he or she will potentially provide a financial-services company, helping it offer its services to customers who will deliver the greatest return. EScores "can take into account facts like occupation, salary and home value" and help companies "choose whom to woo on the Web."[85] Marketers use the qualities of a consumer's score to decide, in real time, whether he or she is a potential valuable customer and

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Explaining that "[i]n approximately 65% of payday transactions, customers provide a wireless phone number on applications instead of a landline number," Neustar is able to help companies like Money Mart verify the applicant's name, address, and mobile number. *Id.* Internet consumers can also be targeted using Neustar's "AdAdvisor" database product, which can "instantly connect consumers to attributes and propensities such as demographics, lifestyle preferences, and brand affinities." *Learn More About AdAdvisor and Alliant Data*, LOTAME, http://www.lotame.com/learn-more-about-adadvisor-and-alliant-data (last visited Nov. 11, 2013).

80. Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power*, N.Y. TIMES, Aug. 18, 2012, http://www.nytimes.com/2012/08/19/business/electronic-scores-rank-consumers-by-potential-value.html. A version of this Article was provided to reporter Natasha Singer as background prior to the publication of her *N.Y. Times* article, *Secret E-Scores Chart Consumers' Buying Power*. *See id.*

81. eBureau, Online Lead Quality Scoring: Increase Sales While Lowering Cost Per Sale 3 (July 19, 2010) (white paper), *available at* http://www.docstoc.com/docs/47507273/Online-Lead-Quality-Scoring-Increase-Sales-While-Lowering-Cost-Per-Sale.

82. *Id.* at 5.

83. EBUREAU, ESCORES 1 (2010), http://www.ebureau.com/sites/default/files/file/datasheets/ebureau_escore_datasheet.pdf.

84. *Id.*; *see* eBureau, *Find Your Next Customer Through Predictive Analytics*, *available at* http://www.scribd.com/doc/35429784/eBureau-Solutions-Brochure (last visited Nov. 11, 2013).

85. *See* Singer, *supra* note 80.

the kind of response required. Individuals with the highest scores will get more favorable attention from sales agents.[86] For example:

> By pairing a marketer's customer data with eBureau's offline profile data, eBureau is able to build a predictive model that identifies the best and worst prospects across the addressable online audience. . . . eBureau helps ensure that marketers don't target just anyone who is raising their hand, but only those who will increase the value of their business.[87]

The company also provides "eScores for Collections" that "accurately measure the probability of recovering various types of consumer debt."[88]

D. Digital Targeting Collides with Digital Scoring

TruSignal, a spinoff from eBureau, is a predictive analytics company that generates "a consumer propensity Score (a number from 0-9)" used "to predict which products and services may be of interest to you."[89] The company profiles more than 100 million U.S. adults every month.[90] Data used by TruSignal comes from 40 sources, including major financial institutions, census data, past purchase history, property records, and "geo-location" information.[91] TruSignal "provides Scores to a network of interactive partners" who "place cookies that include the Scores on consumers' computers when they visit a website."[92] The score enables online marketers to show ads to a particular consumer "if their Score predicts that they may have a high propensity for the customers' services or products."[93]

86. *See id.*

87. Press Release, eBureau, *eBureau Presents Winning Case at BlueKai's Data Summit* (June 29, 2011), http://www.ebureau.com/press-releases/ebureau-presents-winning-case-bluekai%E2%80%99s-data-summit.

88. EBUREAU, ESCORES FOR COLLECTIONS 1 (2010), http://www.ebureau.com/sites/default/files/file/datasheets/ebureau_escore_collections_datasheets.pdf; *see* EBUREAU, INCOME ESTIMATOR (2010), http://www.ebureau.com/sites/default/files/file/datasheets/ebureau_income_estimator_datasheet.pdf; EBUREAU, PREPAID DEBIT CARD PROVIDER: REDUCES CUSTOMER ACQUISITION COSTS UP TO 50% WHILE DOUBLING CONVERSION RATES (2011), http://www.ebureau.com/sites/default/files/file/ebureau_prepaid_debtcard_provider.pdf.

89. *Consumer Privacy Statement*, TRUSIGNAL (Apr. 25, 2012), http://www.tru-signal.com/consumer-privacy-statement.

90. *Build Your Audience*, TRUSIGNAL, http://www.tru-signal.com/how-it-works/build-your-audience (last visited Nov. 11, 2013).

91. *Discover Your Formula*, TRUSIGNAL, http://www.tru-signal.com/how-it-works/discover-your-formula (last visited Nov. 11, 2013).

92. *Consumer Privacy Statement*, *supra* note 89.

