# The FTC report on how big data interacts with the law

The US Federal Trade Commission ('FTC') issued a report, 'Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues,' on 6 January 2016. This report includes analysis of the laws that may pertain to the use of big data by companies, such as the Federal Trade Commission Act ('FTC Act') as well as equal opportunity legislation. Mike Nonaka and Andrew Smith of Covington & Burling discuss the report's findings.

The report followed up on the FTC's workshop in September 2014[1], and seminar on alternative scoring products in March 2014[2]. The report provides an overview of big data, summarises its benefits and risks, and outlines considerations for companies using big data, including potentially relevant laws. The report does not recommend that Congress pass additional legislation regulating the collection, use, or disclosure of big data, unlike the FTC's comparable report on data brokers from 2014[3]. Instead, the report analyses existing laws that would apply to the generation, use, and disclosure of big data, implying that existing legal frameworks sufficiently mitigate any risks to consumers from big data.

The three legal frameworks analysed in the report are open-ended and give regulators significant discretion. The Fair Credit Reporting Act ('FCRA')[4] can be read to support a broad interpretation of the information that may be covered by its requirements. Equal opportunity laws have been enforced expansively, often under disparate impact theories based on statistical analyses without regard to any intent to discriminate against a constitutionally-protected group. Laws prohibiting unfair and deceptive acts or practices have been used by regulators to restrict business practices that would not otherwise violate the law. Accordingly, the three legal frameworks analysed in the report impose high-level requirements on big data and give regulators the authority to curb unanticipated risks to consumers that may arise from the collection, use, and disclosure of big data in the future.

The report serves as a helpful resource for a company in evaluating the potential uses, benefits, risks, and compliance requirements for big data. While many companies that already collect, use, and disclose big data will be familiar with the laws analysed and how to comply with them, new companies should review the report to develop an understanding of the legal frameworks applicable to big data.

## What is big data?

The report does not provide a comprehensive definition, instead describing it as a "confluence of factors" including "the nearly ubiquitous collection of consumer data from a variety of sources, the plummeting cost of data storage, and powerful new capabilities to analyze data to draw connections and make inferences and predictions." The report restates the 'three Vs' often used to characterise big data: volume (for its vastness), velocity (for how quickly it can be accumulated and analysed), and variety (for its breadth).

The report describes many different uses for big data, including the use of non-traditional data elements to expand access to credit and other services for consumers who do not have traditional credit bureau profiles. But, big data also presents risks - for example, the denial of credit or other services to individual consumers based on big data that is not actually predictive of the individual consumer's creditworthiness.

## Which laws potentially apply to the use of big data?

Fair Credit Reporting Act
Companies that compile big data may be consumer reporting agencies subject to the FCRA. The report cites the FTC's enforcement actions against Spokeo and Instant Checkmate for the proposition that online data brokers that collect information, create personal profiles, and market these profiles for FCRA-covered purposes, such as eligibility for credit, insurance, or employment, will be treated as consumer reporting agencies[5]. Simply posting a disclaimer on the data broker's website stating that profiles may not be used for FCRA-covered purposes is insufficient to avoid liability under the FCRA - the broker must ensure that data is not used to determine eligibility through upfront diligence of users, contract provisions, and back-end monitoring of users.

A puzzling footnote in the report casts doubt on a long-standing FTC interpretation[6], dating back to the original 1973 FTC Commentary on the FCRA, which states that "information that does not identify a specific consumer does not constitute a consumer report even if the communication is used in part to determine eligibility." The FTC no longer believes this provision is accurate, taking the position that a report "crafted for eligibility purposes with reference to a particular consumer or set of particular consumers (e.g., those that have applied for credit)" is "a consumer report even if the identifying information of the consumer has

been stripped."

To the extent that such a report can be identified or linked with an individual consumer, even if it does not include the consumer's name, address or other identifying information, we would agree that the report would be a consumer report, if "crafted […] with reference to a particular consumer" and used to determine that consumer's eligibility for credit or another FCRA-permitted transaction.

