

#REPRESENT  
[www.representconsumers.org](http://www.representconsumers.org)  
P.O. Box 461972, West Hollywood, CA 90046

April 29, 2020

**SENT VIA EMAIL**

Andrew Smith  
Director, Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580  
Email: [smith@ftc.gov](mailto:smith@ftc.gov)

**RE: Consumers Need More Than a Blog Post to Protect Them Against Unfair and Discriminatory Algorithmic Decision-Making and Secret Surveillance Scoring.**

Dear Director Smith:

It is now clear that one major side-effect of the pandemic may be a lasting, potentially terminal loss of personal privacy.

Nearly a year ago, #REPRESENT<sup>1</sup> brought to the Commission's attention the tech industry's use of personal data and Secret Surveillance Scores to covertly discriminate against American consumers, and urged immediate action by the FTC.<sup>2</sup> Now, under the guise of monitoring the spread of Coronavirus, data industry predators are poised to market new scores based on data collected during the pandemic to determine who can re-enter the workforce, who can rent an apartment, who can attend school, the terms of insurance, prices consumers will pay for products and services, how valuable a corporation considers a consumer, and whether a consumer is considered a fraud threat.

While it appears that the Commission reviewed our June 2019 Petition that exposed Secret Surveillance Scoring and urged immediate action, the agency has done nothing on the issue – until you posted a blog on April 8, 2020 titled “Using Artificial Intelligence and Algorithms.” As a response to our Petition, not to mention the continuing calls for action from other organizations and elected officials, your blog is a deeply disappointing and wholly inadequate response.

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<sup>1</sup> #REPRESENT is 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> Letter from Laura Antonini and Harvey Rosenfield, #REPRESENT, to Secretary Donald S. Clark, FTC, *Request for Investigation, Injunction, and Other Relief Against Surveillance Scoring Based on Invisible Algorithms* (Jun. 24, 2019), <https://www.representconsumers.org/wp-content/uploads/2019/06/2019.06.24-FTC-Letter-Surveillance-Scores.pdf>.

Allowing tech companies to decide for themselves how to regulate their use of algorithmic tools and Secret Surveillance Scoring, without any binding requirements, is an abdication of the FTC's responsibility to protect Americans. The Commission's inaction is particularly disturbing at this moment when Americans are struggling to survive.

➤ **The Commission's Blog Fails to Address the Economic and Social Injuries to Consumers Exposed By #REPRESENT's June 2019 Petition.**

#REPRESENT's June 2019 Petition warned the Commission that algorithmic decision-making and Secret Surveillance Scoring would widen the already egregious economic divide in this country. We identified numerous shadowy data analytics companies that use algorithms to combine tens of thousands of pieces of private information about each American into a "score" that supposedly predicts what price a consumer will pay for a product or service; whether a consumer is a crank or even a crook, and be denied shopping privileges; how much profit a consumer will generate for a company (dictating the level of customer service they will receive); how well someone will perform at a job; if a person will be a good tenant; whether a consumer will return a purchase; if someone will take their medication or get pregnant. We also identified the corporations that purchase these scoring products and apply them to their customers.

That was ten months ago.

Now, COVID-19 poses an unprecedented threat to consumers' health and economic well-being. Authorities are trying to determine how America will reconstruct itself after a near-total economic shutdown, and the danger of Secret Surveillance Scoring has grown exponentially.

➤ **Data Collected About Americans During the COVID-19 Crisis Will Vastly Escalate Secret Surveillance Scoring.**

The pandemic is being used as an excuse to justify a vast expansion of the existing system of collection and weaponization of Americans' personal information against them. For example, credit bureau behemoth Experian has access to data about consumers defaulting on mortgages and filing for unemployment and is already offering its corporate customers like banks, insurance companies, healthcare providers, non-profits and even government agencies packages of profiles of "At-Risk Audience Segments" (i.e.,

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consumers who are financially suffering as a result of the pandemic).<sup>3</sup> With an estimated 20% of Americans currently unemployed<sup>4</sup> – a number that could reach levels not seen since the Great Depression between 1931 and 1940<sup>5</sup> – Experian data and scoring systems will be used to deny those who can least afford it access to credit, health care, jobs, and other necessities. Naborly, a company that provides tenant screenings, is asking landlords to confidentially identify tenants who failed to pay rent on April 1, which could lead to denial of future housing opportunities.<sup>6</sup> Amazon is scoring Whole Foods stores – using data on racial diversity of employees – to rank which stores have employees who are most likely to unionize for being treated poorly by the company during the pandemic.<sup>7</sup> Employees identified as likely to unionize could then be denied other job opportunities in the future.

