

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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**NetChoice Response to FTC Request for Comments on
The Consumer Welfare Implications Associated with The Use of Algorithmic
Decision Tools, Artificial Intelligence, and Predictive Analytics**

NetChoice respectfully submits the following response regarding the Federal Trade Commission’s (“FTC”) request for comments on “The Consumer Welfare Implications Associated with The Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics.”

NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

We’ve seen a lack of consumer-benefit analysis regarding the use of algorithms. Nonetheless, we’ve unfortunately seen FTC reports suggesting activity. We suggest that the FTC analyze substantiated data of privacy ills and, only if problems are identified, take actions.

1. Outline for an FTC Harms Study and A Critique of FTC Research So Far

There has been no compressive analysis identifying real world harms of analytics. Instead, certain advocates focus on theoretical harms and anecdotes to drive the conversation. This does a disservice to the FTC and to consumers.

Outline for a Study of Actual Harms

[T]he injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.

-- FTC Policy Statement on Unfairness, Dec. 17, 1980¹

The core of the FTC's power is its ability to bring an action under Section 5 of the FTC Act² for unfair trade practices. The unfairness doctrine requires a showing of harm – something the FTC has extensive history in identifying. In addition, this harm must not be substantial, not reasonably avoidable, and not outweighed by countervailing benefits.

A. The FTC should identify real world harms identified by consumers

In most cases a substantial injury involves monetary harm ... [and U]nwarranted health and safety risks may also support a finding of unfairness.

-- FTC Policy Statement on Unfairness, Dec. 17, 1980³

To find actual harm to consumers, the FTC should analyze harms that consumers themselves identify. One possible starting point for this study is the FTC's consumer complaint center. Last year the complaint center received more than 2 million complaints.⁴ The study can analyze this data and see if any complaints are the result of analytics. Moreover, the study should conduct surveys, conversations with consumers, analysis of complaint letters, and town hall discussions.

B. Separate actual harms from general privacy anxiety

"Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."

-- FTC Policy Statement on Unfairness, Dec. 17, 1980⁵

To maintain credibility and provide a basis for new laws or regulations, this study should identify actual harms as opposed to general privacy anxiety. Actual harms could include financial, employment, and physical threats. If these harms exist, the FTC can then begin its harms-benefits analysis.

The examples presented in speeches are theoretical or anecdotal – not based on facts

To date, many anti-algorithm studies have focused on *theoretical* and *anecdotal* harms of analytics, or conflated analytics with other issues. We have even seen this at the FTC. This undermines the reputation of the FTC as being impartial and skews the discussion of analytics.

¹ FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

² 15 USC § 41, *et al.*

³ FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

⁴ "Between January and December 2013, the CSN received more than 2 million consumer complaints, which the FTC has sorted into 30 complaint categories." By organizing into categories the research is even more manageable. FTC Consumer Sentinel Network Data Book, Feb. 2014, p.2

⁵ FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

Below are just a couple of examples of statements that we ask the FTC to adjust to allow for a more thoughtful discussion of analytics.

Avoid uses of “Could,” “May,” and “Might”

Talking in hypotheticals often leads to a conversation of what *may be* and not what *is so*. This leads to a “parade of horrors” instead of a discourse of actual harms. In her speech to the US Chamber of Commerce, former FTC Commissioner Brill spoke mostly about potential harms of analytics rather than actual harms or actual benefits. And the Commissioner used the words “may”, “might” and “could” over a dozen times⁶ without identifying actual harms of analytics alone.

Conflation of issues prevents focused analysis of real harms from analytics

All too often the conversation about analytics is conflated with discussions of the internet of things, data brokers, and health data. Since the FTC has different workshops on each of these topics, it clearly sees a distinction between these issues.⁷

Conflation of issues injects inflated rhetoric and frenzy into a general discussion and could be used to justify misdirected regulation. We ask the FTC avoid studies that conflate these issues and instead maintain a focused discussion.

Exaggerating misuses of analytics

The FTC has a history of convening workshops designed for thoughtful discussion of issues. Unfortunately, as we saw at the Big Data Workshop, statements by the FTC created a discussion of speculative harms – combining them with charged words that inspire apprehension and opposition to the growth of analytics.

Of course, many of the theoretical harms of analytics are illegal. The FTC, Department of Justice, and other agencies can already act. And if they are illegal, NetChoice supports law enforcement engagement.

However, talking in hypotheticals injects passion into what should otherwise be a calm and rational discussion.

