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Secret Surveillance Scores: Pay No Attention to What's Behind the Curtain

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This Comment discusses the potential and actual misuse of consumers' secret surveillance scores in e-commerce, employment, and housing situations, as evidenced in a 2019 FTC complaint. The calculation and use of these secret surveillance scores are currently unregulated. The Comment presents two main arguments: First, secret surveillance scores are equivalent to credit scores used in the financial credit reporting industry and should thus undergo similar regulation. Second, the collection of consumer data points to calculate secret surveillance scores highlights the need for broad, nation-wide consumer digital data privacy legislation. The collection and use of secret surveillance scores are akin to the collection and use of credit scores in the financial credit reporting industry. Therefore, the secret surveillance scores should be regulated in a similar fashion by the same regulating bodies. Regulatory oversight will ensure protections for consumers from the consideration of sensitive demographic characteristics in score calculations. There also exist model digital data privacy laws that empower consumers to control the data points collected about them online. The European Union's General Data Protection Regulation and the California Consumer Privacy Act both serve as solid foundations for broader nation-wide legislation to protect consumer digital data information. The ideal solution would realize and implement both arguments to protect consumers in an emerging digital commercial industry.

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I. INTRODUCTION

In an almost completely digital economy, data collection of consumer information is a common industry practice, especially among technology companies, e-commerce retailers, and online service providers.[1] Publicly, the justification for the collection of consumer data points is for a practice known as targeted advertising.[2] These data points enable e-commerce retailers and online service providers to more efficiently offer relevant and specific goods

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1. Rebecca J. Rosen, *What Does It Really Matter If Companies Are Tracking Us Online?*, THE ATLANTIC (Aug. 16, 2013), https://www.theatlantic.com/technology/archive/2013/08/what-does-it-really-matter-if-companies-are-tracking-us-online/278692/ [https://perma.cc/5BGT-FZKV].

2. *Id.*

and services to consumers based upon consumers' individual interests.[3] Globally, consumers generate roughly 2.5 quintillion bytes of data every day through emails, web searches, photos, online commerce, text messages, phone calls, social media posts, media streaming, and interactions with service providers like ride sharing or online encyclopedias.[4]

Concerns with the data collection practices of major commercial media conglomerates, like Google and Facebook, are often discussed and scandalized in the media, including the 2018 scandal involving Cambridge Analytica.[5] Several Cambridge Analytica employees defected and exposed that Facebook shared private user information and data points with Cambridge Analytica ahead of the 2016 presidential election.[6] Cambridge Analytica then used these data points gathered from users' Facebook accounts to show users targeted and fabricated political advertisements with the intention of influencing the users' political opinions ahead of the election.[7] As a result of these types of scandals, state legislatures have reacted by attempting to regulate data collection.

Facebook has also been in the recent news for the misuse of consumers' biometric information.[8] Facebook utilized facial recognition software to identify and link users' faces with new photos uploaded to the website.[9] This practice was in violation of Illinois's Biometric Information Protection Act.[10] Biometric data covered under the Illinois law includes facial scans, fingerprint scans, and iris scans.[11] The Illinois Biometric Information Protection Act of 2018 is one of the strictest in the country, protecting consumers from having their biometric information used without consent.[12] Facebook collected and stored the biometric information of users without receiving any consent from those users.[13] In a class action lawsuit, the Ninth Circuit Court

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3. *Id.*
4. Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018), https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#3333d40e60ba [https://perma.cc/7APQ-97WS].
5. Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html [https://perma.cc/XP2N-MXYZ].
6. *Id.*
7. *Id.*
8. 740 ILL. COMP. STAT. 14/1 to 14/99 (2008); *see also* Ally Marotti, *Facebook May Pay Illinois Users a Couple of Hundred Dollars Each in $550 Million Privacy Settlement*, CHI. TRIBUNE (Jan. 30, 2020), https://www.chicagotribune.com/business/ct-biz-facebook-class-action-settlement-20200130-mpp7vvpgvzeehfj4gbvzlwp3yy-story.html [https://perma.cc/76DZ-NVMA].
9. Marotti, *supra* note 8.
10. *Id.*
11. 740 ILL. COMP. STAT. 14/1 to 14/99 (2008).
12. *Id.*
13. Patel v. Facebook, Inc., 932 F.3d 1264, 1274 (9th Cir. 2019).

