

#REPRESENT

[www.representconsumers.org](http://www.representconsumers.org)

P.O. Box 461972, West Hollywood, CA 90046

September 11, 2019

**SENT VIA EMAIL**

The Honorable Letitia James  
Attorney General of the State of New York  
Office of the Attorney General  
The Capital  
Albany, NY 12224

**RE: Secret Surveillance Scoring: Request for Investigation and Enforcement Action.**

Dear Attorney General James:

We write to alert your office of a matter of urgent concern for consumers in New York and across the nation: the tech industry's deployment of secret surveillance scores that enable large corporations to discriminate against consumers in the marketplace. Enclosed is a detailed petition we submitted to the Federal Trade Commission on June 24, 2019, asking the Commission to investigate and stop illegal surveillance scoring. We are concerned, however, that the FTC may not have the resources or the political consensus to challenge these practices – at least before they become so firmly entrenched in American commerce that it will be difficult to later to dislodge them.

As the enclosed petition explains, at least 11 tech companies – none of them known to Americans, much less household names – are applying secret algorithms to tens of thousands of pieces of private information about each American to create a variety of scores that enable corporations to overcharge, mistreat or even refuse to do business with those with poor scores. These scores include:

- **“Customer Profitability Scores” that are used to charge different prices to different consumers for the same product based on predictions of how profitable a particular customer will be to the companies.** For example, Home Depot and Walmart quote different prices for different users for everyday items like paint, pens and paper towels, while travel companies like CheapTickets and Travelocity quote different prices for different users for airfare and hotels.

- **“Consumer Value Scores” that penalize “less valuable” customers with poor or no customer service.** Scoring firms Zeta Global and Kustomer Inc. use thousands of data points about consumers to create scores that enable their corporate clients to subject low-scoring consumers to long hold times or to deny them assistance altogether. In an era in which judicial decisions are reducing consumers’ right to their day in court, denying American consumers access to customer services leaves them with no way to correct errors or resolve disputes over faulty products or even identity theft.
- **“Fraud Scores” that tag consumers who assert their rights as potential criminals and deny them the right to return an item, or even buy it.** Big box stores like Best Buy and Sephora use fraud scoring firms to refuse to do business with consumers who are flagged by the algorithms as “untrustworthy” for behavior that is routine among American consumers – such as paying for fast delivery or returning items.
- **“Job Scores” and “Tenant Scores” that deny people housing or employment** based on a score that blacklists her simply because she uses a particular web browser.

Because these new algorithmic scoring systems are closely guarded secrets, consumers have no knowledge that they are victims, and no recourse when a score based on inaccurate information is used to make a negative decision about them. Surveillance scoring empowers corporations to engage in modern-day redlining with enormous potential to conceal racial and other forms of discrimination against consumers.

Two of the companies identified in our petition are headquartered in the state of New York: Zeta Global and Kustomer Inc., but all of them are targeting consumers not only in New York but across the nation. As the leader of one of the nation’s strongest consumer protection agencies – exemplified by your actions fighting for consumers’ financial rights, ensuring access to healthcare and protecting the environment, and most recently by your initiation of independent inquiries into Facebook and Google – you are uniquely situated to use the power of your office to undertake a much-needed inquiry into these pernicious practices.

Please contact us if you would like further information.

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Letitia James, New York State Attorney General  
RE: Secret Surveillance Scoring: Request for Investigation and Enforcement Action.  
September 11, 2019  
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Respectfully Submitted,

Handwritten signature of Laura Antonini in blue ink.

Laura Antonini  
Policy Director  
(949) 929-2612  
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Handwritten signature of Harvey Rosenfield in blue ink.

Harvey Rosenfield  
President  
Harvey@RepresentConsumers.org

#REPRESENT

[www.representconsumers.org](http://www.representconsumers.org)

June 24, 2019

**SENT VIA FEDEX OVERNIGHT AND EMAIL**

Donald S. Clark, Secretary of the Commission  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

**RE: Secret Surveillance Scoring: Urgent Request for Investigation and Enforcement Action.**

Dear Mr. Clark:

Major American corporations, including online and retail businesses, employers and landlords are using Secret Surveillance Scores **to charge some people higher prices for the same product than others, to provide some people with better customer services than others, to deny some consumers the right to purchase services or buy or return products while allowing others to do so and even to deny people housing and jobs.**

The Secret Surveillance Scores are generated by a shadowy group of privacy-busting firms that operate in dark recesses of the American marketplace. They collect thousands or even tens of thousands of intimate details of each person's life – enough information, it is thought, to literally predetermine a person's behavior – either directly or through data brokers. Then, in what is euphemistically referred to as “data analytics,” the firms' engineers write software algorithms that instruct computers to parse a person's data trail and develop a digital “mug shot.” Eventually, that individual profile is reduced to a number – the score – and transmitted to corporate clients looking for ways to take advantage of, or even avoid, the consumer. The scoring system is automatic and instantaneous. None of this is disclosed to the consumer: the existence of the algorithm, the application of the Surveillance Score or even that they have become the victim of a technological scheme that just a few years ago would appear only in a dystopian science fiction novel.

Discriminating against Americans based on Secret Surveillance Scores contradicts and undermines the bedrock principles of competition and fairness that have long served as a foundation for the nation's marketplace. Secret Surveillance Scores are also contrary to American ideals of equality, providing yet another way to divide Americans into the

“haves” and the “have-nots,” with the have-nots relegated to the status of second-class citizens who are not only victims of overcharges and other abuses but are often treated as if they were criminals.

Based on an analysis of the law, we concluded that these practices violate federal laws. Through its powers under Section 5 of the Federal Trade Commission Act, the FTC has taken a leading role in protecting Americans from privacy-related abuses in the marketplace. We request that, pursuant to the Federal Trade Commission’s authority under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and 16 C.F.R. § 2.5, the Commission investigate the use of Secret Surveillance Scores to determine (1) how Secret Surveillance Scores are generated and applied; (2) which companies are generating and applying Secret Surveillance Scores; (3) which consumers are being targeted by companies using these scores; and (4) the impact of Secret Surveillance Scores on consumers and the marketplace.

Additionally, we request that the Commission investigate the companies and firms (including those identified in this Petition (see § IV)) that use or develop Secret Surveillance Scores.

If the Commission finds that the companies developing and applying Secret Surveillance Scores are violating Section 5 of the Federal Trade Commission Act, we further request that the Commission take appropriate enforcement action and prohibit the use of Secret Surveillance Scores.<sup>1</sup>

## **I. INTRODUCTION: LOSS OF PRIVACY AND THE ADVENT OF SECRET SURVEILLANCE SCORING.**

This Petition does *not* ask the Commission to investigate the collection of American’s personal information. The battle over whether Americans’ personal data can be collected is over, and, as of this moment at least, consumers have lost. Consumers are now victims of an unavoidable corporate surveillance capitalism.<sup>2</sup> Rather, this Petition highlights a disturbing evolution in how consumers’ data is deployed against them.

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<sup>1</sup> This Petition is submitted on behalf of #REPRESENT, a project of the Consumer Education Foundation, a California-based nonprofit consumer advocacy organization organized under the Internal Revenue Code, 26 U.S.C. § 501(c)(4).

<sup>2</sup> Surveillance capitalism is described as “the commodification of our personal data by tech giants like Facebook and Google and their imitators in telecommunications, electronics and other industries.” Tim Wu, *How Capitalism Betrayed Privacy*, NY Times (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/opinion/sunday/privacy-capitalism.html>; see Karl Manheim and

Intrinsic to Secret Surveillance Scoring is the exponential growth in the amount of personal data that is now collected. By using the Internet, smartphones, social media and connected devices, consumers create a limitless stream of data. Anything that connects to the Internet is capable of collecting information about consumers. Today, that not only includes a computer or a smartphone, but the Internet of Things, or IoT. (IoT “refers to the capability of everyday devices to connect to other devices [or] people through the existing Internet infrastructure.”<sup>3</sup>) IoT includes any kind of electronic equipment,<sup>4</sup> medical device,<sup>5</sup> home appliance, car,<sup>6</sup> clothing, or toy for children.<sup>7</sup>

Contrary to the public’s understanding, the private perpetrators collecting and profiting from this information are not just the technology goliaths Google, Facebook, Instagram, Netflix and Amazon. Tens of thousands of smaller companies that provide an app, program, or website on the Internet or through connected devices are continuously surveilling Americans as well.<sup>8</sup>

The scope of what global corporations know about the intimate details of Americans’ daily lives is barely understood. They know our race, religion, age, gender, social security

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Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 Yale J. L. & Tech. 106, 123-125 (2019).

<sup>3</sup> *Internet of Things (IoT)*, EPIC <https://epic.org/privacy/internet/iot/> (last visited Jun. 19, 2019).

<sup>4</sup> See, e.g., Letter from John M. Simpson, Privacy Project Director, Consumer Watchdog, to Chairman Maureen Ohlhausen and Commissioner Terrell McSweeney, FTC, *Complaint Regarding Home Digital Assistants’ Threat to Privacy* (Dec. 19, 2017), <http://www.consumerwatchdog.org/sites/default/files/2017-12/LtrFTC121917.pdf>.

<sup>5</sup> See, e.g., Lily Hay Newman, *Medical Devices Are the Next Security Nightmare*, Wired (Mar. 2, 2017), <https://www.wired.com/2017/03/medical-devices-next-security-nightmare/>; Willow, *A Wearable Breast Pump*, Medgadget (Jan. 23, 2018), <https://www.medgadget.com/2018/01/willow-wearable-breast-pump-ces-2018.html>.

<sup>6</sup> John R. Quain, *Alexa, What Happened to My Car?*, New York Times (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/business/amazon-alexa-car.html>.

<sup>7</sup> Sheera Frenkel, *A Cute Toy Just Brought a Hacker Into Your Home*, New York Times (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/technology/connected-toys-hacking.html>; *Could Smart Toys Be Spying on Your Kids?*, NBC News, (Dec. 23, 2017), <https://www.nbcnews.com/nightly-news/video/could-smart-toys-be-spying-on-your-kids-1123238467592>.