The footnote, however, also states that a report "crafted […] with reference to a […] set of consumers" - e.g., aggregated or averaged data regarding attributes of consumers sharing certain characteristics - can be a consumer report. Putting aside the statutory requirement that a consumer report must bear on an individual consumer, the FTC's footnote does not address the fairly obvious problems that would result from the application of the FCRA regulatory regime to aggregated data - for example, how would a consumer reporting agency disclose to a consumer information about other individuals in the consumer's cohort, and how would the consumer dispute or correct such information?

### Equal opportunity laws

The report urges companies to assess their use of big data analytics to comply with discrimination prohibitions in the Equal Credit Opportunity Act ('ECOA')[7], Fair Housing Act[8], Age Discrimination in Employment Act[9], and other equal opportunity laws. Even if analytics suggest, for example, that members of a protected class are less likely to repay loans, a company may be precluded from taking action or failing to take action with respect to a member of a protected class based on these analytics.

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This concern has particular significance for the theory of discrimination referred to as 'disparate impact,' in which facially neutral policies have a disproportionate adverse effect on a protected class. Big data analytics may inform a facially neutral policy regarding credit decisioning, but if the policy has a disproportionate adverse effect on a protected class, the policy nevertheless may violate equal opportunity laws if the policy is not justified by a legitimate business necessity or a less discriminatory alternative exists.

Regarding the extent to which advertising implicates equal opportunity laws, the report makes clear for example that a company's advertisement to a particular community for a credit offer that is open to all will not by itself violate ECOA, absent evidence of "discouragement" - i.e., making oral or written statements in advertising that would discourage on a prohibited basis a reasonable person from making or pursuing an application.

### Federal Trade Commission Act

Section 5 of the FTC Act prohibits unfair or deceptive acts or practices and applies to most companies acting in commerce[10] (in addition, although not noted in the report, the Dodd-Frank Act prohibits unfair, deceptive, and abusive acts or practices with respect to consumer financial services companies and their service providers, as enforced by the Consumer Financial Protection Bureau[11]). This authority was used by the FTC to take enforcement action against a credit card marketing company that failed to disclose that its consumers' credit lines would be reduced if they used funds for cash advances or for certain types of transactions based on big data analytics[12]. The report

also cautions companies against the sale of big data analytics products to customers that the companies "have reason to know […] will use the products for fraudulent or discriminatory purposes." The report gives other examples of unfair or deceptive acts or practices relating to the use or disclosure of big data.

### Conclusion

Big data use is expected to grow as companies continue to enhance their data collection and analytics processes and new vendors of non-traditional data enter the market. The report indicates that the FTC will be vigilant in enforcing big data's compliance with applicable laws, one or more of which may apply to a company's use of big data, and the laws' breadth requires a fact-specific analysis to fully understand the extent of the legal/compliance risks.

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1. FTC, Public Workshop, Big Data: A Tool for Inclusion or Exclusion? (15 Sept 2014).
2. FTC, Spring Privacy Series: Alternative Scoring Products (19 Mar 2014).
3. FTC, Data Brokers: A Call for Transparency and Accountability (Sept 2014).
4. 15 U.S.C. §§ 1681 et seq.
5. US v. Spokeo, Inc., No. 2-12-cv-05001-MMM-SH (C.D. Cal. 12 June 2012); US v. Instant Checkmate, Inc., No. 3:14-cv-00675-H-JMA (S.D. Cal. filed 24 Mar 2014).
6. FTC Staff Report, 40 Years of Experience with the Fair Credit Reporting Act (July 2011) and FTC, Statements of General Policy of Interpretations, 38 Fed. Reg. 4945, 4946 (23 February 1973).
7. 15 U.S.C. §§ 1691 et seq.
8. 42 U.S.C. §§ 3601 et seq.
9. 29 U.S.C. §§ 621 et seq.
10. 15 U.S.C. § 45(a)(1).
11. 12 U.S.C. § 5536(a).
12. FTC v. CompuCredit Corp., No. 1:08-cv-1976-BBM-RGV (N.D. Ga. 10 June 2008).