93. *Id.*; *see TruSignal Grading Client Data for Online Ad Targeting—CEO Meyer and Prez Dowhan Discuss*, ADEXCHANGER (Feb. 20, 2012, 8:57 AM), http://www.adexchanger.com/data-exchanges/trusignal/; *see also* Press Release, TruSignal, *Predictive Analytics Expert eBureau Spins Off Digital Ad Targeting Business into New Company Named TruSignal* (Jan. 10, 2012), http://www.tru-signal.com/press-releases/Predictive-Analytics-Expert-eBureau-Spins-Off-Digital-Ad-Targeting-Business-Into-New; *Discover Your Formula*, *supra* note 91; *How It Works FAQ*, TRUSIGNAL, http://www.tru-signal.com/how-it-works/faq (last visited Nov. 11, 2013).

TruSignal has a data sheet explaining that "underbanked consumers" are ideal audience members.[94] It suggests that "[t]he TruAudience Syndicated Segment for Underbanked Consumers includes people who have profile characteristics similar to consumers who maintain nontraditional banking relationships. This segment is valuable for advertisers looking to reach consumers using money transfer services, applying for short term loans or prepaid debit card products through online channels."[95] Its data sheet further explains that TruSignal uses the following "Top Predictive Factors" to create its profiles: "Length at residence, [e]stimated home value, [n]ot owner occupied residence, [m]usical tastes, [and] [f]inancial strength."[96] An accompanying pie chart lists hobbies—presumably including "musical tastes"—as comprising 11% of data sources, but financial information comprising 32%, and demographics equaling 36%, are understandably more influential.[97] The data set also includes public information, such as public records and census information.[98]

The TruSignal data set would appear to meet the first prong of the consumer report definition:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor . . . .[99]

The question is whether the data set is then used to determine a consumer's eligibility for credit. The answer depends on whether, and how, online advertising is converted directly into credit offers derived from consumer reports. The system is in place to seamlessly deliver an offer based on the online profiling and scoring data, where a consumer has been identified and prescreened without any knowledge of the process. The murky and purposefully ill-defined divisions among online lead generation, consumer profiling, scoring, and tracking, coupled with the integration of advertising and direct sales, have created new challenges for both consumers and regulators.

94. *TruAudience Syndicated*, *supra* note 13.
95. *Id.*
96. *Id.*
97. *See id.*
98. *See TruAudience Syndicated*, *supra* note 13.
99. 15 U.S.C § 1681a(d)(1) (2012).

E. Experian, Equifax, TransUnion, and FICO Are Also Players in This New Ecosystem

Traditional credit reporting and scoring companies such as Experian, Equifax, TransUnion, and FICO have also expanded their services to include consumer targeting on the Internet.[100] For example, Experian's Digital Advertising Service (DAS) helps marketers track and target users by combining "offline and online data and analytics" through the use of real-time data collection.[101] Experian claims that its "Audience IQ" Internet product provides "real-time results" and "powerful, end-to-end addressable advertising capabilities in one easy-to-use platform that combines planning, targeting and optimization" to match consumers with "offers that drive engagement."[102] Through its online targeting product, Experian promises it can find "prospects with credit challenges" and help credit companies acquire "card-members who will make it through a prime approval process."[103]

Experian offers a glimpse of how it constructs some of its online products:

> [W]e layer in the Experian consumer view and database, a compiled set of consumer data which combines U.S. Census data, public record data, self-reported data, into a rich view of consumers at the household level. What we do is anonymously match, and therefore enrich the information that we have when we look at online behavior. We also layer into this the Experian Mosaic, the lifestyle segment classification system, which was recently updated not more than six months ago. It is the most complete and up-to-date view of the American consumer that you can find anywhere.[104]

In addition to LowerMyBills.com, PriceGrabber, and freecreditscore.com, Experian also acquired the well-known online tracking firm Hitwise.[105] In

100. *See* Press Release, Experian, *Experian and Adobe Expand Partnership To Include Hitwise and Adobe SiteCatalyst Data Exchange* (June 21, 2011), http://www.experian.com/hitwise/press-release-adobe-hitwise-partnership.html; Press Release, WealthEngine, *WealthEngine and TransUnion Announce Strategic Partnership To Offer New Consumer Insights Using Sophisticated Wealth Scores* (Oct. 15, 2012), http://www.wealthengine.com/news-events/press-release/wealthengine-and-transunion-announce-strategic-partnership-offer-new; *FICO Customer Dialogue Manager*, FICO, http://www.fico.com/en/Products/DMApps/Pages/FICO-Customer-Dialogue-Manager.aspx (last visited Nov. 11, 2013).

101. *See Campaign/Optimization Manager*, EXPERIAN, http://Experian.hodesiq.com/job-description.asp?JobID=2776703 (last visited Nov. 11, 2013).

102. EXPERIAN, AUDIENCE IQ FOR ADVERTISERS (2011), http://www.experian.com/assets/marketing-services/brochures/audience-iq-brochure.pdf.

