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VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113 (Annex X)
Washington, DC 20580

Re: *Big Data: A Tool for Inclusion or Exclusion? Workshop*, Project No. P145406

Dear Mr. Clark:

The U.S. Chamber of Commerce ("Chamber")[1] is pleased to submit these comments to the Federal Trade Commission ("Commission") in response to the agency's request for comments on issues to be discussed at its upcoming September 15, 2014, workshop on "Big Data: A Tool for Inclusion or Exclusion?"[2] The workshop "will examine the potentially positive and negative effects of big data on low income and underserved populations."[3] These comments incorporate by reference the Chamber's comments on big data filed with the White House Office of Science and Technology Policy ("OSTP") and the National Telecommunications and Information Administration ("NTIA") on March 31, 2014, and August 5, 2014, respectively.[4]

Entities using big data still must comply with the numerous U.S. laws and regulations that prohibit unfair discrimination. Therefore, given the benefits of big data to consumers and the U.S. economy, the Commission should restrain from acting in this area unless there are specific, identified harms that cannot be addressed adequately by the current legal framework.

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[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system.
[2] Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion?* (last accessed August 14, 2014), *available at* http://www.ftc.gov/news-events/events-calendar/2014/09/big-data-tool-inclusion-or-exclusion. ("*Big Data: A Tool for Inclusion or Exclusion? Workshop Announcement").*
[3] *Id.*
[4] *See, U.S. Chamber Comment Letter to the White House Office of Science and Technology Regarding its Big Data Study* (filed Mar. 31, 2014), *available at* https://www.uschamber.com/comment/comment-letter-big-data-study; and *U.S. Chamber Comments to NTIA on Big Data and Consumer Privacy in the Internet Economy* (filed August 5, 2014), *available at* https://www.uschamber.com/comment/comments-ntia-big-data-and-consumer-privacy-internet-economy.

I. Data is a Key Driver of U.S. Innovation and Economic Growth

To help our economy continue to recover, the Chamber believes that big data will be a key component in the creation of jobs and innovation. Data is used in many beneficial ways in our economy and by our society, including but certainly not limited to: improving healthcare, enabling businesses to better understand and serve their customers, increasing access to credit, detecting and preventing fraud as well as authenticating individual identities, and refining the manufacturing of products.[5] As White House Counselor John Podesta said at the March 3, 2014, White House/Massachusetts Institute of Technology (MIT) big data workshop:

> The value that can be generated by the use of big data is not hypothetical. The availability of large data sets, and the computing power to derive value from them, is creating new business models, enabling innovations to improve efficiency and performance in a variety of public and private sector settings, and making possible valuable data-driven insights that are measurably improving outcomes in areas from education to healthcare.[6]

As it examines big data, the Commission should fully study the benefits of data and focus on how to enable more and better use of data.[7] Without fully understanding the capabilities and benefits of data, it will be impossible to understand the opportunity costs associated with limiting the use of data.[8] Beyond harnessing big data to answer specific questions, big data analysis allows "insights that could not be anticipated empirically or theoretically before the analysis took place….Instead, the data 'speak' and tell scientists something they did not know before."[9] Therefore, in addition to looking at data use, the Commission should also examine the implications to innovation and economic growth if this data is not allowed to be used. It is also worth noting that many of the benefits derived from data will come from business and scientific applications that do not involve the use of personal information.[10]

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[5] *See also*, Jeff Lundy, PhD, *Data for Good* (Jan. 17, 2014), *available at* http://www.uschamberfoundation.org/blog/post/data-good/31581; Rich Cooper, S*afer Cities through Data-Driven Crime Prevention* (Mar. 25, 2014), *available at* http://www.uschamberfoundation.org/blog/post/safer-cities-through-data-driven-crime-prevention/34326; and Rich Cooper, *The Promise and Challenges of Data-Driven Healthcare* (May 6, 2014), *available at* http://www.uschamberfoundation.org/blog/post/promise-and-challenges-data-driven-healthcare/34398.

[6] *Remarks as Delivered by Counselor John Podesta at The White House/MIT "Big Data" Privacy Workshop* at 2 (Mar. 3, 2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/030414_remarks_john_podesta_big_data.pdf.