<sup>8</sup> Another way our personal information ends up in the hands of strangers is through criminal hacking. Recent data shows that 73% of all U.S. companies have experienced a data breach. *Data Breaches on the Rise*, EPIC, <https://epic.org/2018/01/data-breaches-on-the-rise.html> (last visited Jun. 19, 2019). Between January 1 and March 31, 2018 alone, 1.4 billion records of American consumers were exposed in 686 data breaches. Douglas Bonderud, *Data Breach Statistics Q1 2018: Disclosure Times Remain High as Total Numbers Fall*, SecurityIntelligence (May 10, 2018), <https://securityintelligence.com/news/data-breach-statistics-q1-2018-disclosure-times-remain-high-as-total-numbers-fall/>.

number, driver's license number, household income and finances, zip code, marital status, height, weight, eye color, hair color, facial structure, fingerprint, the sound of our voice, whether we are parents or expectant parents, if we own pets, our location (which can include up to 14,000 location data points per day<sup>9</sup>), what we are buying and where we are buying it, where and what we eat, where we vacation, our sexual interests, dietary restrictions, medical conditions, genetic information, political views, what we search for on the Internet, what websites we visit, when we open an email,<sup>10</sup> what apps we use and how long we use them, the names and contact information of people we text, call, and visit, when and how we exercise.

Americans have been hemorrhaging personal information on a minute by minute basis for years. It is estimated that, by 2020, 1.7MB of data will be collected *every second for every person on earth*.<sup>11</sup> That adds up to 146.88 GB per day – in less than 48 hours, the amount of data collected about an individual would exceed the storage of most mobile devices. These data can contain tens or even hundreds of thousands of discrete data points about each consumer. Facebook allows advertisers to target an estimated 52,000 separate traits about each of its users, based on Facebook's customer data bank supplemented by purchases Facebook makes from third-party data brokers.<sup>12</sup>

A belated national dialogue about privacy is finally underway, led by California, where last year the social media and tech giants were forced to support legislation containing the strongest privacy safeguards in the nation upon the threat of a ballot proposition backed by citizen groups.<sup>13</sup> Many federal privacy bills would give consumers greater

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<sup>9</sup> See Jennifer Valentino-DeVries, Natasha Singer, Michael H. Keller, Aaron Krolik, *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, New York Times (Dec. 10, 2018), <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html>.

<sup>10</sup> Jeff Chester and Edmund Mierzwinski, *Big Data Means Big Opportunities and Big Challenges: Promoting Financial Inclusion and Consumer Protection in the "Big Data" Financial Era*, p. 11, Center for Digital Democracy and U.S. PIRG Education Fund (Mar. 2014), <https://uspirg.org/reports/usf/big-data-means-big-opportunities-and-big-challenges>.

<sup>11</sup> *Data Never Sleeps*, DOMO (6th Ed. 2018), <https://www.domo.com/solution/data-never-sleeps-6>.

<sup>12</sup> Adam Green, *Facebook's 52,000 Data Points on Each Person Reveal Something Shocking about its future*, Komando.com (Sep. 17, 2018), <https://www.komando.com/happening-now/489188/facebooks-52000-data-points-on-each-person-reveal-something-shocking-about-its-future>; Julia Angwin, Surya Mattu and Terry Parris Jr., *Facebook Doesn't Tell Users Everything It Really Knows About Them*, ProPublica (Dec. 27, 2016), <https://www.propublica.org/article/facebook-doesnt-tell-users-everything-it-really-knows-about-them>.

<sup>13</sup> Under the California Consumer Privacy Act, beginning January 1, 2020, consumers will have the right to request that a business disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for collecting or selling the information, and the categories of third parties with which

control over the collection of their personal information – for example, by allowing consumers rights to view and delete information that has already been collected about them.<sup>14</sup> But none would stop or even greatly limit the collection of many types of personal data. And none of the proposed or enacted privacy bills would regulate or bar the deployment of peoples’ data against them through Secret Surveillance Scores.

This Petition asks the Commission to investigate and prohibit the targeting of consumers’ private data against them *after* it has been collected.

As technology rapidly develops, and as corporations amass exponentially more personal data about hundreds of millions of consumers across the country, the methods by which companies score and make decisions about consumers will become increasingly intrusive and the impact of those scores will become increasingly onerous. Pervading these practices is the likelihood that some unscrupulous companies and firms are using these tools to engage in unlawful forms of discrimination – by using characteristics like age, gender and race in developing Secret Surveillance Scores.

There have been few studies and reports about surveillance scoring and the effect these scores are having on Americans’ lives. The FTC hosted a seminar in 2014 to discuss Secret Surveillance Scores, but took no action.<sup>15</sup> Since then, companies that develop and employ Surveillance Scores have acquired an astronomical amount of data. In fact, it is estimated that **90% of the data collected across the globe at that time was collected between 2016 and 2018.**<sup>16</sup>

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the information is shared; consumers will have the right to opt out of the sale of personal information by a business; businesses are prohibited from discriminating against consumers who exercise that right; and, consumers will be able to bring lawsuits when a data breach has occurred. Cal. Civ. Code § 1798.100 *et seq.*

<sup>14</sup> See, e.g., Jeffrey Attebarry, *A Survey of Proposed Federal Privacy Legislation and the Year Ahead*, Corporate Counsel (Feb. 4, 2019), <https://www.law.com/corpocounsel/2019/02/04/a-survey-of-proposed-federal-privacy-legislation-and-the-year-ahead/>.

<sup>15</sup> *Spring Privacy Series: Alternative Scoring Products*, FTC (Mar. 19, 2014), <https://www.ftc.gov/news-events/events-calendar/2014/03/spring-privacy-series-alternative-scoring-products>.

<sup>16</sup> Bernard Marr, *How Much Data Do We Create Everyday? The Mind-Blowing Stats Everyone Should Read*, Forbes (May 21, 2018), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#1f06663e60ba>.

## II. SCORING OF CONSUMERS.

### A. What is a Secret Surveillance Score?

Surveillance scoring is the inevitable result of two trends. First is the mass collection of data about people as noted above. The use of this vast and deep repository of information about each person in the United States has profound implications for our country.

The second trend is the development of technologies that enable the nearly instantaneous processing of data: increasingly powerful computers and faster communications technologies, and sophisticated algorithms– the instructions that tell the computer what to do with the data– that allow companies to treat consumers differently and in ways that may be illegal. On the horizon now is the next step in the evolution of decision-making technology. “Artificial intelligence” is a new form of algorithm that can “learn” to modify itself – to revise itself without human involvement. It is not an exaggeration to suggest that data brokers already collect more than enough data to predict every consumer’s individual behavior with near 100% accuracy. Scientists are racing to develop algorithms that will allow them to do so. Facebook has already shown that its algorithms can make such predictions better than a person’s roommate, sibling, or even spouse – merely by evaluating 300 “likes.”<sup>17</sup>

Surveillance scoring starts with “analytics companies,” the true number of which is unknown. Operating deeply in the shadows of the American marketplace, these firms amass thousands or even tens of thousands of demographic and lifestyle data points about consumers, with the help of an estimated 121 data brokers<sup>18</sup> and aggregators who are able to purchase our personal data from consumer-facing companies across the global marketplace.

To generate a Surveillance Score, “the score modeler feeds raw information (factors about consumers) into an algorithm designed to trawl through reams of data to detect

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<sup>17</sup> Wu Youyou, Michal Kosinski, David Stillwell, *Computer-Based Personality Judgments Are More Accurate Than Those Made by Humans*, National Academy of Sciences, (Jan. 27, 2015); Michal Kosinski, David Stillwell, Thore Graepel, *Private Traits and Attributes are Predictable from Digital Records of Human Behavior*, National Academy of Sciences (Apr. 9, 2013).

<sup>18</sup> Steven Melendex, *A Landmark Vermont Law Nudges Over 120 Data Brokers Out of the Shadows*, Fast Company (Mar. 2, 2019), <https://www.fastcompany.com/90302036/over-120-data-brokers-inch-out-of-the-shadows-under-landmark-vermont-law>.

consumer behavior patterns[.]”<sup>19</sup> The analytics firms use algorithms to categorize, grade, or assign a numerical value to a consumer based on the consumer’s estimated predicted behavior.<sup>20</sup> That score then dictates how a company will treat a consumer. Consumers deemed to be less valuable are treated poorly, while consumers with better “grades” get preferential treatment.

In the World Privacy Forum’s landmark study “The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Future,” authors Pam Dixon and Bob Gellman identified approximately 44 scores currently used to predict the actions of consumers. These include:

- The Medication Adherence Score, which predicts whether a consumer is likely to follow a medication regimen;<sup>21</sup>
- The Health Risk Score, which predicts how much a specific patient will cost an insurance company;<sup>22</sup>
- The Consumer Profitability Score, which predicts which households may be profitable for a company<sup>23</sup> and hence desirable customers;
- The Job Security score, which predicts a person’s future income and ability to pay for things;<sup>24</sup>
- The Churn Score, which predicts whether a consumer is likely to move her business to another company;<sup>25</sup>
- The Discretionary Spending Index, which scores how much extra cash a particular consumer might be able to spend on non-necessities;<sup>26</sup>
- The Invitation to Apply Score, which predicts how likely a consumer is to respond to a sales offer;<sup>27</sup>
- The Charitable Donor Score, which predicts how likely a household is to make significant charitable donations;<sup>28</sup> and

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<sup>19</sup> Pam Dixon and Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Future*, p.18., World Privacy Forum (Apr. 2, 2014), <https://www.worldprivacyforum.org/2014/04/wpf-report-the-scoring-of-america-how-secret-consumer-scores-threaten-your-privacy-and-your-future/>.

<sup>20</sup> *See id.*, p. 27.

<sup>21</sup> *Id.*, pp. 19, 63-66.

<sup>22</sup> *Id.*, pp. 19, 62-65.

<sup>23</sup> *Id.*, pp. 19, 45-47.

<sup>24</sup> *Id.*, pp. 19, 47.

<sup>25</sup> *Id.*, pp. 19, 51-52.

<sup>26</sup> *Id.*, p. 48.

<sup>27</sup> *Id.*, pp. 48-49.

<sup>28</sup> *Id.*, p. 49.