103. *Audience Targeting for Financial Services*, EXPERIAN, http://www.experian.com/marketing-services/audience-targeting-for-financial-services-industry.html (last visited Nov. 11, 2013); *see Targeting*, EXPERIAN, http://www.experian.com/marketing-services/digital-advertising.html (last visited Nov. 11, 2013).

104. *Experian Hitwise SVP Bradstock Says AudienceView Using Largest Panel of Online Consumer Behavior*, ADEXCHANGER (Mar. 27, 2012, 1:11 AM), http://www.adexchanger.com/data-exchanges/experian-hitwise (quoting Simon Bradstock).

105. Adario Strange, *Experian Acquires Hitwise for $240 Million*, WIRED (Apr. 19, 2007),

2012, the firm sold LowerMyBills.com and Pricegrabber.[106] In March 2012, Hitwise launched a new service called AudienceView that helps marketers more precisely target online users.[107] Digital consumers can be tracked based on their "Summarized Credit Scores;" "[a]ge, income, gender, race and ethnicity;" and "[v]isits to specific websites."[108] An Experian executive explained that:

> [T]he benefits from AudienceView reside in the company's ability to combine an online sample of 10 million users in the United States with data in the offline Experian Marketing Service ConsumerView database, which provides insights from 235 million U.S. consumers and 113 million households classified by more than 1,000 behavioral attributes.[109]

Online financial marketers are taking advantage of aggregated, unregulated products such as "Aggregated FICO Scores from IXI," which is part of Equifax.[110] These financial scores, explains FICO, "[c]an be used throughout the customer lifecycle including to enhance prospecting, segmentation, campaign planning, targeting, and offer development."[111] FICO describes them as a "micro-neighborhooded form of the FICO Score to enhance marketing applications, thus enabling credit grantors, insurance companies, and other firms to utilize an aggregated version of the industry accepted credit risk assessment measure for non-FCRA marketing purposes."[112] Each "micro-neighborhood" is made up of at least seven households.[113] FICO also offers marketers the ability to bootstrap from their popular consumer-scoring system

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http://www.wired.com/business/2007/04/experian_acquir.

106. *See* Matt Brian, *Experian Agrees $175m Deal with Ybrant Digital To Offload PriceGrabber and Other Comparison Sites,* THE NEXT WEB (May 10, 2012), http://thenextweb.com/insider/2012/05/10/experian-agrees-175m-deal-with-ybrant-digital-to-offload-pricegrabber-and-other-comparison-sites; *see also* Khan, *supra* note 25; Richard Maven, *Experian Buys Hitwise for £120m*, ECONSULTANCY (Apr. 19, 2007, 9:57 AM), http://econsultancy.com/us/blog/1067-experian-buys-hitwise-for-120m; Sean Michael Kerner, *PriceGrabber .com Grabbed by Experian*, INTERNETNEWS.COM (Dec. 14, 2005), http://www.internetnews.com/ec-news/article.php/3570946/PriceGrabbercom+Grabbed+by+Experian.htm.

107. Press Release, Experian, *Experian Hitwise Launches AudienceView* (Mar. 25, 2012), http://press.experian.com/United-States/Press-Release/experian-hitwise-launches-audienceview.aspx.

108. *Track Website Traffic with Experian Hitwise*, WEBSITE TRAFFIC TOOLS (Apr. 2, 2012), http://www.website-traffic-tools.com/blog/news/track-website-traffic-with-experian-hitwise-110.

109. Laurie Sullivan, *How To Find New Customers Through Audience Ad Targeting*, MEDIAPOST (Mar. 21, 2012, 1:35 PM), http://www.mediapost.com/publications/article/170412/how-to-find-new-customers-through-audience-ad-targ.html.

110. *Aggregated FICO Scores*, EQUIFAX-IXI SERVICES, http://www.ixicorp.com/products-and-services/customer-targeting-and-scoring/aggregated-fico-scores (last visited Nov. 11, 2013).

111. *Id.*

112. *Id.*

113. *See Customer Targeting and Scoring*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/products-and-services/customer-targeting-and-scoring (last visited Nov. 11, 2013); *see also Aggregated FICO Scores*, *supra* note 110.

through an Internet-focused "Precision Marketing Manager."[114]

F. Disclaimer: Micro-Neighborhood Products Cannot Be Used for FCRA Decisions

In a joint PowerPoint presentation entitled "Enhancing Your Marketing Effectiveness and Decisions with Non-Regulated Data," Equifax IXI and FICO presenters explain that such scoring products "[c]annot be used as: [a] factor in establishing or determining an individual's eligibility for personal credit, insurance, or employment."[115] That, of course, would make the products consumer reports. The presentation goes on to point out, however, that companies gain the "ability to incorporate FICO insight into non-FCRA marketing applications."[116] The major credit bureaus appear to want it both ways. They want to create precise tools to target individual consumers while simultaneously claiming that their financial micro-targeting activities do not warrant FCRA safeguards.