of Appeals upheld that this use of facial recognition software violated Illinois law and ordered Facebook to pay $550 million in damages to plaintiffs.[14] Aside from state-sponsored legislation regulating specific uses of consumer digital data, ultimately Congress has failed to establish any meaningful regulation of these data collection practices on a national level.[15] One reason for a lack of regulation of digital data collection is that the data collected, while alarming, has been used mostly for benign advertising and marketing purposes, at least publicly.[16]

Recently, however, a complaint filed with the Federal Trade Commission on June 24, 2019, exposed a new method of highly specific data point tracking that e-commerce retailers and online service providers use to score and rank consumers against each other in a sort of consumer social hierarchy.[17] E-commerce retailers and service providers can, and often do, use secret surveillance scores (hereinafter referred to as SSS) to evaluate the worthiness of the consumer.[18] After the consumer has been evaluated and scored, these scores are also used to determine the quality of customer service that retailers and service providers will provide to that specific consumer.[19] The quality of customer service can potentially vary in regards to the length of time a consumer must wait on hold when they call a customer service number, whether or not the retailer will accept an item for return from the consumer, or even in price variations for goods and services.[20] These scores, in essence, create an tacit hierarchal system of consumers, with more desirable, higher-scoring consumers receiving a higher quality of customer service while the less desirable, lower-scoring consumers receive the proverbial cold shoulder in customer service.[21] The method of calculating these scores is based upon key data points collected from a consumer's interaction with various websites.[22] This method of collection is not so different from the method of collection used for targeted advertising, but the development and use of

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14. *Id.*

15. Rosen, *supra* note 1; Tim Herrera, *You're Tracked Everywhere You Go Online. Use This Guide to Fight Back.*, N.Y. TIMES (Nov. 24, 2019), https://www.nytimes.com/2019/11/24/smarter-living/privacy-online-how-to-stop-advertiser-tracking-opt-out.html [https://perma.cc/DT9S-YVK3].

16. Rosen, *supra* note 1.

17. Letter from Laura Antonini, Pol'y Dir., and Harvey Rosenfield, President, Represent Consumers, to Donald S. Clark, Sec'y, Fed. Trade Comm'n (June 24, 2019) (on file with FTC), 1, https://www.representconsumers.org/wp-content/uploads/2019/06/2019.06.24-FTC-Letter-Surveillance-Scores.pdf [https://perma.cc/P3S3-KTE8].

18. Letter from Laura Antonini, *supra* note 17, at 1-2; Kashmir Hill, *I Got Access to My Secret Consumer Score. Now You Can Get Yours, Too.*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/business/secret-consumer-score-access.html [https://perma.cc/YW3E-6M54].

19. Hill, *supra* note 18.

20. *Id.*

21. *Id.*

22. Letter from Laura Antonini, *supra* note 17, at 1-2.

the scores to establish a secretive consumer social order is new territory with concerning and far-reaching implications for commerce equity and digital egalitarianism.[23]

SSS are used similarly to credit scores in that they both rate and rank consumers against one another based upon a collection of specific data points about each consumer.[24] However, the similarities end there.[25] Historically, credit reporting agencies collected data points about consumers' financial information in order to assign a numeric credit score to individual consumers.[26] This credit score is then provided to and used by retailers, credit lenders, potential employers, service providers, and other institutions to make a determination on the credit worthiness of the consumer in question.[27] Whether it be to provide a line of credit or to hinder their ability to engage in e-commerce, both the SSS system and the credit rating system have powerful consequences for consumers in our modern digital economy.[28] Naturally, a consumer's credit score is imperative to navigate the American economy, thus government regulatory oversight of credit reporting agencies is paramount.[29]