- The Pregnancy Predictor Score, which predicts the likelihood of someone getting pregnant.<sup>29</sup>

There are also scores that determine a consumer's likelihood to "bad-mouth a company[.]"<sup>30</sup>

## **B. Surveillance Scores are secret.**

Almost everything about Surveillance Scores is deliberately hidden from the public:

- The existence of the scores is secret.
- The kinds of data being fed into the algorithms is secret.
- The source of that data is secret.
- The algorithm is secret.
- The score is a secret.

The firms that develop the algorithms and those that apply the scores conceal their methods by treating their practices and programs as "trade secrets." The number of different types of Secret Surveillance Scores that are being used against consumers is unknown because companies want to keep what they are doing out of the public eye.

Moreover, because the nature of the personal information being fed into the algorithms is concealed, it is impossible for a consumer to know whether the Secret Surveillance Scores are based on inaccurate, outdated, or unreliable information. Obviously, if the score is based on erroneous information, whatever decision a company is making about a consumer based on that score will be erroneous. Considering that credit scores – the existence of which has been public since 1970 – are routinely based on credit reports found to contain errors that harm consumers' financial standing,<sup>31</sup> it is highly likely that Secret Surveillance Scores are based on inaccurate or outdated information. Since the

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<sup>29</sup> *Id.*, pp. 55-57.

<sup>30</sup> Khadeeja Safdar, *On Hold for 45 Minutes? It Might Be Your Secret Customer Score*, Wall Street Journal (Nov. 1, 2018), <https://www.wsj.com/articles/on-hold-for-45-minutes-it-might-be-your-secret-customer-score-1541084656>.

<sup>31</sup> See, e.g., News Release, FTC, *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports That Could Result in Less Favorable Terms for Loans* (Feb. 11, 2013), <https://www.ftc.gov/news-events/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports> ["One in four consumers identified errors on their credit reports that might affect their credit scores"].

score and the erroneous data upon which it relies are secret, there is no way to correct an error,<sup>32</sup> assuming the consumer was aware of it.

**C. Example: Customer value scores dictate the price consumers pay and the level of customer service they receive.**

One surreptitious type of Secret Surveillance Score that has been documented by journalists and confirmed by our research, the customer value score, has already quietly permeated the marketplace. The customer value score assigns each person and household a monetary value: how much that consumer or household is worth based on the predicted profit that they will generate for the company.<sup>33</sup> It is estimated that hundreds of data analytics firms calculate customer value scores.<sup>34</sup>

The premise behind the customer value score is that not all consumers are equal. Peter Fader, a marketing professor at The Wharton School of the University of Pennsylvania who helped popularize customer value scores, argues that “[n]ot all customers deserve a company’s best efforts[.]”<sup>35</sup> Companies consider consumers less “worthy” or “valuable” if they buy items on sale or make too many calls to customer service, even though repeated calls to customer service likely means that the product or service is difficult to use or of poor quality, rather than that there is something wrong with the person calling. Indeed, it appears that the purpose of the customer value score is to punish a savvy consumer who shops for the best deal or knows how to assert her rights.

A more nefarious purpose suggested by some is the customer value scores’ reliance on an assessment of a person’s age, where they live, their income level, behavioral information,<sup>36</sup> the number of bedrooms in their house, their credit card, or their marital status – characteristics that frequently serve as surrogates for gender, race, or other categories that constitute unlawful discrimination under federal law.

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<sup>32</sup> Natasha Singer, *The Scoreboards Where You Can’t See Your Score*, New York Times (Dec. 27, 2014), <https://www.nytimes.com/2014/12/28/technology/the-scoreboards-where-you-cant-see-your-score.html> [“Faulty data, invalid assumptions and defective models can’t be corrected when they are hidden”].

<sup>33</sup> See *Definition of customer lifetime value*, <https://www.clv-calculator.com/clv/definition-customer-lifetime-value/>. (last visited Jun. 19, 2019).

<sup>34</sup> Safdar, *supra* note 30.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

## 1. Discriminatory pricing.

Customer value scores are used by retailers to make instantaneous, automated judgments about a consumer that may result in consumers paying different prices for the same product based on how much profit the algorithm decides a particular consumer will produce.

Online price testing confirms that businesses are varying prices based on the particular consumer.

**Home Depot.** An early seminal study of price discrimination published by researchers at Northeastern University in 2014 (Northeastern Price Discrimination Study) examined the pricing practices of e-commerce websites. The researchers developed a software-based methodology for measuring price discrimination and tested it with 300 real-world users who shopped on 16 popular e-commerce websites.<sup>37</sup>

Of ten different general retailers tested in 2014, only one – Home Depot – was confirmed to be engaging in price discrimination.<sup>38</sup> Home Depot quoted prices to mobile-device users that were approximately \$100 more than those quoted to desktop users.<sup>39</sup> The researchers were unable to ascertain why Home Depot penalized mobile-device users.<sup>40</sup> “Home Depot didn’t dispute the accuracy of the findings” of the Northeastern Price Discrimination Study, the Wall Street Journal reported.<sup>41</sup>

The Northeastern Price Discrimination Study also found that “human shoppers got worse bargains on a number of websites,” compared to an automated shopping browser that did not have any personal data trail associated with it,<sup>42</sup> validating that Home Depot was considering shoppers’ personal data when setting prices online.

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<sup>37</sup>Aniko Hannak et al., *Measuring Price Discrimination and Steering on E-commerce Web sites*, Northeastern University (Oct. 23, 2014), [http://www.ccs.neu.edu/home/cbw/static/pdf/imc151-hannak.pdf#\\_ga=2.168469798.626541938.1547520668-169367495.1547520668](http://www.ccs.neu.edu/home/cbw/static/pdf/imc151-hannak.pdf#_ga=2.168469798.626541938.1547520668-169367495.1547520668).

<sup>38</sup> *Id.*

<sup>39</sup> Elizabeth Dwoskin, *Why You Can’t Trust You’re Getting the Best Deal Online*, Wall Street Journal (Oct. 23, 2014), <https://www.wsj.com/articles/why-you-cant-trust-youre-getting-the-best-deal-online-1414036862>.

<sup>40</sup> Hannak et al., *supra* note 37.

<sup>41</sup> Dwoskin, *supra* note 39.

<sup>42</sup> Noah Smith, *Big Data Might Lead to Higher Prices*, Bloomberg (Mar. 9, 2018), <https://www.bloomberg.com/opinion/articles/2018-03-09/big-data-might-tell-retailers-which-consumers-to-charge-more>.

Subsequently, the researchers at Northeastern University developed an online tool<sup>43</sup> to “expose how websites personalize prices.”<sup>44</sup> The Price Discrimination Tool is a plug-in extension used on the Google Chrome browser that allows any Internet user to perform searches on five websites to see if the user is being charged a different price based on whatever information the companies have about that particular user. The Price Discrimination Tool uses a remote computer server that is anonymous – it has no personal data profile – to simultaneously perform the same search that a human shopper performs on the website. The Price Discrimination Tool then displays the price results from the human shopper’s search and those obtained by the remote anonymous computer server.

Our own testing using the Price Discrimination Tool revealed that Home Depot continues to offer different prices to human shoppers.

For example, a search on Home Depot’s website for “white paint” reveals price discrimination. Of the 24 search results on the first page, Home Depot quoted us higher prices for six tubs of white paint than it quoted the anonymous computer (the prices in red indicate the lower prices quoted to the computer server; the higher prices quoted to us appear in black font):

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<sup>43</sup> The Price Discrimination Tool was created by the Volunteer Science group. See Volunteer Science, *Price Personalization Extension Compare Prices*, <https://volunteerscience.com> (last visited Jun. 19, 2019).

<sup>44</sup> Price Comparison, <https://chrome.google.com/webstore/detail/price-comparison/gppbmlnjiobkdgpbcmlobgganlmdjfh?hl=en> (last visited Jun. 19, 2019).

Compare



Lower price quoted  
to anonymous  
computer server in  
**RED**

**Glidden Professional** 5 gal. Speed-  
Wall Semi-Gloss Interior Paint  
Model# GPS-5000-05  
★★★★☆ (58)

Higher price quoted  
to us in **BLACK**

1 **\$59.87** ~~\$62.98~~

✓ Free delivery

⚠ Limited stock at Marina Del Rey  
Call to check availability

**Add to Cart**

Compare



**Glidden Ceiling** 5 gal. White Flat Interior Ceiling Paint  
Model# GPL-0000-05  
★★★★★ (127)  
0 ~~\$53.87~~ \$60<sup>98</sup>

✓ Free delivery  
✓ 15 in stock at Marina Del Rey  
Check nearby stores

[Add to Cart](#)

Compare



**Exclusive BEHR PRO** 5 gal. e600 White Satin Enamel Exterior Paint  
Model# PR64005  
★★★★★ (48)  
+15 ~~\$99.00~~ \$105<sup>00</sup>

✓ Free delivery  
⚠ Limited stock at Marina Del Rey  
Call to check availability

[Add to Cart](#)

Compare



**BEHR PRO** 5 gal. i100 Toned-Base Semi-Gloss Interior Paint  
Model# PR17005  
★★★★★ (56)  
0 ~~\$77.00~~ \$83<sup>00</sup>

✓ Free delivery  
✓ 10 in stock at Marina Del Rey  
Check nearby stores

[Add to Cart](#)

Compare



**BEHR PRO** 5 gal. i100 Toned-Base Flat Interior Paint  
Model# PR11005  
★★★★★ (63)  
0 ~~\$59.00~~ \$63<sup>98</sup>

✓ Free delivery  
✓ 9 in stock at Marina Del Rey  
Check nearby stores

[Add to Cart](#)

Compare



**Glidden Premium** 5 gal. Satin Latex Exterior Paint  
Model# GL6911-05  
★★★★★ (72)  
0 ~~\$101.00~~ \$119<sup>00</sup>

✓ Free delivery  
⚠ Limited stock at Marina Del Rey  
Call to check availability

[Add to Cart](#)

Our testing also revealed similar price discrimination on Home Depot's website for light bulbs, toilet paper, toilet paper holders, caulk guns, halogen floor lamps and screw drivers.