In addition to its Aggregated FICO Scores, Equifax IXI offers multiple products delivering "financial insights," including "WealthComplete," "Income360," and "Discretionary Spending Dollars," which improves "targeting and models by analyzing an estimate of households' discretionary spending dollars."[117] Equifax IXI's "Financial Cohorts Digital" product is just one of its "Digital Targeting Options," providing "Financial and Propensity Measures for Online Marketing."[118] IXI's "Ability to Pay (ATP) Digital" enables online targeting of users based on their "ability to pay their financial obligations."[119] Other Equifax IXI online financial-targeting products enable marketers to identify people as a "Social Network User," "Online Gamer," or "Heavy Internet User," as well as "Likely Gamblers," those who are "Likely to Respond to Home Insurance Offer[s]," and those who "Shop for Children."[120]

To advertising agencies, Equifax IXI explains that its unique solutions enable online advertisers and agencies to both target only the consumers who have the right financial profile for each offer and brand, and to ensure that the right message is delivered. Providing advanced forms of what it calls "audience targeting," Equifax IXI tells agencies it can help them:

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114. *FICO Precision Marketing Manager*, GLEANSTER, http://www.gleanster.com/solutions/fico-precision-marketing-manager (last visited Nov. 11, 2013).

115. See Ian Wright et al., *Enhancing Your Marketing Effectiveness and Decisions with Non-Regulated Data*, FICO WORLD 2011, at slide 14 (on file with author).

116. *See id.* at slide 13.

117. *Customer Targeting and Scoring*, *supra* note 113.

118. *IXI Digital Targeting Options*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/ixi-digital/ixi-digital-targeting-options/ (last visited Nov. 11, 2013).

119. *See id.*

120. *See id.*

- Utilize financial insights real-time to optimize your site content and campaigns
- Limit marketing to consumers that are less likely to have the right financial profile for your brand
- Serve premium offers to visitors that are more likely to have your desired financial profile for certain products and save lower value offers for others
- Develop creative and messaging for ads that will resonate and bring business to your company based on visitors' estimated financial profiles[.][121]

Equifax IXI's "AudienceIntel" service enables financial companies to help develop "Landing Pages"—the first page a user will land on after, for example, conducting a search or clicking on an advertisement—which is fashioned according to data collected and an assessment of an individual's financial status or interest.[122] In this way, an advertisement can be quickly turned into a data-enriched environment designed to sell a specific product.

Financial marketers are also exploring how customers respond to dynamic or differential pricing (price sensitivity), such as what the reception would be for various annual percentage rates offered on a loan. The price sensitivity score is available from FICO, and is made possible through advanced analytics.[123] FICO also identifies low discretionary spending capacity individuals, who should be ignored. FICO recently explained that "[k]nowing [an] [i]ndividual's [l]ikely [f]uture [b]ehavior [i]ncreases [m]arketing [o]pportunity."[124] The company also says that it can help lenders recognize valuable prospects to target by identifying who can take on more debt.[125] It is "time-to-event model[s]" that enable companies to predict and act on what they believe will be our behavior and actions, enabling the targeting of an offer for customers with best scores.[126] One FICO score reflects "discretionary spending capacity," which can help credit card companies and others to identify "favorable prospects in markets with rising delinquency rates" and other factors.[127] These

121. *Advertising and Site Content Optimization*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/ixi-digital/solutions-for-advertisers-and-agencies/advertising-and-site-content-optimization (last visited Nov. 11, 2013); *Solutions for Advertisers and Agencies*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/ixi-digital/solutions-for-advertisers-and-agencies (last visited Nov. 11, 2013).

122. *AudienceIntel*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/ixi-digital/solutions-for-advertisers-and-agencies/audienceintel/ (last visited Nov. 11, 2013).

123. BECK & FAHNER, *supra* note 11, at 18-20; *Marketing Management*, FICO, http://www.fico.com/en/Industries/Insurance/Pages/MarketingManagement.aspx (last visited Nov. 11, 2013).

124. BECK & FAHNER, *supra* note 11, at 11.

125. FAIRISAAC, STATEMENT OF DIRECTION SCORING 1 (Apr. 2008), http://library.corporate-ir.net/library/67/675/67528/items/291634/ScoringStatementofDirectionApril2008.pdf.

126. FICO, WHICH RETAIL ANALYTICS DO YOU NEED? 4 (Mar. 2011) (white paper) (on file with author).

127. Wright et al., *supra* note 115, at slide 19.

scores are used to "better segment [the] prospect base" by "understand[ing] discretionary spending capacity and behaviors."[128]

G. The Cookie Monster Meets Financial Marketing on the Internet

Equifax IXI, Neustar, and others may claim to sell products that compile "aggregated," not individual, data, partly to avoid FCRA regulation. This assumption needs regulatory review. Aggregated results can easily be either disaggregated or combined with a few identifiers to create actionable, individualized data.