Likewise, consumer SSS have become increasingly important for a consumer hoping to engage with e-commerce.[30] With the digitization of simple tasks like ordering food, paying bills, playing games, and buying gifts to more complex tasks like tele-commuting, the internet is nearly impossible to avoid.[31] E-commerce offers advantages to both consumers and businesses.[32] These advantages range from reduced overhead costs for both consumers and retailers, the ability to provide personalized advertisements, and an ability to reach a wider audience that could not otherwise be available in local, traditional commerce markets.[33] However, in stark contrast to the credit scoring system, SSS are not subject to any meaningful government regulation.[34]

This Comment seeks to explore potential regulations that could monitor and influence the way that data brokerage companies collect, compile, and

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23. Bill Murphy Jr., *'Secret Consumer Scores' Explain Why Some People Get Much Better Service Than Others. Now, You Can Finally Request Your Data and Get Your Information*, INC. (Nov. 9, 2019), https://www.inc.com/bill-murphy-jr/secret-consumer-scores-explain-why-some-people-get-much-better-service-than-others-now-you-can-finally-request-your-data-get-your-file.html [https://perma.cc/4Z8V-DV2X].

24. Letter from Laura Antonini, *supra* note 17, at 1.

25. *Id.*

26. Julia Kagan, *Credit Score*, INVESTOPEDIA (Jan. 31, 2020), https://www.investopedia.com/terms/c/credit_score.asp [https://perma.cc/82QP-XAMJ].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Gagandeep Kaur, *Traditional Commerce vs. E-Commerce*, 2 INT'L. RSCH. J. MGMT. SCI. & TECH., 334, 334-340 (2011).

32. *Id.*

33. *Id.*

34. Letter from Laura Antonini, *supra* note 17, at 2.

provide opportunity for corrections to consumers' SSS. Section II discusses the history of the consumer protection regulation agencies and the legislation that oversees the credit scoring industry. The regulating agencies and existing legislation serve as examples of how SSS regulations may form. Section III examines some specific issues surrounding SSS and the legislative regulatory gap. Section IV argues how to successfully fill that gap by bridging existing consumer data legislation with the credit scoring regulatory system to inform the development of secret surveillance scoring regulation.

II. HISTORY OF CONSUMER PROTECTION REGULATING AGENCIES AND LEGISLATION

The consumer financial industry is a multi-faceted, complex system that relies on the interdependency between government regulatory oversight and free market expression. The use of consumer financial credit scores is a perfect example of this symbiotic relationship between industry and government. Private financial companies evaluate and score the consumer's credit worthiness based upon data gathered about the consumer's financial history and provide that information to other private businesses that might consider lending a line of credit to the consumers or providing them with employment; in turn, the government regulatory bodies oversee this evaluation and scoring method to ensure that the process is fair, equal, and, most importantly, not discriminatory in nature.[35]

A. PRIMARY REGULATORY AGENCIES

To understand how to protect consumers engaged in commercial activities, it is important to first discuss and examine both the existing federal regulating agencies and the current legislation that protects consumers engaged in commerce. The primary regulating bodies for the consumer commercial industry are the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB).[36] These regulating agencies enforce the rules set forth in the Fair Credit Reporting Act, which took effect in 1970,[37] and, generally, exist to protect equality and fairness to consumers engaged in commerce in a general sense.[38]

35. *Id.*

36. 15 U.S.C. § 41; 12 U.S.C. § 5491; Julia Kagan, *Fair Credit Reporting Act (FCRA)*, INVESTOPEDIA (May 14, 2019), https://www.investopedia.com/terms/f/fair-credit-reporting-act-fcra.asp [https://perma.cc/24EH-ZX2H].