**Walmart.** We also detected price discrimination on Walmart's website using the Price Discrimination Tool. Our testing revealed price discrimination on Walmart's website for items such as paper towels, highlighters, pens, paint and toilet paper roll holders. For example:



Lower price quoted to anonymous computer server in **RED**

InterDesign Classico Toilet Paper Roll Holder with S ...

★★★★☆ 22

~~\$20.89~~ **\$10.26**

Free pickup

Higher price quoted to us in **BLACK**

The image shows a product listing for an InterDesign Classico Toilet Paper Roll Holder. The product is a black metal holder with two rolls of white toilet paper. The price is shown as \$10.26 in red, with a crossed-out original price of \$20.89 in black. A red arrow points from a text box on the left to the red price, and a black arrow points from a text box on the right to the black price. The text boxes contain the following text: 'Lower price quoted to anonymous computer server in RED' and 'Higher price quoted to us in BLACK'. Below the price, it says 'Free pickup'.



Bounty Select-A-Size **Paper Towels**,  
White, 8 Triple R ...

3537

-2 ~~\$18.34~~ \$19.92 3.0¢ / sq ft

2-day shipping  
Free pickup today

Add to Cart



BIC Gelocity Quick Dry  
Retractable Fashion Gel Pen, ...

★★★★ 1

0 ~~\$3.64~~ \$8.00

2-day shipping  
Pickup discount eligible

Add to Cart



BIC Brite Liner **Highlighter**, Chisel Tip, Assorted Co ...

2

+6 ~~\$8.20~~ \$11.20 47.0¢ / each

2-day shipping  
Free pickup



Viva Signature Cloth **Paper Towels**,  
Choose-A-Sheet, 8 ...

860

-14 ~~\$12.42~~ \$16.98 2.0¢ / each

2-day shipping  
Free pickup

Add to Cart



KILZ COMPLETE COAT  
Interior/Exterior **Paint & Primer** ...

★★★☆☆ 2

+11 ~~\$25.03~~ \$26.08

Free shipping on  
orders over \$35  
Free pickup



BIC Atlantis Original Retractable  
Ballpoint Pen, Med ...

★★★★★ 5

0 ~~\$4.15~~ \$9.69

2-day shipping  
Free pickup

Add to Cart

**ASOS.** ASOS, an online retailer that sells men and women’s clothing, treats customers differently depending on their customer value score.<sup>45</sup> ASOS published a research paper in 2017 revealing that the customer value scores it uses are based on more than 100 data points, including age and location.<sup>46</sup>

**Travelocity.** Software developer Christian Bennefeld, founder of etracker.com and eBlocker.com, did a sample search for hotel rooms in Paris on Travelocity in 2017 using his eBlocker device, which “allows him to act as if he were searching from two different” computers.<sup>47</sup> Bennefeld found that when he performed the two searches at the same time, there was a \$23 difference in Travelocity’s prices for the Hotel Le Six in Paris.<sup>48</sup>

**CheapTickets.** The Northeastern Price Discrimination Study found that the online bargain travel site CheapTickets offers reduced prices on hotels to consumers who are logged into an account with CheapTickets, compared to those who proceed as “guests.”<sup>49</sup> We performed our own search of airfares on CheapTickets without being logged in. We searched for flights from LAX to Las Vegas for April 5 through April 8, 2019. Our searches produced identical flight results in the same order, but Mr. Rosenfield’s prices were all quoted at three dollars higher than Ms. Antonini’s.

**Other travel websites.** The Northeastern Price Discrimination Study found that Orbitz also offers reduced prices on hotels to consumers who were logged into an account (Orbitz has been accused of quoting higher prices to Mac users versus PC users because Mac users have a higher household income<sup>50</sup>); Expedia and Hotels.com steer a subset of users toward more expensive hotels; and Priceline acknowledges it “personalizes search results based on a user’s history of clicks and purchases.”<sup>51</sup>

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<sup>45</sup> Safdar, *supra* note 30.

<sup>46</sup> See Benjamin Paul Chamberlain et al., *Customer Lifetime Value Prediction Using Embeddings* (Jul. 2017), [https://arxiv.org/pdf/1703.02596.pdf?mod=article\\_inline](https://arxiv.org/pdf/1703.02596.pdf?mod=article_inline).

<sup>47</sup> *Can Shopping Online Make You a Victim of Price Discrimination?*, CBS This Morning (Jan. 9, 2017), <https://www.cbsnews.com/news/shopping-online-could-make-you-a-victim-of-price-discrimination/>.

<sup>48</sup> *Id.*; also, the Northeastern Price Discrimination Study found that a search on Travelocity returned differing search results –displaying different hotels to different users or presenting hotels in different orders to different users – when the search was performed on mobile devices. Hannak et al., § 5.2, *supra* note 37.

<sup>49</sup> Hannak et al., § 1, *supra* note 37.

<sup>50</sup> Dana Mattioli, *On Orbitz, Mac Users See Costlier Hotel Options*, Wall Street Journal (Aug. 23, 2012), <https://www.wsj.com/articles/SB10001424052702304458604577488822667325882>.

<sup>51</sup> *Id.*

## 2. Discriminatory customer service.

Customer service is one of the most dreaded labyrinths a consumer must navigate when he or she has issues with a product or service. Bad customer service is more than just a time-consuming headache for a consumer. It often prevents consumers from resolving disputes with a company.

Algorithms that enable companies to provide better support to customers they consider more “valuable” are already well entrenched in U.S. commerce. Companies deliberately shunt “unworthy” consumers into inferior customer service systems, under which they may be put on a telephone hold for lengthy periods of time, or be denied assistance altogether, depending upon their customer value score. The algorithms evaluate the net financial cost of each customer and assess whether it is worth company time to resolve a consumer’s problem.

Various data analytics firms that develop customer value scores for customer services include:

**Zeta Global.** Zeta Global sells customer value scores that will determine, among other things, the quality of customer service a consumer receives from one of Zeta’s corporate clients. Zeta Global “has a database of more than 700 million people, with an average of over 2,500 pieces of data per person,”<sup>52</sup> from which it creates the scores.

The scores are based on data “such as the number of times a customer has dialed a [customer service] call center and whether that person has browsed a competitor’s website or searched certain keywords in the past few days.”<sup>53</sup> Based on that score, Zeta will recommend to its clients, which include wireless carriers, whether to respond to one customer more quickly than to others.<sup>54</sup>

**Kustomer Inc.** Customer-service platform Kustomer Inc. uses customer value scores to enable retailers and other businesses to treat customer service inquiries differently.<sup>55</sup> According to Kustomer Inc.’s CEO, “If you’ve got an angry shopper with a high lifetime value, you might want to bump up the[ir] priority” in the customer service queue.<sup>56</sup>

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<sup>52</sup> Safdar, *supra* note 30.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

**Opera Solutions.** Opera Solutions describes itself as a “a global provider of advanced analytics software solutions that address the persistent problem of scaling Big Data analytics.”<sup>57</sup> Opera Solutions generates customer value scores for its clients (including airlines, retailers and banks),<sup>58</sup> “draw[n] from more than 5,000 data ‘signals’ per customer[.]”<sup>59</sup> The company tracks, for example, “the number of times a person calls to complain over the prior 90 days[.]”<sup>60</sup> According to the COO of Opera Solutions, a “high-value customer who had a real service disruption and never calls to complain should be compensated more quickly than someone who is complaining and costing time and money,”<sup>61</sup> begging the question of how a consumer could hope to be compensated if they don’t call to complain.

**Affinitiv.** Affinitiv is a data analytics firm that develops customer value scores for car manufacturers and dealers.<sup>62</sup> Factors that Affinitiv uses to determine how worthy or valuable a particular customer may be include “previous car purchases, whether a household has a teenager, where else a person has shopped and ZIP Codes, which can be used as a proxy for income[.]” and what kind of credit card a consumer has.<sup>63</sup> According to the chief executive of Affinitiv, the goal is “to weed out costly customers[.]” which he defined as “people who visit 16 stores to get the absolute lowest price[.]”<sup>64</sup>

#### **D. Example: Fraud scores criminalize consumers.**

In an escalation of hostile scoring practices, some companies have begun surreptitiously applying a “fraud score” or a “trust score” to refuse to do business with consumers who are flagged by the algorithms as “untrustworthy.” According to these companies, behavior that is routine among American consumers – such as paying for fast delivery or returning items – constitutes fraud.

Consumers may choose to pay for the fastest shipping option for any number of legitimate reasons, such as needing an item quickly; also, consumers may return an item because it did not work correctly, or they purchased the wrong product. None of these actions can be considered even remotely fraudulent; indeed, they reflect the normal

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<sup>57</sup> *Company*, Opera Solutions, <https://www.operasolutions.com/company> (last visited Jun. 19, 2019).

<sup>58</sup> Safdar, *supra* note 30.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Our Story*, Affinitiv <https://www.affinitiv.com/our-story/> (last visited Jun. 19, 2019).

<sup>63</sup> Safdar, *supra* note 30.

<sup>64</sup> *Id.*

conduct of rational consumers that is welcomed by many online and brick and mortar retailers, at least according to their advertising. But companies subscribing to these scoring systems will nevertheless decline a transaction with a person who has been assigned a high “fraud” score.<sup>65</sup>

**The Retail Equation.** The Retail Equation, based in Irvine, California, develops and markets fraud scores. It touts itself as working “with retailers to warn consumers when their return transactions violate store policies or mimic excessive return behaviors.”<sup>66</sup> The Retail Equation’s services are used in *34,000 stores* in the United States.<sup>67</sup> The company works with retail giants like Best Buy, Home Depot, J.C. Penney, Sephora and Victoria’s Secret for fraud prevention services.<sup>68</sup>

When a customer is flagged as a potential crook by the Retail Equation, its retail clients will deny a consumer the right to return an item *after she has purchased it*. Unless consumers have been warned in advance or denied a return by the Retail Equation, consumers are unaware that they have been flagged based on criteria only known to the retailers and the Retail Equation. Retailers do not disclose details about the Retail Equation in their return policies and keep their relationship with Retail Equation secret.<sup>69</sup>

The Retail Equation soft-pedals its stigmatization of consumers. It argues on its website: “[t]he refusal of a return does not mean a consumer’s return is fraudulent or abusive, only that the consumer’s return history is similar to patterns often associated with such behavior.”<sup>70</sup> While the fraud score used by the Retail Equation “varies from retailer to retailer,” it claims that the factors it “may” use to label a consumer as a crook are: the frequency of returns; return dollar amounts; whether the return is accompanied by a receipt; and purchase history.<sup>71</sup> The Retail Equation asserts that factors it does *not* take

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<sup>65</sup> Khadeeja Safdar, *Why Paying for Fast Shipping Could Get You Flagged as a Fraudster*, Wall Street Journal (May 13, 2018), <https://www.wsj.com/articles/why-paying-for-fast-shipping-could-get-you-flagged-as-a-fraudster-1524139200>.