FICO's use of data-profiling cookies for its online targeting incorporates "direct-measured data aggregated to [the] neighborhood level."[129] It is based on a "Complete and Granular" database that incorporates information from "95+ firms, 200 million accounts, [and] 800 million records," revealing "detailed investment preferences and behaviors."[130] FICO builds these cookies based on users' ZIP+4 (a minimum of seven households that incorporate "non-regulated" data based on income, assets, and credit).[131] These cookies all reside in a "geolocation database" used to "match to consumers," enabling "[d]igital targeting based on [an] Aggregated FICO Score."[132] An online user with a higher aggregated FICO Score can be identified and targeted for specific services, such as housing, with the "Net Result: Better ROI, lower bad debt."[133]

Like other online marketing companies, Equifax IXI claims that the data it collects on users is "anonymous" and harmless.[134] Yet IXI is able to pull together a precise array of information that can determine who we are online and what kind of financial offer we should receive, all of which is undisclosed and unaccountable to the user. IXI claims on its website that it "is committed to protecting the privacy of our clients and their customers," and that its "digital products neither incorporate nor reveal any personally identifiable information."[135] Yet it goes on to explain that:

> - [Equifax] IXI uses cookies for the delivery of some of our digital ad targeting products. In these cases, IXI places cookies on online users' browsers to facilitate our partners' ability to serve targeted advertising to those users. . . . [T]he cookies are used to inform what ad is

128. *Id.* at slide 19.
129. *Id.* at slide 32.
130. *Id.*
131. Wright et al., *supra* note 115, at slide 33.
132. *Id.* at slides 33, 38.
133. *Id.* at slide 38.
134. *Privacy Commitment*, EQUIFAX IXI SERVICES, http://www.ixicorp.com/privacy-commitment (last visited Nov. 11, 2013).
135. *Id.*

> delivered to the user based on estimated characteristics (such as income or propensity to make certain types of financial investments) and on geography. . . .
>
> . . . .
>
> - IXI also works with third party ad network partners to deliver some of our digital solutions to clients. . . .[136]

Companies like Equifax IXI are hiding behind a purposefully disingenuous and increasingly discredited definition of what can be considered "anonymous" when tracking and targeting a consumer on the Internet.[137] A more informed explanation can be found in a report sponsored by Winterberry Group, one of the trade associations that Equifax IXI claims helps it to be privacy compliant.[138] A report on "audience buying," released in 2011, reveals that the industry's claims that the data is not identifiable do not hold up:

> Despite the challenges inherent in the PII/non-PII divide, some data executives downplay the importance of knowing a prospect's name and address, arguing that pixel-driven data—insight into what an individual browser does on a website or a platform like Facebook—often brings the sought-after targeting capabilities, even without a consumer name. "A cookie is just as good as an individual ID," argued an executive at one large media-buying platform. . . .
>
> . . . Ultimately, many said, the consumer's name and address isn't as important in raw behavioral data to determine propensity to respond.[139]

The use of digital profiling and targeting to identify consumers as either "targets or waste," as Professor Joseph Turow writes, reflects the growing capability of marketers to identify individuals as unworthy of even being offered services, or to discriminate against consumers if they lack the qualities sought to ensure greater profits.[140]

Further, the opacity and ubiquity of online tracking systems make it impossible for consumers to avoid them, giving marketers even more power. Privacy scholar Chris Hoofnagle and colleagues, in a 2012 article, point out that:

136. *Id.*

137. *See id.*

138. *See From Information to Audiences: The Emerging Marketing Data Use Cases*, WINTERBERRY GROUP, at 13 (Jan. 2012), *available at* http://www.slideshare.net/NikolayBulanov/iab-winterberry-auidience datause.

139. *Id.*; *see also Experian Marketing Solutions Audience IQ Privacy Policy*, EXPERIAN, http://www.experian.com/privacy/audience-iq.html (last visited Nov. 11, 2013).

140. JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH 88 (2011).

> Those who argue that consumers can negotiate the nuances of privacy and tracking online assume that the online world is similar to the offline world. In the offline world, consumers can vote with their feet and, in most circumstances, leave a business they do not wish to frequent without it collecting data about the experience. In the online world, efficiencies in identification and aggregation alter the balance of power of the relationship between the consumer and the business.[141]

The use of these scores and products, especially when applied online in real time, raises questions about what consumers are entitled to know about the financial-profiling products used to evaluate them.