The Study by Prof. Sweeney’s Interns was Anecdotal

As it will likely be referenced, the FTC study by Prof. Latanya Sweeney’s interns regarding “big data” and analytics, is by the account of one FTC researcher, “anecdotal.”⁸ Anecdotes could be useful to get a conversation started but should not be the basis for sweeping regulatory or legislative changes. This study barely provided any meaningful analysis of the issues at hand,

⁶ See FTC Commissioner Julie Brill, *The Trees and the Forest: Protecting Consumer Trust in the Big Data Era – Keynote Address at the U.S. Chamber of Commerce Foundation Conference on the Future of Data-Driven Innovation* (October 2014)

⁷ See, e.g., “Internet of Things - Privacy and Security in a Connected World” Nov. 19, 2013, “Alternative Scoring Products” Mar. 19, 2014, and “Consumer Generated and Controlled Health Data” May 7, 2014.

⁸ FTC Researcher Zang called the Omega Psi Phi example “the Omega Psi Phi anecdote.” Statement of FTC researcher Zang, *id.* at 55.

aside from a couple out-of-context screenshots and a methodologically unsound review of credit card ads based on a non-transparent and fluid metric of online criticism.

Moreover, the research conducted by Prof. Sweeny's interns was presented as little more than visiting a webpage and looking at the contextual ads appearing.⁹ It could be the case that those who conducted the study refreshed the webpage so many times that it randomly achieved the ads that concerned Prof. Sweeney. In addition, other factors driven by advertisers were ignored, such as auction bidding and placement targeting.

One thing is certain – this anecdote does not indicate that any harms are being caused by algorithms or analytics. We ask the FTC to avoid accepting suggestions that this research is broader than its actual scope and avoid suggesting it is representative of most analytics uses.

2. Balancing Real World Harms

The injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces.

-- FTC Policy Statement on Unfairness, Dec. 17, 1980¹⁰

The FTC policy statement on unfairness sets out the guidelines for how this balancing of real world harms should occur:

Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects. The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.¹¹

The FTC should balance actual harms, if any, against actual real world beneficial uses of analytics.

⁹ *Id.* at 154

¹⁰ FTC Policy Statement on Unfairness, Dec. 17, 1980, *available at* <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

¹¹ Transcript of FTC Workshop "Big Data: A Tool For Inclusion Or Exclusion," Sept. 14, 2014 reported by Jennifer Metcalf p. 155

Actual Benefits to Health Services

With Ebola and the flu in the news, identifying epidemics is foremost on consumers' minds. Predictive analytics is helping to identify emerging problems before they become full-blown epidemics.

Take for example, Google Flu Trends. This information helps direct care to places with the greatest need. In fact, one report found Google Flu Trends was able to predict regional outbreaks of flu up to 10 days before they were reported by the Centers for Disease Control and Prevention.¹²

Or consider how Boston Children's Hospital analyzed Wikipedia's traffic to help predict flu trends in the state up to 2 weeks earlier than the CDC.¹³ In 2013 John Hopkins research reported that Google Flu Trend data "was the only source of external information to provide statistically significant forecast improvements over the base model." Moreover, when combined with CDC information the research becomes even more beneficial.¹⁴

Ongoing Government uses of Predictive analytics

Governmental agencies are leveraging the benefits of predictive analytics.

The FDA used Kaiser Permanente's database of 1.4 million patients to show that the arthritis drug Vioxx increased the risk of heart attacks and strokes.¹⁵ This saved lives and identified actual harms. Congress is considering a bill to allow collection of health data to better enable analytics techniques to reveal the root causes, rates, and trend of sudden unexpected infant and child deaths.¹⁶

Likewise, the company Palantir develops algorithms that are used to identify terrorist threats using communications data, and to detect fraudulent behavior in health care and financial services.

Finally, predictive analytics apps like Street Bump helped the city of Boston¹⁷ to more efficiently identify and address street potholes.

Helping Consumers save Money

Algorithmic Decision Tools helps consumers identify opportunities to save money. For example, Farecast analyzes billions of flight price records to predict the movement of airfares

¹² Google Flu Trends - <http://www.google.org/flutrends/about/how.html>

¹³ Miguel Helft, *Google Uses Searches to Track Flu's Spread*, NY Times (Nov. 11, 2008)

¹⁴ Ryan Parrish, *New model predicts flu trends using Internet traffic on Wikipedia articles*, VaccineNews (Apr. 23, 2014)

¹⁵ Graham et al, *Risk of acute myocardial infarction and sudden cardiac death in patients treated with cyclo-oxygenase 2 selective and non-selective non-steroidal anti-inflammatory drugs: nested case-control study*, The Lancet, Vol. 365, No. 9458, 2005, pp. 475-481

¹⁶ Sudden Unexpected Death Data Enhancement and Awareness Act, H.R. 669, 113th Cong. (2013)

¹⁷ Street Bump. Street Bump, available at <http://www.cityofboston.gov/DoIT/apps/streetbump.asp>

and saves purchasers an average of \$50 per ticket.¹⁸ Decide.com uses analytics to predict price movements for millions of products and saves consumers hundreds of dollars.¹⁹

There are hundreds of similar consumer-benefiting services. Studies should identify them and balance all these benefits against actual harms – if any are found.