<sup>66</sup> The Retail Equation, <https://www.theretailequation.com> (last visited Jun. 19, 2019).

<sup>67</sup> Khadeeja Safdar, *How Your Returns Are Used Against You at Best Buy, Other Retailers*, Wall Street Journal (Mar. 13, 2018), <https://www.wsj.com/articles/how-your-returns-are-used-against-you-at-best-buy-other-retailers-1520933400>; see also Hayley Peterson, *Amazon Isn’t Alone in Punishing Shoppers for Too Many Returns – These Are All the Companies That Track Your Returns*, Business Insider (May 22, 2018), <https://www.businessinsider.com/stores-that-track-returns-list-2018-3>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Frequently Asked Questions*, The Retail Equation, <https://www.theretailequation.com/frequently-asked-questions/> (last visited Jun. 19, 2019).

<sup>71</sup> *Id.*

Mr. Donald S. Clark, Secretary, Federal Trade Commission

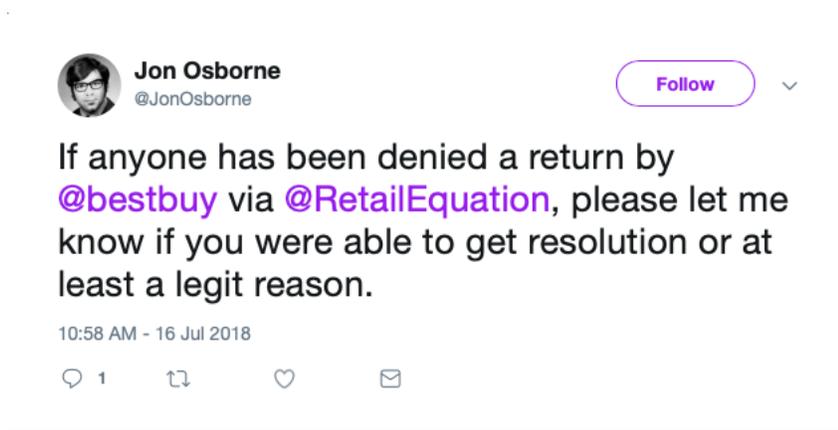
RE: Secret Surveillance Scoring: Urgent Request for Investigation and Enforcement Action.

June 24, 2019

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into consideration include: age, gender, race, nationality, physical characteristics and marital status.<sup>72</sup> However, online customer complaints indicate that The Retail Equation collects drivers' license information, which includes age, race and physical characteristic data.

When electronics retailer Best Buy began denying returns based on the fraud score developed by the Retail Equation, a consumer uproar ensued:



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<sup>72</sup> *Id.*



**Brian M.**  
Little Rock, AR  
6 friends  
2 reviews

★★★★★ 12/16/2017

I am experiencing what appears to be everyone else's problem with this company- being given the run around. I feel that companies like Best Buy are using TRE to pass the buck in efforts to not honor their return policy.

I am an elite plus member, tried to return a laptop because it's not what I need for my business and I was denied.

Now I'm stuck with a \$1400 device that I don't want and I am being ping ponged between Best Buy and TRE.

Absolutely terrible way to treat a long time costumer. I will do no more business with Best Buy.

Kate B. and 54 others voted for this review

Useful 54 Funny 1 Cool 1



**Minh T.**  
Houston, TX  
0 friends  
3 reviews

[Share review](#)

[Embed review](#)

[Compliment](#)

[Send message](#)

[Follow Minh T.](#)

★★★★★ 5/10/2018

Customer service is terrible. Best Buy uses them to flag fraud but often catches regular consumers. If you have a policy all I ask is be transparent. I know when I buy something from Amazon I may have to pay for return shipping unless otherwise noted. Best Buy needs to be upfront about their return policy. All of the Retail Equation is done under secrecy and it unfair to the consumer.

Kate B. and 7 others voted for this review

Useful 8 Funny Cool



**Angus C.**  
Irvine, CA  
16 friends  
28 reviews  
15 photos

★★★★★ 3/14/2018

I have made more than \$5000 worth of purchase in an year at Best Buy (I'm Elite Plus member), and only returned less than \$300, then I was warned by BBY as if I committed a crime, and being blocked form returning for 12 months, is it even legal for this company to do so ?

Jon T. and 16 others voted for this review

Useful 17 Funny Cool

Customers of other retailers working with the Retail Equation echo similar complaints:

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**Emily C.**  
Oakland, CA  
2 friends  
7 reviews  
9 photos

[Share review](#)  
[Embed review](#)  
[Compliment](#)  
[Send message](#)  
[Follow Emily C.](#)

★★★★★ 8/9/2018

This company is the most BS company I've ever seen. They should be wiped off the face of the earth.

Recently The Retail Equation blocked me from making returns at Sephora for one whole year, and I didn't understand why because I don't make many returns at all and my returns are always accompanied by receipts. I called them later asking why, but they didn't give me any straightforward answer. The guy just read off some script and offered to send me my Return Activity Report (RAR), so I accepted. Lo and behold, after waiting patiently for a long while I never got my RAR and had to email them asking for it. Finally I got my RAR through email, and it was just a list of what I returned and at what Sephora location. That didn't help me at all!

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**John P.**  
North Hollywood, Los Angeles, CA  
0 friends  
10 reviews

★★★★★ 3/28/2018

I return 3 items to Home Depot and I could not return anything for a whole year I will not shop at Home Depot anymore I will go to Lowe's from now on

**Jon T. and 23 others** voted for this review

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**Riskified.** Another scoring company that labels itself as a “fraud prevention” service is Riskified. “Riskified uses machine learning to recognize good orders and improve [a company’s] bottom line.”<sup>73</sup> Riskified’s website does not explain what a “good order” is. According to Riskified, it “evaluates shoppers based on online browsing behavior, along with other details like transaction data and geolocation information, and then issues approvals or denials at the time of purchase[.]”<sup>74</sup> Under these criteria, honest consumers

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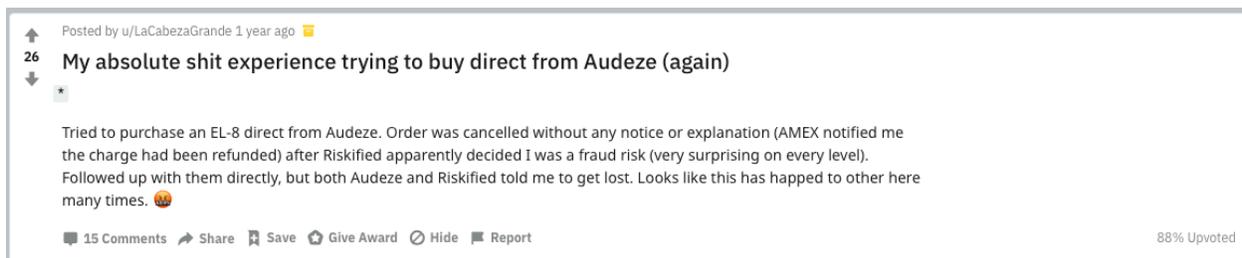
<sup>73</sup> Romain Dillet, *Riskified Prevents Fraud on Your Favorite E-commerce Site*, TechCrunch (2018), <https://techcrunch.com/2018/06/19/riskified-prevents-fraud-on-your-favorite-e-commerce-site/>.

<sup>74</sup> Safdar, *supra* note 65.

are labeled as fraudsters and have their purchases denied based on completely irrelevant wealth-based information like where they live.

Unlike the Retail Equation, whose scores only result in the denial of returns, Riskified's fraud scores go even farther by not only preventing returns of merchandise *but also* purchases. When one of Riskified's clients denies a purchase, the client direct customers to Riskified.<sup>75</sup> Consumers who have had transactions denied as a result of Riskified's fraud scores complain "[t]here was no explanation, no appeal."<sup>76</sup>

Riskified works with retailers Macy's and Finish Line,<sup>77</sup> as well as electronics retailer Audeze. Customers are not happy with Riskified's fraud score:



**Sift.** Sift is a company that promises clients that it goes “beyond fraud prevention”<sup>78</sup> by using “[m]assive data[,] [u]nmatched accuracy[,] and] [d]eep expertise”<sup>79</sup> to judge and rate consumers. Sift’s clients are “startups and established companies” that include coffee chain Starbucks, travel-booking service Airbnb, online restaurant-booking service Opentable, online furniture retailer Wayfair, grocery-delivery service Instacart and the professional social network LinkedIn.<sup>80</sup> Sift has developed its own version of a fraud score, which it calls a “Sift score,” that assigns consumers a rating between 1 and 100 to “flag” a person’s accounts, transactions and even devices like mobile phones that appear to be untrustworthy.<sup>81</sup> A Sift’s spokesperson says the Sift score is “like a credit score, but for

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Sift, <https://sift.com> (last visited Jun. 19, 2019).

<sup>79</sup> *Why Sift*, Sift <https://sift.com/why-sift> (last visited Jun. 19, 2019).

<sup>80</sup> Christopher Mims, *The Secret Trust Scores Companies Use to Judge Us All*, Wall Street Journal (Apr. 6, 2019), <https://www.wsj.com/articles/the-secret-trust-scores-companies-use-to-judge-us-all-11554523206>.