H. Is Being "In-Market" a Signal We Are Being Evaluated for Our "Eligibility" for Credit?

A new data market has emerged, selling access to a consumer's intent to be "in-market" for a product or service. Online data warehousing companies, such as BlueKai, offer online marketers easy access to intent information from Acxiom and many other data brokers. Available for Internet targeting through BlueKai, Acxiom's "InfoBase" includes information on the "buying activity on the majority of U.S. households."[142] A broad range of consumer-financial activity is part of InfoBase, including net worth, mortgage status, bank card and credit card ownership, those with home loans, and user-interest information.[143] Other "data aggregator" financial information available through the BlueKai Exchange identifies an online consumer by estimated household income, estimated credit utilization, working-class status, personal finances, and retail-card use.[144]

V. ARE THESE MARKETING LISTS ACTUALLY PRESCREENED LISTS? ARE THE ADS ACTUALLY OFFERS BASED ON CREDIT "ELIGIBILITY"?

In the view of the authors, such online scoring databases combining these factors (including intent) are equivalent to prescreened lists, which are consumer reports. The authors believe that TruSignal's (and similar) products contain information about a consumer's creditworthiness, one prong of the test of a credit report. Again, as discussed above, the question for the FTC to

141. Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 294 (2012).

142. *See* BLUEKAI, BLUEKAI EXCHANGE—THE LARGEST AUCTION MARKETPLACE FOR ALL AUDIENCE DATA 3 (2010), http://www.bluekai.com/files/BrandedData.pdf (enumerating demographic, socioeconomic, and lifestyle information available on Acxiom's InfoBase).

143. *See id.* (listing user-interest examples such as sweepstakes, contests, mail order, and likely investors).

144. *See id.* at 3-8 (listing other factors used in audience targeting).

determine is whether TruSignal and others also sell the data set in a way that meets the second prong of the definition of a consumer report: "establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under section 1681b."[145]

We know that through the power of consumer tracking and data analytics, financial marketers measure what they term the "customer journey" and the "purchase cycle." From the initial use of a search engine, to the exploration on a specific website (including knowing where you click and how you navigate the site), to collecting lead-generation information through tools such as calculators, requests for information or discounts, and urging you to "like" them on Facebook, online marketers boast of having the power to move a consumer down the "marketing funnel." Financial marketers can deliver highly personalized advertisements to trigger responses, including the use of geolocation and user data to generate many different distinct pitches. Through interactive advertising technologies, including "neuromarketing," a consumer can be urged, in multiple ways, to engage with the interactive marketing message for credit or other financial products. As we have briefly explained, financial marketers now have a wealth of information and techniques to determine how to treat an individual consumer. When an online score is linked to a cookie and multiple sources of offline and online information, it becomes a powerful screening and consumer-credit-assessment system. Triggering an offer based on creditworthiness information could render these practices actionable under the FCRA.

VI. CONCLUSION: THE ROLES OF THE CFPB AND THE FTC

We are at the beginning of the big data and online financial-marketing revolution. Consumers need safeguards to ensure that they do not confront the same oblique and unfair deception that contributed to the last financial crisis. The predictive capabilities of digital marketing enable determinations to be made about our financial future without sufficient checks and balances. Today's consumers rely on "multichannel" media—such as social networks, mobile phones, and email—to make financial decisions. But, they are largely unaware of how the process works, namely that they are subject to invisible "calls to action" that help generate a profile that can include their "demographic, geographic, financial and product preference information."[146] They would not reasonably expect that their use of an online calculator for credit cards, insurance, and auto purchases, may be used to "make immediate offers . . . based on key profile data such as loan amount, income level or

145. 15 U.S.C. § 1681a(d)(1)(A)–(C) (2012).

146. LEADFUSION, *supra* note 42, at 1-2.

geographic location."[147] Nor would they expect that such calculators made available for mobile phones may have built-in "pre-defined segmentation rules to drive recommended next steps" based on data inputs.[148] A consumer cannot be expected to know they have become part of an "intent" screening system, which may "use behavioral or event triggers . . . from [a] website, online banking system, data warehouse, call center or retail branch" to identify them for targeted emails promoting an offer, nor that such an offer can be customized based on their online behavior.[149] With powerful computers and armies of "Math Mad Men" helping design campaigns to influence how we spend our money, it is time for regulators to protect consumers and police the digital financial marketplace.

In addition to its recent actions on FCRA activities in the social-networking space, in March 2012, the FTC released its final comprehensive report on online privacy.[150] In this framework, the FTC called for a variety of new privacy protections and actions, including legislation to govern the "information broker" industry.[151] It urged that businesses make privacy the default setting for consumers, providing them "greater control over the collection and use of their personal data through simplified choices and increased transparency."[152] Regarding data brokers, the new framework (primarily proposals for "best practices") suggested that companies "provide consumers with reasonable access to the data the companies maintain about them, proportionate to the sensitivity of the data and the nature of its use."[153] Companies were encouraged to provide consumers with the opportunity to convey "affirmative express consent" before collecting "sensitive data for certain purposes."[154] Consumer groups have repeatedly called for tighter regulation of this sensitive online data, including for financial-marketing purposes. The FTC has also urged that data brokers who "compile data for marketing purposes" consider developing a centralized website that would provide consumers the opportunity to learn about their "access rights and other choices" if they wished to obtain such information.[155]

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147. *Id.* at 2.