37. 15 U.S.C. § 41; 12 U.S.C. § 5491; Kagan, *supra* note 36.

38. 15 U.S.C. § 41; 12 U.S.C. § 5491.

1. Federal Trade Commission

The FTC is an independent branch of the United States federal government with investigative powers to regulate trade and advance consumer protections.[39] For the average consumer, the FTC serves a function to protect consumers from antitrust or predatory business practices like scams or deceptive advertisements.[40] The FTC has the power to investigate complaints made by consumers against companies, and if unlawful activities are discovered during the course of the investigation, the FTC may issue civil fines, and request voluntary compliance, or file an official administrative complaint to be heard before an Administrative Law Judge.[41] The FTC also enforces consumer protections to "get, use and maintain credit."[42] For example, in 2019, the FTC brought administrative action against several defendants for scamming consumers into purchasing fraudulent credit card interest rate reduction programs through the use of illegal robocalling.[43] As a result of the action, the FTC collected civil damages from the defendants and refunded consumers.[44] The FTC's powers are the result of multiple historic statutes created with the intention of protecting consumers in the economy.[45] Most notable of these statutes are the Sherman Act and the Clayton Act.[46]

The Sherman Act of 1890 promoted fair competition in commerce by establishing strict rules against the "restraint of trade" or "monopolization, attempted monopolization, or conspiracy or combination to monopolize" which could be achieved through price fixing.[47] For the purposes of keeping markets competitive and protecting consumers from unfair trade, the Sherman Act imposed guidelines on unreasonable, impermissible monopolistic trade practices.[48] Penalties for violating the Sherman Act can be both civil

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39. 15 U.S.C. § 41.

40. 15 U.S.C. §§ 41-58; Will Kenton, *Federal Trade Commission*, INVESTOPEDIA (Sep. 23, 2019) https://www.investopedia.com/terms/f/ftc.asp [https://perma.cc/72JF-YG9C].

41. 15 U.S.C. §§ 41-58; Kenton, *supra* note 40.

42. *Credit and Your Consumer Rights*, FED. TRADE COMM'N (June 2017), https://www.consumer.ftc.gov/articles/0070-credit-and-your-consumer-rights [https://perma.cc/W7VP-9YHC].

43. *FTC Returns Nearly $315,000 to Consumers Who Bought Worthless Credit Card Interest Rate Reduction Programs*, FED. TRADE COMM'N (May 23, 2019), https://www.ftc.gov/news-events/press-releases/2019/05/ftc-returns-nearly-315000-consumers-who-bought-worthless-credit [https://perma.cc/CMT4-6PCR].

44. *Id.*

45. 15 U.S.C. §§ 41-58.

46. 15 U.S.C. § 1; 15 U.S.C. § 12.

47. 15 U.S.C. § 1; *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/ZR4B-86GU].

48. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/ZR4B-86GU].

and criminal in nature, with criminal charges and convictions more targeted towards intentional violations of the law.[49]

The Clayton Act of 1914 fills in some gaps left by the Sherman Act, concerning mergers and interlocking directorates (when the same person makes business decision for competing companies).[50] The restrictions on mergers and interlocking directorates of the Clayton Act come into play where permitting the mergers or interlocking directorates would diminish fair competition between companies or potentially create a monopoly.[51] The Clayton Act was first amended in 1936 by the Robinson-Patman Act which bans "discriminatory prices, services, and allowances in dealings between merchants."[52] The second amendment to the Clayton Act was in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act which requires private companies to notify the government in advance of their intention to conduct large mergers or acquisitions.[53]

Established in 1914, the FTC was created with the focus on breaking up trusts, or large corporate conglomerates that employed potentially monopolistic trade practices.[54] The FTC may investigate a single business entity or an industry at-large after receiving complaints of fraud or false advertising from consumers, businesses, the media, congressional inquiries, or pre-merger notification filings.[55] To achieve this end, the FTC has expansive powers to strengthen the protections established in the Sherman and Clayton Acts.[56]