<sup>81</sup> *Id.*

overall trustworthiness[.]”<sup>82</sup> The Sift score is based on “[m]ore than 16,000”<sup>83</sup> pieces of personal information about a particular consumer and is “constantly changing” as Sift acquires more data about consumers.<sup>84</sup>

A consumer who is allegedly “untrustworthy” may not be allowed to open accounts or complete transactions with Sift’s clients.<sup>85</sup> It is not clear whether Sift generates a different Sift score for each corporate client depending on instructions from that client, or whether there is a single Sift score that is utilized by all Sift clients. But it is clear that Sift will deny a consumer the ability to do business with multiple clients once that consumer is flagged as untrustworthy. According to a Sift spokesperson, if a consumer is flagged as fraudulent at Instacart, that consumer might have problems completing transactions at another Sift client, like Wayfair.<sup>86</sup> The ripple effect could have serious consequences for completely innocent consumers trying to purchase goods or services online. Like all Surveillance Scores, the Sift score is a closely-guarded secret.

#### **E. Example: Tenant scores deny people housing.**

Landlords have moved beyond checking traditional credit lending scores when assessing whether to rent to a potential tenant, perhaps because such practices are regulated under federal laws. A number of “tenant-screening” companies now offer different versions of a “tenant score” that use personal information beyond what is used in a traditional credit score. These tenant scores can land people on a tenant blacklist, preventing them from securing housing. Even those with good credit scores can be blacklisted.<sup>87</sup>

**CoreLogic.** CoreLogic is a data analytics company<sup>88</sup> that generates tenant scores for landlords, real estate agents and property management companies. One of CoreLogic’s tenant scores is called the MyRental score, which “assesses risk by predicting the likelihood a tenant will fulfill a lease obligation.”<sup>89</sup> According to CoreLogic, the MyRental

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Kim Barker and Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters With Little Recourse*, New York Times (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/nyregion/new-york-housing-tenant-blacklist.html>.

<sup>88</sup> *Our Company*, CoreLogic, <https://www.corelogic.com/about-us/our-company.aspx> (last visited Jun. 19, 2019).

<sup>89</sup> *About MyRental*, CoreLogic, <https://www.myrental.com/about-us> (last visited Jun. 19, 2019).

tenant score is a number between 200 and 800, and is “based on data from multiple sources, including: application information, payment performance, eviction history, past due accounts, bankruptcy records, credit bureau data and scores, and more!”<sup>90</sup> It is unclear what “more” information CoreLogic uses to generate these scores. CoreLogic claims to know “which elements correlate with low risk applicants.”<sup>91</sup>

CoreLogic also offers a “proprietary tenant screening system” that uses a tenant score called the SafeRent score to predict a renter’s length of stay.<sup>92</sup> Like the MyRental tenant score, the SafeRent score is also a single number between 200 and 800.<sup>93</sup> While it is unclear what information goes into a SafeRent score, CoreLogic does look at information such as age and income level when predicting the length of a renter’s stay for its clients.<sup>94</sup>

Many consumers have complained about errors in CoreLogic’s SafeRent scores:

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<sup>90</sup> *Tenant Scores*, CoreLogic, <https://www.myrental.com/tenant-screening-products/tenant-score> (last visited Jun. 19, 2019).

<sup>91</sup> *Id.*

<sup>92</sup> *Predicting a Renter’s Length of Stay*, CoreLogic, <https://www.corelogic.com/blog/2018/07/predicting-a-renters-length-of-stay.aspx> (last visited Jun. 19, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



**Brianda of Glendale, AZ** ✓ **Verified Reviewer**

Original review: April 30, 2019

My husband and I applied for a rental home, all of our finances are correct as well as our credit history, but we were denied because this company reported my husband's criminal history incorrectly. Someone else with his name and last name, different age however, showed up under his report with a criminal past. We are working on this dispute right now but they are not being very helpful. He recently adjusted his immigration status and went through a thorough background check including fingerprint and FBI databases and came back as clean. I am not sure how this company works or how they can link 2 completely different people to provide a bogus report. Very frustrated with them!



**Barbara of Fort Worth, TX** ✓ **Verified Reviewer**

Original review: June 22, 2018

My husband, mother, and myself applied for an apartment lease this week through the same rental company we currently live in NRP but for another complex. My disabled mother needs a place to live and we need to upsize to a larger unit so she can move in with us. One was not available at our current complex we have lived at for 3 years so we decided to apply at another with a 4 bedroom unit.

To our SHOCK we were denied based on criminal background. We were stunned because none of us have a criminal background. So we came home and PAID to have my husband's criminal background check done through the department of public safety and another individual with my husbands same first, middle and last name came up but with a different spelling of the first name. Coincidentally this other man ALSO shares my husband's birthday of May 5th. HOWEVER, this man is \*\*. My husband is \*\*. This man has a long list of charges and arrests, and time in jail. Drug charges, weapons charges. We called CoreLogic to explain to them that this was not us, and asked them what information they had that came back; they told us drug and weapons charges.

We explained that that man is not my husband, and they asked to have us email a copy of my husband's ID over to them. WELL they gave us a bogus non working email address. So I cant even send them over that information to dispute this. I am beyond livid. My lease it up in 9 days, and we now have nowhere to move to. The other apartment doesnt even seem to care that the company they use screwed up and reported another person's criminal history as ours. They tell us we have to wait 120 days to reapply. WHY? Is that even legal? I have 3 kids and we will now be facing homelessness. This is not fair.

**TransUnion.** TransUnion is a company that provides tenant screening for landlords, and uses a “sophisticated formula”<sup>95</sup> to generate its ResidentScore, which it boasts is “15% better than traditional credit scores.”<sup>96</sup> The ResidentScore is a number between 350-850.<sup>97</sup> According to TransUnion, “[u]nlike other scoring models, TransUnion’s ResidentScore is powered by a sophisticated analysis of more than 500,000 actual resident records.”<sup>98</sup> TransUnion is vague in describing the formula it uses to generate the ResidentScore.<sup>99</sup>

#### **F. Example: Employment scores deny people jobs.**

Data analytics companies now offer potential employers scores generated “through psychological profiling based on thousands of data points related to where people live, their social media use, their personal relationships, and even which web browser they use.”<sup>100</sup> The employment score dictates how eligible an applicant is for a job at the particular employer.<sup>101</sup> According to a 2017 report, 71% of U.S. companies use these types of “people analytics” for recruitment.<sup>102</sup>

**HireVue.** HireVue is a job scoring firm that helps employers with hiring decisions based on “AI-driven predictions.”<sup>103</sup> HireVue creates employment scores based on “20,000 data points we collect[,]” including “[t]he content of the verbal response, intonation, and nonverbal communication” in videos of applicants.<sup>104</sup> HireVue then analyzes the data

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<sup>95</sup> *ResidentScore*, TransUnion, <https://www.mysmartmove.com/SmartMove/landlord-credit-check-service.page> (last visited Jun. 19, 2019).

<sup>96</sup> *SmartMove*, TransUnion, <https://www.mysmartmove.com> (last visited Jun. 19, 2019).

<sup>97</sup> TransUnion, *supra* note 95.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Sam Adler-Bell and Michelle Miller, *The Datafication of Employment*, The Century Foundation (Dec. 19, 2018), <https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge/#easy-footnote-bottom-17>.

<sup>101</sup> *Id.*; in 2012, researchers from three universities created a Facebook personality score that “correlates with job performance.” Apparently, people who post on social media about cats are less desirable job candidates than those who post about dogs. See Eve Tahmincioglu, *Facebook Profiles Predict Job Success*, Today.com (Feb. 22, 2012), <https://www.today.com/money/facebook-profiles-predict-job-success-%20%201C8368043>.

<sup>102</sup> Laurence Collins, David R Fineman, Akio Tsuchuda, *People Analytics: Recalculating the Route*, Deloitte 2017 Global Human Capital Trends (Feb. 28, 2017), <https://www2.deloitte.com/insights/us/en/focus/human-capital-trends/2017/people-analytics-in-hr.html>.

<sup>103</sup> HireVue, <https://www.hirevue.com> (last visited Jun. 19, 2019).

<sup>104</sup> Adler-Bell, *supra* note 100.

using its “proprietary machine learning algorithms” to predict an applicant’s future job performance.<sup>105</sup>

**Cornerstone OnDemand.** Cornerstone OnDemand is an employment scoring firm with a roster of huge companies as clients, including Virgin Media, Hyatt, Walgreens, University of Southern California, Wendy’s, Canon and Hallmark.<sup>106</sup> Cornerstone looks at data such as which web browser an applicant uses (e.g., Chrome or Firefox), and where an applicant lives, to score the applicant on how successful they would be at a particular job.<sup>107</sup> Cornerstone’s algorithm “favors lower commute times[,]”<sup>108</sup> which automatically deprives qualified people of the opportunity to get a certain job because they cannot initially afford to live near the workplace.

### **III. SURVEILLANCE SCORES ARE UNFAIR AND DECEPTIVE UNDER SECTION 5 OF THE FTC ACT.**

Section 5 of the FTC Act authorizes the Commission to investigate and prosecute “unfair or deceptive acts or practices in or affecting commerce.”<sup>109</sup>

#### **A. Secret Surveillance Scores are unfair under Section 5 of the FTC Act.**

An act or practice is unfair if (1) it “causes or is likely to cause substantial injury to consumers”; (2) the injury “is not reasonably avoidable by consumers themselves”; and (3) the injury is “not outweighed by countervailing benefits to consumers or competition.”<sup>110</sup> The practice of surveillance scoring is unfair under all three tests.

##### **1. Secret Surveillance Scores cause or are likely to cause substantial injury to consumers.**

An act or practice is unfair if it “causes or is likely to cause substantial injury to consumers.” Consumer injury is “substantial ... if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number

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<sup>105</sup> *Id.*

<sup>106</sup> *Happy Clients*, Cornerstone, <https://www.cornerstoneondemand.com/clients> (last visited Jun. 19, 2019).

<sup>107</sup> Adler-Bell, *supra* note 100.

<sup>108</sup> *Id.*

<sup>109</sup> 15 U.S.C. §45(a).

<sup>110</sup> 15 U.S.C. § 45(n).

of consumers.” Substantial injury would involve monetary or economic harm or unwarranted health and safety risks.”<sup>111</sup>

**Customer Value Scores result in price discrimination.** Charging different prices to different customers based on secret customer value scores causes, or is likely to cause, substantial injury to consumers who are charged higher prices solely due to an automated determination by an algorithm.