148. *Id.*

149. *Marketing Solutions*, LEADFUSION, http://www.leadfusion.com/solutions/marketing-solutions (last visited Nov. 11, 2013); *see Mobile Financial Tools*, LEADFUSION, http://www.leadfusion.com/solutions/researching-solutions/mobile-financial-tools (last visited Nov. 11, 2013); *Premium Financial Tools*, *supra* note 40.

150. *See generally* FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (Mar. 2012), http://www.ftc.gov/os/2012/03/120326privacyreport.pdf [hereinafter PROTECTING CONSUMER PRIVACY].

151. *Id.* at 69.

152. *Id.* at i.

153. *Id.* at iv.

154. PROTECTING CONSUMER PRIVACY, *supra* note 150, at 60.

155. *Id.* at ix.

The report also called for extending consumer privacy protections on a sliding scale to firms whose activities may place them outside the FCRA:

> Finally, some businesses may maintain and use consumer data for purposes that do not fall neatly within either the FCRA or marketing categories discussed above. These businesses may encompass a diverse range of industry sectors. They may include businesses selling fraud prevention or risk management services, in order to verify the identities of customers. They may also include general search engines, media publications, or social networking sites. They may include debt collectors trying to collect a debt. They may also include companies collecting data about how likely a consumer is to take his or her medication, for use by health care providers in developing treatment plans.
>
> For these entities, the Commission supports the sliding scale approach, which several commenters endorsed, with the consumer's ability to access his or her own data scaled to the use and sensitivity of the data. At a minimum, these entities should offer consumers access to (1) the types of information the companies maintain about them; and (2) the sources of such information.[156]

The FTC promisingly announced that it would focus its attention on "large platform providers," including leading online companies, where the comprehensive tracking of consumers online reflects "heightened privacy concerns."[157]

The Obama Administration also released its own Consumer Privacy Bill of Rights (the Bill) in February 2012.[158] The Bill's principles form the foundation of a series of multistakeholder negotiations sponsored by the administration between consumer groups and digital advertisers which began in July 2012.[159] The goal is to develop new, mutually agreeable self-regulatory codes of conduct that the FTC could enforce.[160]

Importantly, the new CFPB is expected to use behavioral economics as the lodestar for its activities, which should give it information to help evaluate these practices.[161] Also, the CFPB completed its first "larger participants"

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156. *Id.* at 67 (footnotes omitted).

157. *Id.* at 73.

158. *See generally* WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (Feb. 2012), https//www.whitehouse.gov/sites/default/files/privacy-final.pdf.

159. *See Commerce Department's NTIA Announces First Privacy Multistakeholder Process Topic,* U.S. DEP'T OF COMMERCE (June 18, 2012), http://www.commerce.gov/os/ogc/developments/commerce-department%E2%80%99s-ntia-announces-first-privacy-multistakeholder-process-topi; *First Privacy Multistakeholder Meeting: July 12, 2012*, NAT'L TELECOMM. & INFO. ADMIN. (June 15, 2012), http://www.ntia.doc.gov//other-publication/2012/first-privacy-multistakeholder-meeting-july-12-2012.

160. *See* WHITE HOUSE, *supra* note 158, at 1-3.

161. Carter Dougherty, *Behavioral Economics Gets Its First Big Test*, ST. LOUIS POST-DISPATCH, June 5, 2011, http://www.stltoday.com/business/local/behavioral-economics-gets-its-first-big-test/article_9e02943e-cbca-59a8-bb7d-4cbc0638de8b.html.

rulemaking, in the summer of 2012.[162] It now has authority to examine or supervise the largest CRAs.[163] That means, in addition to enforcement powers and stronger FCRA rulemaking authority than the FTC, the CFPB also has the ability to look inside CRA "black box" operations. The examination authority will also facilitate better enforcement and better rulemaking.[164]

Additional investigation of the online credit-score industry should be high on the FTC's and CFPB's agendas, addressing how firms create and use these profiling products, and ensuring that consumers have control over how such scores are assembled and used.[165] One of the key issues is the use of such scores for forms of discrimination, including preferential or dynamic pricing. Some consumers may only receive lesser offers than they actually qualify for; some consumers may be charged more than others for the identical product, perhaps in a deceptive manner. In other contexts, similar activities have been actionable, especially when used to discriminate against protected classes. As discussed above, a key threshold question for regulators is determining when information is used merely to target ads, and when it is used to establish eligibility for credit or other actions that would bring their practices under the FCRA. The CFPB and FTC should also examine the merging of online and offline data used for both scoring and targeting individual consumers. A full inquiry into how financial-services companies are using online marketing to profile and target individual consumers is required.