2. *Consumer Financial Protection Bureau*

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) created the CFPB.[57] The CFPB is a centralized government agency with the power to regulate corporations dealing in financial products and services offered to consumers.[58] The products and services that fall under the purview of the CFPB include consumer lending services like

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49. *Id.*
50. 15 U.S.C. § 12.
51. *Id.*
52. *The Antitrust Laws*, *supra* note 48.
53. 15 U.S.C. § 18.
54. Kenton, *supra* note 40.
55. *Id.*
56. F.T.C. v. Brown Shoe Co., 384 U.S. 316, 321 (1966).
57. 12 U.S.C. § 5491; *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ [https://perma.cc/K275-UG5N]; Will Kenton, *Consumer Financial Protection Bureau – CFPB*, INVESTOPEDIA (Mar. 11, 2019), https://www.investopedia.com/terms/c/consumer-financial-protection-bureau-cfpb.asp [https://perma.cc/J9M3-Q57Y].
58. Will Kenton, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA (May 10, 2019), https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp [https://perma.cc/MN95-C2BQ].

mortgages, auto loans, student loans, and retirement, as well as products like credit and debit cards.[59] The intention of the Dodd-Frank Act is to prevent the predatory financial lending by mortgage-lending institutions that caused the economic recession of 2008.[60] The Dodd-Frank Act transferred many rulemaking responsibilities from the FTC to the CFPB, however both agencies share authority to enforce regulations.[61] The CFPB assists consumers directly by enabling consumers to control their financial identities with the implementation of four specific, strategic goals:

[t]he first goal is to prevent financial harm to consumers while promoting good financial practices. The second goal is to empower consumers to live better economic lives. The third goal is to inform the public and policymakers with data-driven analytical insights. The fourth and final goal is to further advance the CFPB's overall impact by maximizing resource productivity. [62]

While the CFPB and FTC share authority to enforce the law against violators of consumer protections, the judiciary retains the remedial power required to levy damages from violators.[63] The FTC and CFPB are both powerhouse regulatory agencies that use federal legislation as a guideline to protect consumers, holding the commercial industry to fair and nondiscriminatory practices, and providing consumers with the ability to access, manage, and correct their credit scores.[64]

B. LEGISLATION TO PROTECT CONSUMERS

Congressional laws supply the FTC and CFPB with the guidance and tools required to determine when and how a consumer complaint could warrant an investigation or administrative action against a commercial entity. There are several pieces of legislation passed with the intention of empowering the FTC and CFPB to enforce consumer protections in a specific manner, in a specific arena of commerce. The FTC and CFPB are notably involved in the protection of the consumer financial industry in terms of monitoring and

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59. *Id.*
60. *Id.*
61. 15 U.S.C. § 1681; *Fair Credit Reporting Act*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/documents/statutes/fair-credit-reporting-act/545a_fair-credit-reporting-act-0918.pdf [https://perma.cc/L4JY-7W9J].
62. Kenton, *supra* note 57.
63. *Payments to Harmed Consumers*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/payments-harmed-consumers/ [https://perma.cc/W2KM-ZB4S].
64. 15 U.S.C. § 41; 12 U.S.C. § 5491.

regulating financial lenders and credit reporting agencies.[65] Specific legislation surrounding the consumer financial industry explicitly gives the FTC and CFPB their power and ability as investigators and enforcers.[66] Some of these laws discussed below interact with one another as amendments and some laws are standalone legislation, but all of these laws have deeply influenced the way consumer financial data is treated by the FTC and CFPB. They are discussed below in chronological order.

1. Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) is the main, foundational federal legislation which offers consumer privacy protection in the credit industry.[67] The FCRA was conceived in 1970 as a means to prevent companies from compiling secret credit scores with potential inaccuracies that would affect a consumer's ability to obtain credit.[68] The FCRA was enacted with a goal to provide accurate and fair credit reporting by balancing the need for the disclosure of nonpublic consumer information with the need to protect consumers' privacy rights.[69] Under FCRA, consumer information is gathered through the reporting of public records, information disclosed from financial institutions, and other sources that account for consumer transactions within a given month.[70] Consumers have access to this information by request and are given the right to dispute any inaccurate information.[71]

The FCRA imposed regulation on credit reporting companies, including Equifax, Experian, and TransUnion.[72] The FCRA compels these credit reporting companies to provide consumers with their financial scores in a "fair, timely, and accurate manner," and provide consumers with a reasonable process to correct any inaccuracies.[73] On the other hand, the FCRA also prohibits consumers from any right of legal action against a credit reporting agency for any inaccuracies on their reports.[74] If a consumer is denied an application for a line of credit, the FCRA requires that the creditor provide the consumer

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65. *Credit Reporting*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/credit-reporting/index-credit-reporting.html [https://perma.cc/NEG9-SXM7].

66. 15 U.S.C. § 1681; 15 U.S.C. § 1691; 15 U.S.C. 6801; 15 U.S.C. § 1601.

67. 15 U.S.C. § 1681; *Credit Reporting*, *supra* note 65.

68. *See* Gail Hillebrand, *After the Facta: State Power to Prevent Identity Theft*, 17 LOY. CONSUMER L. REV. 53, 54 (2004).

69. *See* Steven Robert Roach & William R. Schuerman, Jr., *Privacy Year in Review: Recent Developments in the Gramm-Leach Bliley Act, Fair Credit Reporting Act, and Other Acts Affecting Financial Privacy*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 385 (2005).

70. *Id.*

71. *Id.*

72. 15 U.S.C. § 1681; Kagan, *supra* note 36.

73. 15 U.S.C. § 1681; *see also* Roach & Schuerman, *supra* note 69; *Credit Reporting*, *supra* note 65.

74. 15 U.S.C. § 1681; *see also* Roach & Schuerman, *supra* note 69.

with a written notice identifying the credit monitoring service that was relied upon to make that determination.[75]

The FCRA allows consumers to receive a copy of their credit report, obliging each credit reporting company (Equifax, Experian, and TransUnion) to provide a free copy of the report they have compiled on a consumer once per year.[76] Additionally, if a company takes adverse action against a consumer, such as being denied an application for a line of credit, a consumer may request a free copy of their credit report within sixty days of the decision.[77] For persons experiencing joblessness, persons on welfare, or victims of fraud, including identity theft, the FCRA allows consumers to receive a free credit report if they will be applying for an occupation within sixty days.[78]

2. *Equal Credit Opportunity Act*

The Equal Credit Opportunity Act (ECOA), passed in 1974, protected consumers from any form of credit discrimination "on the basis of race, color, religion, national origin, sex or marital status, or age" by making it illegal for creditors to discriminate based upon these sensitive demographic characteristics.[79] Creditors were unable to ask about or consider these demographics as a means of approving or denying credit or determining credit interest rates for consumers.[80] The ECOA was partly a response to the disparate impact that credit reporting agencies could impose upon women after the dissolution of their marriages where their credit histories were essentially erased leading to irreparable harm to their credit worthiness.[81] The ECOA was an important step in creating equal footing for all persons in their quest to obtain, maintain, and repair their credit scores.[82] Where a financial institution has a pattern of discriminatory screening of consumers, the FTC and CFPB may open investigations into the financial institution after receiving a complaint.[83]