Companies like Home Depot, Walmart, ASOS, Cheaptickets, Orbitz, Expedia, Hotels.com, Travelocity and Priceline may only be charging some consumers a few dollars more than other consumers, but the size of the cost difference does not matter. Given the amount of business these companies do, it is likely that they are inflicting a “relatively small harm” on a “large number of consumers” under the FTC’s standard. Economic models also show that online price discrimination raises overall prices across the board for all consumers.<sup>112</sup>

Additionally, if any of the pricing models employed by these companies are based on scores that discriminate based on age, race, gender, ethnicity, or religion,<sup>113</sup> it would be an express violation of Section 5 of the FTC Act. A recent decision from the California Court of Appeal highlights that charging different prices to consumers based on factors like age constitutes unlawful discrimination. In *Candelore v. Tinder, Inc.*, dating app Tinder charged users over the age of 30 more for a subscription than it charged users under the age of 30.<sup>114</sup> Tinder claimed that its decision to charge older customers more was based on market research that showed individuals under the age of 30 were more economically disadvantaged than those over 30.<sup>115</sup> The Tinder users brought the case under California’s Unfair Competition Law (“UCL”)<sup>116</sup> – often referred to as “California’s

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<sup>111</sup> Sen. Rep. No. 130, 103d Cong. 2d Sess. 12 (1994), reprinted in 1994 U.S.C.C.A.N. 1787-1788.

<sup>112</sup> Nathan Newman, *How Big Data Enables Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population*, p. 5 (2014), <https://perma.cc/VB4Y-53SR> (public comments filed in response to a Federal Trade Commission request for workshop submissions).

<sup>113</sup> See Alessandro Bonatti and Gonzalo Cisternas, *Consumer Scores and Price Discrimination*, MIT (Jun. 22, 2018), [http://web.mit.edu/gcistern/www/score\\_final.pdf](http://web.mit.edu/gcistern/www/score_final.pdf) [“A prominent way in which data brokers operationalize individual-level data is by creating consumer scores, metrics that combine information about individual customers’ age, ethnicity, gender, household income, zip code, and purchase histories to quantify and predict their profitability, health risk, job security, or credit worthiness.”].

<sup>114</sup> *Candelore v. Tinder*, 19 Cal. App. 5th 1138 (2018).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; Cal. Bus. & Prof. Code § 17200.

Little FTC Act” because it was predicated upon section 5 of the FTC Act. The Court found that the pricing model violated the UCL and California’s anti-discrimination statute.<sup>117</sup>

The Court of Appeal stated, “It is inconceivable that an antidiscrimination law like the [California’s civil rights law<sup>118</sup>] would countenance a grocer charging an unemployed 31-year-old patron twice as much as an employed 28-year-old customer merely on the basis of market testing showing that those over the age of 30 ‘as a group’ generally earn more than 18 to 29 year olds.”<sup>119</sup>

**Customer value scores result in poor customer service.** Providing poor customer service to consumers based on secret customer value scores causes, or is likely to cause, substantial injury to consumers. Subjecting consumers to long hold times or otherwise requiring them to spend their time resolving an issue clearly has a financial cost to consumers. For example, a congressional committee estimated that in 2007, air travel delays cost passengers time worth up to \$12 billion in lost productivity, business opportunities and leisure activities.<sup>120</sup> As the Supreme Court of California has said in the context of the state’s “Little FTC Act,” the expenditure of time “to avoid the consequences of a deceptive practice falls within the broad meaning of suffering ‘any damage as a result of the use or employment’ of an unlawful practice, whether or not those transaction costs are cognizable as ‘actual damages.’”<sup>121</sup> Moreover, a company’s refusal to respond to its customers’ inquiries would also result in a consumer being forced to incur an unfair or unlawful overcharge.

These practices are a particularly real threat for customers of most large American companies. Almost all such companies force consumers to “agree” to arbitration clauses that waive a consumer’s right to bring a case against the company in a court of law.<sup>122</sup> Thus, the only practical way Americans can obtain redress for a financial problem is to contact a corporation’s customer service staff and hope it will be responsive.

**Fraud scores.** Labeling a consumer as a fraudster based on inaccurate, irrelevant or discriminatory information causes, or is likely to cause, substantial injury to consumers whose transactions or returns are declined. Consumers who are denied a return may be

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<sup>117</sup> *Id.*

<sup>118</sup> Unruh Civil Rights Act, Cal. Civ. Code § 51.

<sup>119</sup> *Tinder*, 19 Cal. App. 5th at 1152.

<sup>120</sup> Senator Charles E. Schumer, Chairman, and Rep. Carolyn B. Maloney, Vice Chair, Joint Economic Committee Majority Staff, *Flight Delays Cost Passengers, Airlines, and the U.S. Economy Billions* (May 2008), <http://online.wsj.com/public/resources/documents/jecreport05222008.pdf>.

<sup>121</sup> *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 643 (2009).

<sup>122</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

saddled with items that are defective, that they do not need or that were not the item they intended to purchase. Fraud scores may also block innocent consumers from engaging in commerce at some of the most popular and competitively-priced web sites, such as furniture at Wayfair, one of the most popular outlets for inexpensive furniture in the marketplace. And consumers who are treated as if they are criminals and whose transactions are declined may develop a negative credit score, affecting their ability to obtain credit or loans – a particularly pernicious repercussion of fraud scores.

**Tenant scores.** Denying a person housing based on inaccurate, irrelevant or discriminatory information causes, or is likely to cause, substantial injury to consumers because the formulas have the dangerous consequence of denying access to a core human need: housing. Moreover, if any tenant score considers data such as a person’s race, national origin, religion, disability, sex, or familial status, that is a violation of the federal Fair Housing Act.<sup>123</sup>

**Employment scores.** Denying a person employment based on inaccurate, irrelevant or discriminatory information causes, or is likely to cause, substantial injury to consumers. Perfectly qualified candidates may be rejected based on a job score that they know nothing about. These scores reject people based on information that may be irrelevant – for example, Cornerstone OnDemand’s score rates people as less worthy of a job if they have a longer commute. Whether an applicant lives close to the workplace is an economic factor that has no bearing on an applicant’s qualifications for a job; generating an automatic score that ranks someone as a less optimal potential employee based on where they live is unfair, especially when in light of systemically unaffordable rents and housing shortages. Denying a job based on this type of information robs someone of their livelihood and ability to support themselves. Moreover, if any tenant score considers data such as a person’s race, color, religion, sex, or national origin, that is a violation of Title VII of the Civil Rights Act of 1964.<sup>124</sup>

## **2. The injury caused by Secret Surveillance Scores is not reasonably avoidable by consumers themselves.**

Consumers affected by these scores are almost always unaware that they are being charged different prices, receiving substandard customer service, or labeled as crooks. The injury is not reasonably avoidable by any consumer because the Surveillance Scores themselves are secret, are often based on factors not within the consumer’s personal control, and their application to an individual is invisible. Moreover, the score could be

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<sup>123</sup> 42 U.S.C. § 3601-3619, 3631.

<sup>124</sup> 42 U.S.C. § 2000e *et seq.*

based on inaccurate, irrelevant, or discriminatory information, and the consumer has no way to correct such information, assuming they somehow became aware of the error.

Depending on the information used to generate the score, certain tenant scores may be regulated by the Fair Credit Reporting Act (FCRA),<sup>125</sup> giving potential renters the right to review reports about them and dispute inaccurate information. However, it is unclear if the companies generating tenant scores are actually complying with FCRA. For example, in 2013, the Commission warned six companies providing consumers' rental histories to landlords that they may be subject to FCRA.<sup>126</sup> Also, based on the complaints set forth in Section II.E., correcting errors on these reports appears to be a cumbersome if not impossible task for consumers. Thus, the injuries caused by tenant scores are not reasonably avoided by consumers themselves.

With respect to employment scores, employers are required by FCRA to tell applicants if they are conducting a credit score review, but they have no obligation to let applicants know if they have used data analytics firms to provide other information that will be used in a hiring decision. As noted above, job scoring firm HireVue boasts of using 20,000 data points about job applicants to generate scores. No applicant will ever be aware of, much less be able to alter, how those 20,000 data points are used against them. Thus, the injuries caused by employment scores are not reasonably avoided by consumers themselves.

**3. The injury caused by Secret Surveillance Scores is not outweighed by any countervailing benefits to consumers or competition.**

The injuries to consumers resulting from Surveillance Scores are not outweighed by any benefits to consumers or competition – because there are no benefits to consumers, and in fact the scores undermine fair competition in the marketplace.

**Customer value scores resulting in price discrimination.** Supporters of price discrimination insist that it improves the marketplace by encouraging consumers to shop around among competitors to find lower prices.

In 2015, a White House report asserted that price discrimination “can intensify competition relative to uniform pricing, by allowing high-margin sellers to compete

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<sup>125</sup> 15 U.S.C. § 1681 *et seq.*

<sup>126</sup> News Release, FTC, *FTC Warns Data Brokers That Provide Tenant Rental Histories They May Be Subject to Fair Credit Reporting Act* (Apr. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-warns-data-brokers-provide-tenant-rental-histories-they-may>.

more aggressively for price-sensitive customers who might otherwise buy from a lower priced rival.”<sup>127</sup> Economists call this “price optimization,” a burgeoning practice facilitated by algorithms that parse the vast trove of personal data and decide whether a particular person is likely to rebel against a particular price – and charge them as much as the algorithm thinks they can bear. As with all such algorithms, the underlying data could be inaccurate, biased or irrelevant, leading to a miscalculation as to whether someone is “price sensitive.” Moreover, if consumers do not know that they are the target of price discrimination (and they don’t), they are not going to know to shop around.

**Customer value scores resulting in poor customer service.** The likelihood of an injury resulting from poor customer service is not outweighed by any potential countervailing benefits to consumers or competition. Companies may argue that prioritizing high-value customers is better for their business, but it comes at the cost of treating other customers poorly. Customer service is not a “perk” to be bestowed upon favored customers who don’t rock the boat, or perhaps are better equipped to protect their own interests; it is a basic component of a functioning free marketplace. All competition is harmed, consumer confidence is degraded, and the marketplace suffers when consumers are arbitrarily treated differently.