The CFPB and FTC should ensure that consumers know whether (and how) they have been secretly scored or rated by digital financial marketers, especially those consumers labeled as less profitable or undesirable. The new breed of online data-warehousing companies that sell access to consumers' financial behavior, and those that are part of the digital targeting chain, also require scrutiny. Online marketing techniques used by financial companies should be assessed, including the sales of consumers on real-time ad exchanges, to ensure that practices are not unfair and deceptive. For example, webpages are designed to ensure that they promote the "conversion"—a sale or

162. Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau To Supervise Credit Reporting* (July 16, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-superivse-credit-reporting.

163. *Id.*

164. 12 C.F.R. pt. 1090 (2013). The CFPB then announced that examinations of the approximately seventy largest consumer-reporting agencies would begin on September 30, 2012. Press Release, Consumer Fin. Prot. Bureau, *CFPB Releases Exam Procedures for Consumer Reporting Market* (Sept. 5, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-releases-exam-procedures-for-consumer-reporting-market.

165. *See* CFPB REPORT TO CONGRESS, *supra* note 69; Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Study Finds Credit Scores Used by Consumers and Lenders Can Differ* (Sept. 25, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-study-finds-credit-scores-used-by-consumers-and-lenders-can-differ. The CFPB has completed two statutory reports on credit scoring, and others are in process.

some other expected action—of a user. The use of "rich media" applications that are expressly designed to immerse a consumer in the content of an ad should also be evaluated to ensure that they promote an experience that enables reasonable decision-making on a financial product and offer. These and other tactics used to capture consumer information for online leads, or to trigger transactions, require scrutiny.[166]

Regulatory activities interpreting the government's authority to regulate the commercial use of information under a new interpretation of consumer reports will undoubtedly bring renewed threats to the FCRA's constitutionality. As this Article shows, however, while both the marketplace and the techniques have changed, what companies actually *do* has not. Companies are still compiling comprehensive profiles of consumers for determining their eligibility for credit and other related purposes. As a result, the government interest—protecting the privacy of consumer credit information—remains substantial.[167] In addition, for those online information collection and use regimes not deemed to precisely align with the FCRA's exacting definitions, additional protections should include the establishment of a robust parallel regulatory scheme. Finally, as we have documented in several detailed previous filings to the FTC, online marketing incorporates a wide range of sophisticated techniques that can leave a consumer vulnerable when the practices involve such highly personal products, like mortgages, loans, visits to medical information or patient self-help pages, or even location preferences buttressed by GPS.[168] Online marketing tactics have largely gone unregulated, creating new opportunities for financial marketers to engage in practices that must be investigated and stopped. The CFPB should work with the FTC to ensure that necessary twenty-first-century safeguards protect both the welfare and the privacy of online financial consumers.

166. *Mobile Web Optimization*, SITESPECT, http://www.sitespect.com/mobile-web-optimization.shtml (last visited Nov. 11, 2013); *Rich Media Gallery*, *supra* note 6.

167. *See* Trans Union Corp. v. FTC, 245 F.3d 809, 818 (D.C. Cir. 2001); *see also* Press Release, FTC, *FTC Joins Department of Justice and Consumer Financial Protection Bureau in Filing Brief Supporting the Constitutionality of the Fair Credit Reporting Act* (May 8, 2012), http://www.ftc.gov/opa/2012/05/fcra.shtm. *See generally* King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303 (E.D. Pa. 2012) (challenging Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011)).

168. *See Online Health and Pharmaceutical Marketing That Threatens Consumer Privacy and Engages in Unfair and Deceptive Practices*, CENTER FOR DIGITAL DEMOCRACY (Nov. 19, 2010), http://democraticmedia.org/sites/default/files/2010-11-19-FTC-Pharma-Filing.pdf; *see also Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Mobile Marketing Practices*, CENTER FOR DIGITAL DEMOCRACY (Jan. 13, 2009), http://democraticmedia.org/current_projects/privacy/analysis/mobile_marketing; *Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices*, CENTER FOR DIGITAL DEMOCRACY (Nov. 1, 2006), http://www.centerfordigitaldemocracy.org/sites/default/files/FTCadprivacy_0_1.pdf; *Real-Time Targeting and Auctioning, Data Profiling, Optimization, and Economic Loss to Consumers and Privacy*, CENTER FOR DIGITAL DEMOCRACY (Apr. 8, 2010), http://www.centerfordigitaldemocracy.org/sites/default/files/20100407-FTCfiling.pdf.