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75. 15 U.S.C. § 1681; *see also* Roach & Schuerman, *supra* note 69.
76. 15 U.S.C. § 1681; *see also* Roach & Schuerman, *supra* note 69.
77. 15 U.S.C. § 1681.
78. 15 U.S.C. § 1681; *see also* Roach & Schuerman, *supra* note 69.
79. 15 U.S.C. § 1691. *See* Joseph Axelrod, *2012 FTC Study on Credit Scores: 98% Accurately Reflect Credit Risk*, 26 LOY. CONSUMER L. REV. 170, 172 (2013). *See also* Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J.L. & POL'Y 575, 597 (2018).
80. 15 U.S.C. § 1691; *see also* Taylor, *supra* note 79; *Your Equal Credit Opportunity Rights*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/articles/0347-your-equal-credit-opportunity-rights [https://perma.cc/ZZJ5-JJ8V].
81. 15 U.S.C. § 1691; *see also* Taylor, *supra* note 79.
82. 15 U.S.C. § 1691.
83. *See* Kenton, *supra* note 40; *see also* Kenton, *supra* note 57.

3. *Gramm-Leach Bliley Act*

Signed into law by President Bill Clinton in 1999, the Gramm-Leach Bliley Act (GLBA) offered significant financial privacy protections to consumers.[84] The GLBA chiefly removed barriers between investment banks and consumer banks imposed by the "Glass-Steagall Act."[85] But, in relation to consumer financial privacy, the GLBA mandated that commercial banks provide consumers with a detailed privacy notice of any bank policies relating to sharing the consumers' nonpublic personal information with third-party institutions.[86] Nonpublic personal information includes a consumer's name, address, income, Social Security number, but also information gathered about a consumer based upon transactions involving the financial institution's products and services.[87] Additionally, the GLBA required the banking institutions that share this private consumer financial information with third parties offer the consumers an opportunity to opt out of that sharing of information.[88] In 2018, the CFPB passed a new regulation that grants some exceptions to the privacy notice mandate in the GLBA, loosening restrictions on the sharing of nonpublic personal information of consumers.[89]

Before the GLBA, financial institutions were not required to inform consumers that they were sharing the nonpublic personal information with any third parties.[90] By informing consumers that key data points were being collected and shared with other third-party institutions, the GLBA provided greater authority to consumers to control the dissemination of their credit information.[91]

4. *Fair and Accurate Credit Transactions Act*

The Fair and Accurate Credit Transactions Act (FACTA) was passed in 2003 as an amendment to the FCRA meant to enable consumers to protect themselves against fraud and identity theft by changing the standards used

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84. 15 U.S.C. § 6801; *see* Roach & Schuerman, *supra* note 69.
85. 15 U.S.C. § 6801; *see* Roach & Schuerman, *supra* note 69.
86. 15 U.S.C. § 6801; *see* Roach & Schuerman, *supra* note 69; *How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/documents/plain-language/bus67-how-comply-privacy-consumer-financial-information-rule-gramm-leach-bliley-act.pdf [https://perma.cc/LAJ3-7MS6].
87. *How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*, *supra* note 86.
88. 15 U.S.C. § 6802; *see* Roach & Schuerman, *supra* note 69.
89. 12 C.F.R. § 1016 (2014).
90. *See* Roach & Schuerman, *supra* note 69.
91. *Id.*

relating to consumer information.[92] Key changes included the right for each American to request and receive a free credit report once every twelve months, mandated notice to be sent to consumers in the event a retailer or service provider intends to report negative data points against the consumer, and the establishment of a financial literacy commission.[93] Importantly, FACTA also allowed consumers to place fraud alerts on their credit reports to prevent any fraudulent damage to their credit scores.[94] FACTA provides consumers with more power over the maintenance of their individualized credit reports.[95]

5. *Proposed Legislation: Comprehensive Consumer Credit Reporting Reform Act*

As the first major overhaul amendment to the FCRA, the Comprehensive Consumer Credit Reporting Reform Act (CCCRRA) was a failed bill that proposed changes to the ways that identity theft and means to resolve disputed information on credit reports.[96] The CCCRRA addressed issues that the FCRA did not adequately address, such as credit report inaccuracies, the lack of response from credit reporting agencies when inaccuracies were reported, notification to consumers when deleted data points were reinserted on credit reports, and impermissible use of credit reports.[97] Pertaining to the notification of consumers when deleted information was reinserted to a consumer's credit report, CCCRRA would have made credit reporting agencies responsible for notifying consumers of such changes made to their reports.[98] The CCCRRA also would have held credit reporting agencies accountable for providing consumers the information necessary to maintain the accuracy of their credit scores.[99] The CCCRRA, however, was never passed, and died on the House floor in 2017.[100]