[7] *See*, Comments of the Center for Data Innovation to OSTP Regarding Big Data at 2 (filed Mar. 31, 2014), *available at* http://www2.datainnovation.org/2014-ostp-big-data-cdi.pdf; and Comments of the Information Technology Industry Council to OSTP Regarding Big Data at 4 (filed Mar. 27, 2014), *available at* http://www.itic.org/dotAsset/bcae1b74-eb8e-4f01-a02d-7e8aa8bdaf0f.pdf.

[8] *Id.*

[9] Software & Information Industry Association Comments to OSTP Regarding Big Data at 2 (filed Mar. 31, 2014), *available at* http://www.siia.net/index.php?option=com_docman&task=doc_view&gid=5062&Itemid=318.

[10] *See*, Center for Data Innovation Comments at 2 and Information Technology Industry Council Comments at 4.

II. Data Can Empower Underserved and Low Income Populations

Technology and data can increase safety, opportunity, and convenience—especially for underserved and low income populations.[11] In particular, data can be used to empower these populations. Using a greater number of data points reduces the chance that any single data point will be determinative.[12] By analyzing more factors, the use of big data reduces errors, improves accuracy, increases the probability of a correct decision, and hopefully obtains a result that may be perceived as "fairer."[13]

As the Commission acknowledges in its announcement of the workshop, big data can enhance the "ability of certain populations to find and access credit and other services."[14] For example, financial institutions may be able to better assess the creditworthiness of consumers and potentially grant credit to those who have been unable to obtain it (including those who have not yet established credit) by using big data analytics and not relying solely on credit scores.[15]

Additionally, data can identify unfair and discriminatory practices. However, methods to use data in this manner are not well understood outside the civil and voting rights communities. Therefore, to enable greater and better detection of unfair and discriminatory practices, groups with expertise in identifying these types of practices should share this knowledge with others, including the business community.

III. Existing Laws, Regulations, and Self-Regulatory Programs Protect Consumers While Enabling Innovation

In the United States, numerous laws and regulations as well as self-regulatory programs are aimed at protecting consumers and preventing unfair discrimination. Recognizing that the use of some sensitive types of data have a unique risk of harm, there are a variety of sector-specific federal laws (e.g., the Gramm-Leach-Bliley Act (GLBA), the Fair Credit Reporting Act (FCRA), and the Health Insurance Portability and Accountability Act (HIPAA)) designed to protect certain types of information that if misused or accessed without authorization could result in real harm to consumers. Additionally, the Commission has been aggressively asserting its authority under Section 5 of the FTC Act to prohibit unfair or deceptive acts or practices related

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[11] For example, it is worth noting that according to a recent Pew Research Internet Project survey, African Americans and whites have identical rates of smartphone ownership. Aaron Smith, *African Americans and Technology Use: A Demographic Portrait*, Pew Research Internet Project, Jan. 6, 2014, *available at* http://www.pewinternet.org/2014/01/06/african-americans-and-technology-use.

[12] *See*, Comments of Thomas L. Lenard, Ph.D., President and Senior Fellow, Technology Policy Institute to the Commission Regarding "Effects of Big Data on Low Income and Underserved Consumers at 3 (filed July 28, 2014), *available at* http://www.ftc.gov/policy/public-comments/2014/07/28/comment-00010. ("Technology Policy Institute Comments").

[13] *Id.*

[14] *Big Data: A Tool for Inclusion or Exclusion? Workshop Announcement.*

[15] Comments of the Financial Services Roundtable to OSTP regarding Big Data at 3 (filed Mar. 31, 2014), *available at* http://fsroundtable.org/letter-re-big-data-request-information.

to privacy. To address unfair discrimination, a multitude of laws also exist including: Title VII of the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and the Generic Information Nondiscrimination Act. As a complement to these consumer protection and unfair discrimination laws, a variety of effective self-regulatory initiatives exist.

Discrimination is not a technology or data problem, but a long-standing societal issue. The laws that prohibit unfair discrimination for credit, employment, housing and education are not subverted or rendered void by a person or an organization using its own big data or the big data of a third party to unfairly discriminate against a protected class. These anti-discrimination laws are still in effect and all covered entities are still required to follow them. The use of big data does not change any of this.[16] Similarly, data used for marketing purposes should remain unregulated because any harm from this data is merely "irrelevant and uninteresting advertising and marketing."[17]

Concern has been expressed by some that big data could result in price differentiation leading to underserved and low income populations paying higher prices for goods and services.[18] However, as Thomas Lenard, Ph.D., President and Senior Fellow of the Technology Policy Institute, said in his recent comments to the Commission in this proceeding:

> [I]t is more likely that price discrimination will favor lower-income individuals. Since price discrimination involves charging different prices to different consumers for the same product based on their willingness to pay, and since willingness to pay is generally positively related to ability to pay, price discrimination will, other things equal, result in lower prices to lower-income consumers.[19]

Pricing is a complex economic decision based on a variety of factors including the cost of doing business in different areas of counties and states. It is worth highlighting that in a country as diverse and large—economically and geographically—as the United States, the price of an item in New York City, NY and the price of the same item in Phoenix, AZ may be different based on supply, demand (e.g., relative proximity of competitors' stores), and varying costs including rent, supply chain logistics, labor, overhead, etc. The same is true between U.S. cities, counties, states, and regions.

Businesses comply with the myriad of existing laws and regulations governing the use of information collected about consumers. Therefore, policymakers should restrain from acting

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[16] *See also,* Michael Hendrix, *Does Big Data Discriminate?* (June 26, 2014), *available at* http://www.uschamberfoundation.org/blog/post/does-big-data-discriminate/41553.
[17] Comments of the Software & Information Association on the FTC Workshop on Alternative Scoring Products at 9 (filed Apr. 17, 2014), *available at* http://www.ftc.gov/policy/public-comments/2014/04/17/comment-00010.
[18] *See, for example,* Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* at 46-47, May 2014, *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.
[19] Technology Policy Institute Comments at 4.

unless there are specific, identified harms that cannot be addressed adequately by the current multi-layered approach for ensuring consumer protection and preventing unfair discrimination.

IV. Focusing on Improper Uses of Big Data and the Harms Created, Rather than Focusing Heavily On Collection, Provides a Balanced and Scalable Approach Toward Big Data

Federal policy should recognize that differing risks of harm are caused by different types of data collection and usage. For example, there are fewer risks associated with non-personally identifiable data, especially when anonymized or aggregated, than with data that identifies a user. Similarly, encrypted data also results in reduced risk. Therefore, any federal policies in this area need to be flexible and adaptive to accommodate different uses of data along with rapidly developing technology.

The Chamber agrees with the recommendation in the President's Council of Advisors on Science and Technology's (PCAST) recent report on big data that "policy attention should focus more on the actual uses of big data and less on its collection and analysis."[20] Specifically, PCAST goes on to say:

> By actual uses, we mean the specific events where something happens that can cause an adverse consequence or harm to an individual or class of individuals….By contrast, PCAST judges that policies focused on the regulation of data collection, storage, retention, a priori limitations on applications, and analysis…are unlikely to yield effective strategies for improving privacy. Such policies would be unlikely to be scalable over time, or to be enforceable by other than severe and economically damaging measures.[21]

Additionally, societal benefits should be taken into account and certain uses, such as fraud prevention, may warrant fewer restrictions. Data can be analyzed in real time to identity anomalies in transactions, historical data can be used to predict and help prevent future fraud, and the use of data can also help to enhance verification and authentication techniques. For example, using big data to detect and prevent fraudulent activity has helped protect financial institutions and their customers.[22] In 2012, attempted fraud against bank deposit accounts reached $14.8 billion; however, through the use of data analytics and other loss prevention measures, banks stopped $13 billion in fraudulent transactions.[23]

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[20] President's Council of Advisors on Science and Technology, *Report to the President, Big Data and Privacy: A Technological Perspective* at xiii (May 2014), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf.

[21] *Id.*

[22] *See*, Financial Services Roundtable Comments at 2.

[23] American Bankers Association, *Banks Stop $13 Billion in Fraud Attempts in 2012*, *available at* http://www.aba.com/Press/Pages/121213DepositAccountFraud.aspx.

V. Conclusion

As the Commission acknowledges in the announcement of this workshop, "tremendous benefits [to consumers and our economy] flow from the insights of big data."[24] Entities using this data still must comply with all existing laws and regulations as well as relevant self-regulatory practices. Therefore, as the Commission examines big data, the Chamber urges the agency to restrain from acting in this area unless there are specific, identified harms that cannot be addressed adequately by the myriad of means available today to ensure consumer protection and prevent unfair discrimination. Thank you for the opportunity to provide comments on this important matter.

Sincerely,

William L. Kovacs

[24] *Big Data: A Tool for Inclusion or Exclusion? Workshop Announcement.*