**Fraud scores.** The likelihood of an injury resulting from a declined transaction based on a fraud score is not outweighed by any benefit to a consumer because there is no benefit. Companies say the score helps them prevent fraud. But returning merchandise is not a fraudulent activity – it’s an established right of consumers (at least unless specifically disclosed in advance) and in fact embraced as a benefit to consumers by most retail corporations online and elsewhere. For example, retailer Nordstrom is known for its generous return policy, one of the reasons that Nordstrom is thriving online and at its brick and mortar stores despite the “retail apocalypse.”<sup>128</sup> Rather, denying transactions is a way for companies like Best Buy to limit returned merchandise. If they deny a return, they get to keep consumers’ money. Moreover, a pattern of returns may actually reflect the poor quality or defect of a product, *not* a consumer engaging in fraud.

**Tenant scores.** The likelihood of an injury resulting from a denied housing application based on a tenant score is not outweighed by any benefit to a consumer or competition.

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<sup>127</sup> Big Data and Differential Pricing, White House, p.6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/whitehouse\\_files/docs/Big\\_Data\\_Report\\_None\\_mbargo\\_v2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_None_mbargo_v2.pdf).

<sup>128</sup> See Daphne Howard, *Nordstrom and Macy’s; A Lesson in Surviving the Retail Apocalypse*, Retail Dive (Aug. 17, 2017), <https://www.retaildive.com/news/nordstrom-and-macys-a-lesson-in-surviving-the-retail-apocalypse/449051/>.

Helping landlords preemptively weed out potential renters who an algorithm has predicted may violate the terms of their lease, is improper, especially when the scoring companies are using information that may be inaccurate, irrelevant or discriminatory. The Fair Housing Act establishes a federal policy enabling people to obtain housing on a fair and non-discriminatory basis,<sup>129</sup> which far outweighs any potential benefits to landlords.

**Employment scores.** The likelihood of an injury resulting from a denied job application based on an employment score is not outweighed by any benefit to a consumer or competition. Some may argue that employment scores benefit competition by helping companies identify ideal job candidates, however, the likelihood of scoring companies using information that may be inaccurate, irrelevant or discriminatory and that injures consumers far outweighs any potential benefits to competition. The reason that employers must comply with FCRA when they rely on third party reports for hiring decisions is to ensure “fairness, impartiality, and a respect for the consumer’s right to privacy.”<sup>130</sup> The federal policy behind FCRA must outweigh any perceived value from Secret Surveillance Scores.

Because customer value scores, fraud scores, tenant scores and employment scores cause or are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition, their use is unfair under Section 5 of the FTC Act.

#### **B. Secret Surveillance Scores are deceptive under Section 5 of the FTC Act.**

To be deceptive under Section 5 of the FTC Act, a “representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.”<sup>131</sup> The failure to disclose the use of surveillance scoring to consumers is deceptive.

**Customer value scores resulting in price discrimination.** Failing to disclose to consumers that they may be charged higher prices based on a secret customer value score is an illegal omission. When retailers and other companies fail to disclose to consumers that they may be charged higher prices based on a secret customer value score, the omission is “likely to mislead reasonable consumers under the circumstances” in violation of Section 5 of the FTC Act.

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<sup>129</sup> 42 U.S.C. § 3601-3619, 3631.

<sup>130</sup> 15 U.S.C. § 1681.

<sup>131</sup> FTC Policy Statement on Deception (Oct. 14, 1983),

[https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

**Customer value scores resulting in poor customer service.** Failing to disclose to consumers that they may be subject to lower quality customer service based on an unknown customer value score is an illegal omission. When retailers and other companies fail to disclose to consumers that they may receive substandard customer service, such as long hold times or unanswered inquiries, based on a secret customer value score, the omission is “likely to mislead reasonable consumers under the circumstances” in violation of Section 5 of the FTC Act.

**Fraud scores.** Failing to disclose to consumers that their purchases and returns will be denied based on a secret fraud score is an illegal omission amounting to deception under Section 5 of the FTC Act. When retailers and other companies fail to inform consumers that their transactions will be denied based on a secret fraud score, the omission is “likely to mislead reasonable consumers under the circumstances” in violation of Section 5 of the FTC Act.

**Tenant scores.** To the extent potential renters are not informed of the use of tenant scoring to deny them housing, this is an omission that constitutes deception under Section 5 of the FTC Act.

**Employment scores.** Failing to disclose to applicants that they have been denied a job based on a secret employment score is an illegal omission amounting to deception under Section 5 of the FTC Act.

#### IV. CONCLUSION

The Chinese government is currently implementing a population surveillance system to monitor its 1.3 billion citizens (it already has 200 million public surveillance cameras).<sup>132</sup> China plans to use facial recognition technology, in combination with other personal data from cell phones and digital transactions, to identify intimate details about its citizens’ lives, including their purchasing habits and how and with whom they spend their time, in order to create mandatory “social credit ratings” about every one of its citizens based on the data.<sup>133</sup> These ratings will score citizens’ “general worthiness” and

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<sup>132</sup> David Owen, *Should We Be Worried About Computerized Facial Recognition?*, The New Yorker (Dec. 17, 2018), <https://www.newyorker.com/magazine/2018/12/17/should-we-be-worried-about-computerized-facial-recognition>.

<sup>133</sup> *Id.*

provide those with higher scores opportunities like “access to jobs, loans, and travel.”<sup>134</sup> Those with lower scores will not have access to those opportunities.

It is alarming that U.S. corporations and the clandestine data analytics firms that service them are employing the same techniques to surveil and score Americans, for much the same purpose. Companies doing business in the United States should not be mirroring the actions of an authoritarian regime.

The Commission’s mission is to protect consumers and competition. The ability of corporations to target, manipulate and discriminate against Americans is unprecedented and inconsistent with the principles of competition and free markets. Surveillance scoring promotes inequality by empowering companies to decide which consumers they want to do business with and on what terms, weeding out the people who they deem less valuable<sup>135</sup> Such discrimination is as much a threat to democracy as it is to a free market.

Companies generating and applying Secret Surveillance Scores have managed to keep consumers and regulators in the dark about their actions. Americans have a right to know when their personal data is being used against them by companies making instantaneous, automated decisions and judgments about them as consumers, and to be protected against unfair and deceptive practices.

We therefore request that the Commission investigate the use of Secret Surveillance Scores in the U.S. marketplace to determine (1) how Secret Surveillance Scores are generated and applied; (2) which companies are generating and applying Secret Surveillance Scores; (3) which consumers are being targeted by companies using these scores; and (4) the impact of Secret Surveillance Scores on consumers and the marketplace.

Additionally, we request that the Commission specifically investigate the companies identified in this Petition to determine how the scores are being developed and applied:

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<sup>134</sup> *Id.*; see, e.g., John Harris, *The Tyranny of Algorithms is Part of Our Lives: Soon They Could Rate Everything We Do*, *The Guardian* (Mar. 5, 2018),

<https://www.theguardian.com/commentisfree/2018/mar/05/algorithms-rate-credit-scores-finances-data>.

<sup>135</sup> See Danielle Keats Citron and Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 *Wash. L. Rev.* 1, 18, 32-33 (2014).

### **Companies Utilizing Secret Surveillance Scores**

- Companies utilizing customer value scores to charge different prices: Home Depot (which also utilizes fraud prevention scoring firm The Retail Equation), Walmart, ASOS, Cheaptickets, Orbitz, Expedia, Hotels.com, Travelocity and Priceline;
- Companies utilizing fraud scoring firm The Retail Equation: Best Buy, J.C. Penney, Sephora and Victoria's Secret;
- Companies utilizing fraud scoring firm Riskified: Macy's, Finish Line and Audeze;
- Companies utilizing fraud scoring firm Sift: Starbucks, Airbnb, Opentable, Instacart, LinkedIn and Wayfair;
- Companies and institutions utilizing employment scoring firm Cornerstone: New Belgium Brewing, Virgin Media, Penn State Hershey Milton S. Hershey Medical Center, Walgreens, Hyatt, University of Southern California, Commonwealth Bank, Organic Valley, Turner, Homes by West Bay, GIS Inc., University of Tennessee, Penn Community Bank, ArcBest, Wendy's, Sherex Fastening Solutions, Power, Central New Mexico Community College, Assurance, Zero Motorcycles, the YMCA, Accolade, AIESEC, Towercom, tas, Grote, Cassin, Red Door Interactive, Sylvan Learning, Boston College, Sam Houston University, Western Union, Commvault, Rldot, Automation Direct, Alamo Colleges, riskonnect, ivari, Canon, MSC Software, Bright Horizons, Team Rubicon, Project Hope, USG, National Safety Council, Year Up, The Results Company, Harte Hanks, Velux, Hallmark, Elavon, Orlando Health, Affiliates Management Company, Ricoh, HCR Manor Care, Papyrus, E Trade, MetroPCS, Prometheus, American Bankers Association, Kelly Services and Federal Mogul.

### **Data Analytics Companies Generating Secret Surveillance Scores**

- Zeta Global
- Affinitiv Inc.
- Kustomer Inc.
- Opera Solutions LLC
- Retail Equation
- Riskified
- Sift
- CoreLogic
- TransUnion
- HireVue

Mr. Donald S. Clark, Secretary, Federal Trade Commission  
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We additionally request that the Commission report the status of the investigation to the public, and that information obtained from the investigation, and any reports or memoranda regarding the investigation, be made available to the public.

If the Commission finds that companies using and developing secret surveillance secret scores are violating Section 5 of the Federal Trade Commission Act, we request that the Commission enjoin the illegal practices.

Should you have further questions or would like to discuss this Petition, please contact Laura Antonini at [Laura@representconsumers.org](mailto:Laura@representconsumers.org).

Respectfully Submitted,



Laura Antonini  
Policy Director



Harvey Rosenfield  
President

cc via email:

Andrew Smith, Director, Bureau of Consumer Protection

Joseph J. Simons, Chairman

Noah Joshua Phillips, Commissioner

Rohit Chopra, Commissioner

Rebecca Kelly Slaughter, Commissioner

Christine S. Wilson, Commissioner