

September 17, 2020

Joseph J. Simons
Chairman

Rohit Chopra
Commissioner

Christine S. Wilson
Commissioner

Noah Joshua Phillips
Commissioner

Rebecca Kelly Slaughter
Commissioner

Re: Importance of Studying Data-Driven
Bias and Discrimination

Dear Chairman Simons and Commissioners:

The undersigned 27 civil rights, digital rights, racial justice organizations, and consumer groups write to urge you to take steps to support further study of data and discrimination issues in any and all forthcoming 6(b) investigations undertaken by the FTC.

A number of organizations and Members of Congress have written to the Commission in recent months calling for 6(b) investigations of companies that collect, process, and distribute information about children.¹ A bipartisan, bicameral coalition in Congress has also urged the Commission to conduct a 6(b) review of the practices of adtech companies and their data broker partners.²

¹ See Letter from Sens. Edward Markey, Josh Hawley, Richard Blumenthal, Bill Cassidy, Richard Durbin & Marsha Blackburn, to the Fed. Trade Comm'n (May 8, 2020), [https://www.markey.senate.gov/imo/media/doc/Markey%20letter%20to%20FTC%206\(B\)%20on%20children%27s%20privacy.pdf](https://www.markey.senate.gov/imo/media/doc/Markey%20letter%20to%20FTC%206(B)%20on%20children%27s%20privacy.pdf); Letter from Campaign for a Commercial-Free Childhood & Ctr. for Dig. Democracy, to the Fed. Trade Comm'n (Mar. 26, 2020), <https://commercialfreechildhood.org/wp-content/uploads/2020/03/6B-Letter-3.25.20.pdf>; Letter from Common Sense Media, to the Fed. Trade Comm'n (Mar. 26, 2020), https://d2e111jq13me73.cloudfront.net/sites/default/files/uploads/ftc_6b_letter_1.pdf; Letter from Campaign for a Commercial-Free Childhood et al., to the Fed. Trade Comm'n (Dec. 5, 2019), https://www.democraticmedia.org/sites/default/files/field/public-files/2019/coppa_6b_comments_final.pdf.

² Letter from Sens. Ron Wyden, Bill Cassidy, Maria Cantwell, Sherrod Brown, Elizabeth Warren, Edward Markey, Anna Eshoo, Zoe Lofgren, Yvette Clarke & Ro Khanna, to Joseph J. Simons, Chairman, FTC (July 21, 2020), <https://www.wyden.senate.gov/imo/media/doc/073120%20Wyden%20Cassidy%20Led%20FTC%20Investigation%20letter.pdf>.

We also are aware that the FTC recently has launched some high-profile 6(b) investigations, including one last year designed to examine the privacy practices of broadband providers.³ These investigations are important to inform both regulators and the public, especially given both the increasing scale and opacity of privacy practices across industries. We urge the FTC to continue studying the industries under its jurisdiction and, to the extent it is able, reporting the results of those investigations to the public.

As the FTC carries out these investigations, we urge it to include questions designed to better understand how commercial uses of data may reinforce bias and discrimination against historically disadvantaged communities. In the words of Andrew Smith, Director of the FTC's Bureau of Consumer Protection, "The use of AI technology - machines and algorithms - to make predictions, recommendations, or decisions has enormous potential to improve welfare and productivity. But it also presents risks, such as the potential for unfair or discriminatory outcomes or the perpetuation of existing socioeconomic disparities."⁴

Recent research underscores the urgency of these questions. For example, in recent years, research has demonstrated that data-driven search engine ads disproportionately and unjustly suggest that Black people may have arrest records,⁵ that social media platforms use algorithms that distribute housing and employment ads disproportionately to different demographic and racial groups,⁶ and that algorithms

³ Press Release, Fed. Trade Comm'n, FTC Seeks to Examine the Privacy Practices of Broadband Providers (Mar. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers>.