Tech companies are working with the medical industry, other private firms, and government agencies to track the spread of the virus using a panoply of data. For example, Apple and Google have created a voluntary contact-tracing system in which consumers “share” their location data via Bluetooth and apps on their mobile phones to identify their proximity to individuals with COVID-19. This system by definition will be used to discriminate against those in Coronavirus “hot spots,” which may hurt minorities who are being disproportionately impacted by the Coronavirus.<sup>8</sup> Even the Commission’s blog post acknowledges that algorithmic decisions based on health data may benefit “a healthier, white population, to the detriment of sicker, black patients.” Data reporting

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<sup>3</sup> Shoshana Wodinsky, *Experian Is Tracking the People Most Likely to Get Screwed Over by Coronavirus*, Gizmodo (Apr. 15, 2020), <https://gizmodo.com/experian-is-tracking-the-people-most-likely-to-get-scre-1842843363>; News Release, *Experian Offers New At-Risk Audience Segments, Free of Charge, to Essential Organizations to Help Identify Those Most Impacted by COVID-19*, Experian (Apr. 10, 2020), <https://www.businesswire.com/news/home/20200410005011/en/Experian-Offers-New-At-Risk-Audience-Segments-Free>.

<sup>4</sup> Lance Lambert, *Real unemployment rate soars past 20% – and the U.S. has now lost 26.5 million jobs*, Fortune (Apr. 23, 2020), <https://fortune.com/2020/04/23/us-unemployment-rate-numbers-claims-this-week-total-job-losses-april-23-2020-benefits-claims/>.

<sup>5</sup> David Crary, Regina Garcia Cano and Angela Charlton, *Virus pushes US unemployment toward highest since Great Depression*, AP (Apr. 24, 2020), <https://apnews.com/e928d091f81f75b9bc8830c7370f41fb>.

<sup>6</sup> Didi Rankovic, *Naborly asks landlords to report if tenants are “delinquent” on April rent, to build a profile on them*, Reclaim the Net (Apr. 4, 2020), <https://reclaimthenet.org/naborly-rent-coronavirus-april/>;

<sup>7</sup> Hayley Peterson, *Amazon-owned Whole Foods is quietly tracking its employees with a heat map tool that ranks which stores are at most risk of unionizing*, Business Insider (Apr. 20, 2020), <https://www.businessinsider.com/whole-foods-tracks-unionization-risk-with-heat-map-2020-1>.

<sup>8</sup> Sarah Emerson, *Coronavirus Disproportionately Hurts Minorities. So Could Contact Tracing*, Medium (Apr. 16, 2020), <https://onezero.medium.com/coronavirus-disproportionately-hurts-minorities-so-could-contact-tracing-b0e6263bb47b>; see also Julia Angwin, *Will Google’s and Apple’s COVID Tracking Plan Protect Privacy?*, The Markup (Apr. 14, 2020), <https://themarkup.org/ask-the-markup/2020/04/14/will-googles-and-apples-covid-tracking-plan-protect-privacy>.

each consumer's location, collected by Google,<sup>9</sup> Facebook,<sup>10</sup> and smaller companies,<sup>11</sup> is being transferred to public health and government officials to evaluate whether people are obeying social distancing and shelter-at-home orders – and potentially penalize or socially ostracize people whose movements *appear* to be violating such orders.