3. Research to Determine Whether Harms are Already Addressed by Existing Laws

Before seeking new privacy legislation, it is important to identify a gap in statutory authority

-- FTC Commissioner Maureen K. Ohlhausen, Oct. 16 2012²⁰

The FTC already enjoys enforcement authority under Section 5 when it identifies uses of analytics that are unfair. And each state Attorney General has similar powers under “little” Section 5. Likewise, dozens of other federal laws can address the hypothetical harms cited during the workshop: Health Insurance Portability and Accountability Act (HIPAA),²¹ Fair Credit Reporting Act (FCRA)²², and Equal Employment Act (EEA)²³, just to name a few.

We ask the FTC, if it identifies actual harms not offset by actual benefits, to engage in an analysis to identify if existing laws already address the harms. For example, if analytics are used to harm employment, the FTC should research existing employment discrimination and protection laws and identify if gaps exist. The same is true for credit scores and racially based discrimination. If gaps are found, the FTC should look at different ways to fill the gaps through appropriate policy mechanisms, including self-regulatory and co-regulatory models.

Until this analysis occurs, there should be no calls for legislation – especially when actual harms have not yet been identified and balanced against actual benefits.

A concern raised is that analytics could be used to mask historical discrimination. If analytics are being used in this way, the FTC should look to see if existing racial discrimination laws already address even masked discrimination. If so, the FTC should identify the tools law enforcement needs to identify these unlawful practices.

¹⁸ Comments Of Thomas M. Lenard, Ph.D President And Senior Fellow, Technology Policy Institute, *Effects Of Big Data On Low Income And Underserved Consumers* July 28, 2014 p. 4

¹⁹ *Id.*

²⁰ FTC Commissioner Maureen K. Ohlhausen Speech Before the Hudson Institute, *The Government’s Role in Privacy: Getting it Right*, (October 16, 2012)

²¹ Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996.

²² 15 U.S.C. § 1681.

²³ Title VII of the Civil Rights Act of 1964.

Nonetheless, before creating new rules and regulations, we ask the FTC to follow the recommendation of Commissioner Ohlhausen to see if existing rules accomplish the objectives the FTC seeks:

“Before seeking new privacy legislation, it is important to identify a gap in statutory authority or to identify a case of substantial consumer harm that we’d like to address, but can’t, with our existing authority, especially given the array of financial, medical, and health and safety harms already reachable under our current FTC authority or other laws. Otherwise, it is difficult to tell whether the additional protections are necessary or will, on balance, make consumers better off because information sharing has benefits for consumers such as reducing online fraud, improving products and services, and increasing competition in the market overall.”²⁴

Conclusion

As outlined above, we ask the FTC to:

Engage in a serious study of actual harms from analytic uses.

The FTC should use consumer complaints, meetings, and surveys to see if harms from analytics do indeed exist. These should be actual harms, and not general privacy anxiety.

Balance the actual harms versus realized benefits of analytics.

If harms exist, the FTC should balance them against actual benefits of analytics, some of which are discussed in this comment. Studies should engage in identifying these benefits and even call out good uses.

Review existing laws and identify if gaps exist.

If the actual harms are not offset by proven benefits, then the FTC should examine whether existing laws could be used to mitigate the harms. At the same time, the FTC should avoid calling for legislation until completion of the process outlined above. Calls for legislation should be based on need to protect consumers, not hypothetical harms, and based on research of actual harms not offset by benefits and a need to fill gaps in existing laws.

The FTC has an opportunity to truly shape the future of analytics and algorithms. We only ask that it does so from a place of impartiality and facts. We thank you for your consideration and we ask that you recognize the impact FTC regulation would have in either growing or limiting these wonderful and exciting new innovations.

²⁴ FTC Commissioner Maureen K. Ohlhausen Speech Before the Hudson Institute, *The Government’s Role in Privacy: Getting it Right*, (October 16, 2012).

We thank you for your consideration.

Sincerely,

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