⁴ Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM'N (Apr. 8, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms>. See also generally Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016); UPTURN, CIVIL RIGHTS, BIG DATA, AND OUR ALGORITHMIC FUTURE (2015), <https://bigdata.fairness.io/wp-content/uploads/2015/04/2015-04-20-Civil-Rights-Big-Data-and-Our-Algorithmic-Future-v1.2.pdf>; The Leadership Conference on Civil & Human Rights, *Civil Rights and Big Data: Background Material* (Feb. 27, 2014), <https://civilrights.org/2014/02/27/civil-rights-big-data-background-material/>.

⁵ Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56:5 COMMS. ACM 44 (2013).

⁶ Muhammad Ali, Piotr Sapiezynski, Miranda Bogen, Aleksandra Korolova, Alan Mislove & Aaron Rieke, *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes*, 3 PROC. ACM ON HUM. COMPUTER INTERACTION 199:1 (2019).

that optimize the distribution of online content for "user engagement" tend to amplify hate speech and other racist content.⁷

In particular, the FTC should include variations of the following questions in future 6(b) orders:

- What information does the company collect, including from third parties, or infer about its users' actual or perceived race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual orientation, age, familial status, lawful source of income, or disability?
- How is this information processed and analyzed, including, for example, through methods involving artificial intelligence, machine learning, look-alike modeling, social media sentiment mining and cross-device tracking?
- For what purpose(s) is this information collected or inferred and processed?
- Does the company employ any of the following assessment methods to determine whether advertisements or other content, or risk and fraud risk assessments/scores are targeted, distributed, or produce an impact in a way that exhibits bias or produces disparate impact based on a person's actual or perceived race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual orientation, age, familial status, lawful source of income, or disability? For each category, please provide details:
 - Self-testing?
 - Other internal research?
 - Third-party assessments?
 - Other?
- Is the company unable to employ any of the above-listed assessment methods due to insufficient information about users' actual or perceived race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual

⁷ See Kevin Roose, *Social Media Giants Support Racial Justice. Their Products Undermine It.*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/technology/facebook-youtube-twitter-black-lives-matter.html>.

orientation, age, familial status, lawful source of income, or disability? Please explain.

- Does the company employ any assessment methods to determine whether information it collects or processes can be used as proxies for users' actual or perceived race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual orientation, age, familial status, lawful source of income, or disability? If yes, does the company take steps to assess whether use of proxy data may generate bias or disparate impact in the product or service? Please explain.
- How has the company responded to any bias or disparate impact discovered by the company or by outside researchers? What steps has the company taken to address or mitigate any bias?
- Does the company allow for independent testing of its products or services for bias or disparate impact? What information does the company make available to outside scholars, researchers, or consultants to enable independent testing of products and applications for bias?

The Commission has long been committed to studying and addressing these risks. For example, the FTC recently held a hearing to examine “The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics” that featured research and remarks from a number of speakers regarding bias and discrimination issues.⁸

The Commission pledged several years ago to “continue to examine and raise awareness about big data practices that could have a detrimental impact on low-income and underserved populations and promote the use of big data that has a positive impact on such populations.”⁹ We urge the Commission to stay true to its acknowledgement of and commitment to addressing these problems. If the FTC

⁸ Fed. Trade Comm’n, *FTC Hearing #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics*, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century> (last visited Sept. 17, 2020).

⁹ FED. TRADE COMM’N, *BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION?* 33 (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

launches any additional 6(b) investigations, it should incorporate questions to advance the Commission's understanding of data-driven bias and discrimination.

Sincerely,

Access Now
American Civil Liberties Union
Campaign for a Commercial-Free
Childhood
Center for Democracy & Technology
Center for Digital Democracy
Center on Privacy & Technology at
Georgetown Law
Color of Change
Common Sense Kids Action
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
Fight for the Future
Free Press

Lawyers' Committee for Civil Rights
Under Law
The Leadership Conference on Civil and
Human Rights
Media Alliance
MediaJustice
National Consumers League
New America's Open Technology Institute
Privacy Rights Clearinghouse
Public Citizen
Public Knowledge
Ranking Digital Rights
Stop Online Violence Against Women Inc.
United Church of Christ, OC Inc.
Upturn
U.S. PIRG

CC: Andrew Smith, Director, Bureau of Consumer Protection
Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection,
Bureau of Consumer Protection