More ominously, private researchers are tracking people who search Google for symptoms of COVID-19 (e.g., “I can't smell”),<sup>12</sup> assuming that the person who is Googling may be infected – even though the search might be for a loved one, or simply out of idle curiosity. Consumers' temperatures, recorded by Kinsa Health's Internet-connected thermometers, are being used by the company<sup>13</sup> to create a public map of virus hot spots and to help the government with tracking the virus.<sup>14</sup> 23andMe, the popular DNA research firm, which shares its customers' data with Big Pharma,<sup>15</sup> is analyzing customers' DNA – combined with voluntarily provided information like smoking habits and family members' health conditions – to see if genetic traits relate to COVID-19 susceptibility.<sup>16</sup> Quil Health, a joint venture between cable company Comcast and [Pennsylvania-based] Independence Blue Cross, is “exploring” how to use “smart TVs” and in-home motion sensors to deliver healthcare, and possibly to start monitoring Coronavirus patients who have been discharged from the hospital.<sup>17</sup> This data could be used to score citizens as either healthy or as a public health threat, with the “threats”

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<sup>9</sup> See *how your community is moving around*, Google, <https://www.google.com/covid19/mobility/> (last visited Apr. 29, 2020).

<sup>10</sup> KX Jin and Laura McGorman, *Data for Good: New Tools to Help Health Researchers Track and Combat COVID-19*, Facebook (Apr. 6, 2020), <https://about.fb.com/news/2020/04/data-for-good/>.

<sup>11</sup> See, e.g., Sue Halpern, *Can We Track COVID-19 and Protect Privacy at the Same Time?*, The New Yorker (Apr. 27, 2020), <https://www.newyorker.com/tech/annals-of-technology/can-we-track-covid-19-and-protect-privacy-at-the-same-time>; Aaron Holmes, *Thousands of spring breakers traveled from one Florida beach to cities across the U.S. Mapping their phone data shows the importance of social distancing amid the coronavirus outbreak*, Business Insider (Mar. 27, 2020), <https://www.businessinsider.com/coronavirus-florida-spring-break-location-data-spread-social-distancing-2020-3>.

<sup>12</sup> Seth Stephens-Davidowitz, *Google Searches Can Help Us Find Emerging Covid-19 Outbreaks*, The New York Times (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/opinion/coronavirus-google-searches.html>.

<sup>13</sup> Donald G. McNeil Jr., *Restrictions Are Slowing Coronavirus Infections, New Data Suggest*, The New York Times (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/health/coronavirus-restrictions-fevers.html>.

<sup>14</sup> Inder Singh, Founder & CEO, Kinsa, *Before the Committee on Commerce, Science, and Transportation, U.S. Senate Hearing on Enlisting Big Data in the Fight Against Coronavirus* (Apr. 9, 2020), <https://www.commerce.senate.gov/services/files/063C2D34-0021-460A-847F-D9B21A2277B9>.

<sup>15</sup> Megan Molteni, *23andMe's Pharma Deals Have Been the Plan All Along*, WIRED (Aug. 3, 2018), <https://www.wired.com/story/23andme-glaxosmithkline-pharma-deal/>.

<sup>16</sup> Megan Molteni, *Why Does Covid-19 Make Some People So Sick? Ask Their DNA*, WIRED (Apr. 7, 2020), <https://www.wired.com/story/why-does-covid-19-make-some-people-so-sick-ask-their-dna/>.

<sup>17</sup> Heather Landi, *Comcast's Quil Health exploring how to use smart TVs and sensors to keep patients healthy at home*, Fierce Healthcare (Apr. 17, 2020), <https://www.fiercehealthcare.com/tech/comcast-s-quil-health-exploring-ways-to-support-patients-at-home-through-smart-devices-and>.

charged more for insurance – or even barred from re-entering society, getting back to work, going to school, and renting apartments.

The proponents of this massive surveillance assure us the data they collect will be anonymized or aggregated so that each person’s identity is not disclosed. But there is zero doubt that “anonymized data” can easily be reverse engineered and re-identified to tie back to a particular individual.<sup>18</sup>

➤ **The Commission Must Take Actions to Protect Consumers from Unfair and Discriminatory Algorithmic Decisions and Secret Surveillance Scoring.**

Rather than posting vague suggestions in a blog post that companies are not obliged to follow, the Commission must take concrete action to actually protect consumers. The Commission must:

- Require data analytics firms and the companies that buy their products to:
  - Disclose, on their websites and directly to consumers who are the targets of an algorithmic decision or Secret Surveillance Score, the data and/or factors used in the algorithmic decision or Secret Surveillance Score, and the source of the data/factors. The Commission must require companies to highlight the key factors that affected the decision or score, rank ordered for importance.
  - Inform consumers when a Secret Surveillance Score was used to make a decision about them, and what the decision or score is.
- Require companies to adopt protocols to ensure the accuracy of data used in an algorithmic decision or Secret Surveillance Score, and make those safety measures public.

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<sup>18</sup> See, e.g., Jacob Hoffman-Andrews and Andrew Crocker, *How to Protect Privacy When Aggregating Location Data to Fight COVID-19*, Electronic Frontier Foundation (Apr. 6, 2020), <https://www.eff.org/deeplinks/2020/04/how-protect-privacy-when-aggregating-location-data-fight-covid-19>; Stacey Gray, *A Closer Look at Location Data: Privacy and Pandemics*, Future of Privacy Forum (Mar. 25, 2020), <https://fpf.org/2020/03/25/a-closer-look-at-location-data-privacy-and-pandemics/>; Jack Morse, *Sorry, you ‘anonymized’ data probably isn’t anonymous*, Mashable (Jul. 23, 2019), <https://mashable.com/article/anonymous-data-sets-easily-de-anonymized/>; 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>.

- Prohibit companies from using highly sensitive data, like biometric or health-related data, in an algorithmic decision or Secret Surveillance Score.
- Give each consumer the right to correct inaccuracies in the data used in an algorithmic decision or Secret Surveillance Score.
- Give each consumer the right to contest an algorithmic decision or Secret Surveillance Score.
- Prohibit companies from changing the terms of a contract or other agreement based on an algorithmic decision or Secret Surveillance Score.
- Prohibit companies from: (i) using data based on legally-protected classifications (race, religion, national origin, sex, marital status, age) to generate an algorithmic decision or Secret Surveillance Score, and (ii) using algorithmic decisions or Secret Surveillance Scores that produce disparate impacts on those in protected classes.
- Investigate and prosecute companies whose algorithmic decision-making and Secret Surveillance Scoring practices violate Section 5 of the Federal Trade Commission Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, or any of the above requirements.

In addition to the Commission’s authority to bring enforcement actions and its broad investigatory powers under Section 6(b) of the Federal Trade Commission Act, the Commission has the authority to create the rules set forth above under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.<sup>19</sup>

Rather than use the Commission’s ample authority to remove the veil of secrecy around algorithmic decision-making and surveillance scores and protect consumers from unfair and discriminatory practices, the Commission suggests that the companies developing and applying Secret Surveillance Scores “consider how you hold yourself accountable.”

Americans have been the victims of tech industry “self-regulation” since the industry began, and it does not work. Absent urgent measures to quarantine sensitive information

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<sup>19</sup> The Commission has the authority to create trade regulation rules “which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce[.]” 15 U.S.C. § 57a(a)(1)(B). These rules “may include requirements prescribed for the purpose of preventing such acts or practices.” *Id.* A violation of a trade rule “shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of [the FTC] Act, unless the Commission otherwise expressly provides in its rule.” 16 C.F.R. § 1.8(a).

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about our health, location, and financial stability, Americans will unknowingly become the victims of unprecedented algorithmic discrimination.

More than a blog post is necessary to protect the American people from discriminatory and unfair algorithmic decision-making and Secret Surveillance Scoring. Those scores will be used to victimize consumers long after the pandemic.

Please contact us if you would like further information.

Respectfully Submitted,



Laura Antonini  
Policy Director  
(949) 929-2612  
[Laura@RepresentConsumers.org](mailto:Laura@RepresentConsumers.org)



Harvey Rosenfield  
President  
[Harvey@RepresentConsumers.org](mailto:Harvey@RepresentConsumers.org)

**cc via email:**

Joseph J. Simons, Chairman  
Noah Joshua Phillips, Commissioner  
Rohit Chopra, Commissioner  
Rebecca Kelly Slaughter, Commissioner  
Christine S. Wilson, Commissioner