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92. 15 U.S.C. § 1601; *see* Hillebrand, *supra* note 68; Julia Kagan, *Fair and Accurate Credit Transactions Act (FACTA)*, INVESTOPEDIA (Nov. 2, 2019), https://www.investopedia.com/terms/f/facta.asp [https://perma.cc/DQ7R-XNGF].

93. *See* Axelrod, *supra* note 79.

94. Kagan, *supra* note 92.

95. *See* Hillebrand, *supra* note 68.

96. Comprehensive Consumer Credit Reporting Reform Act of 2017, H.R. 3755, 115th Cong. (2017); Neil Vanderwoude, *The Fair Credit Reporting Act: Fair for Consumers, Fair for Credit Reporting Agencies*, 39 SW. L. REV. 395, 398 (2009).

97. *Id.*

98. *See* David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the Financial Crisis May Be Contributing to Improving Accuracy in Credit Reporting*, 24 LOY. CONSUMER L. REV. 329 (2012).

99. *Id.*

100. H.R. 3755.

C. CULMINATION OF AGENCIES AND LEGISLATION

The conception of the regulatory agencies and the legislation that the regulatory bodies can use regarding consumer credit has culminated in credit scoring systems. We are likely all familiar with these credit scoring systems (Fair Isaac Corporation (FICO) score or the VantageScore).[101] To provide fair and equal access to credit, these credit scores are used to evaluate the credit worthiness of consumers on an individual basis based upon factors like consumers' annual income, their history of making payments in a timely fashion, the age of their credit, their debt-to-credit ratio, and the number of credit inquiries within a given period of time.[102] These factors are calculated to produce a credit score that determines the risk of default on credit by the consumer.[103]

FICO and VantageScore are two competing credit rating systems for consumer creditworthiness.[104] These competing scoring systems compile their scores in similar ways based upon largely the same data points. FICO scores consumers on a scale between 300 and 850, considering the data collected from each of the three credit reporting agencies separately.[105] Meanwhile, VantageScore rates consumers on a scale of 501 and 990, calculated via a statistical analysis based upon the combination of all three major credit reporting agencies.[106] The primary difference between the two rating systems is merely the weight given to certain financial information and the organizations that use the information.[107] These credit rating systems affect the ease of access to lines of credit and the variability of the interest rates at which that credit is borrowed.[108] In turn, the credit ratings ultimately affect a consumer's ability to obtain a mortgage to purchase a home, a vehicle loan, a credit card, or any expensive goods or services that may require a line of credit for the common consumer.[109] In an economy where the average household debt for consumers has steadily risen, access to lines of credit can be a lifeline.[110]

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101. Kagan, *supra* note 26.
102. *Id.*
103. *Id.*
104. Julia Kagan, *VantageScore*, INVESTOPEDIA (Jun. 12, 2018), https://www.investopedia.com/terms/v/vantagescore.asp [https://perma.cc/HLK9-R98L].
105. *Id.*
106. *Id.*
107. *Id.*
108. Kagan, *supra* note 26.
109. *Id.*
110. Press Release, Federal Reserve Bank of New York, Household Debt Continues to Climb in Third Quarter as Mortgage and Auto Loan Originations Grow (Nov. 13, 2019) https://www.newyorkfed.org/newsevents/news/research/2019/20191113 [https://perma.cc/SEL3-A8VM].

As a product of government regulatory oversight, FICO and VantageScore are obligated to make updates and corrections to consumers' scores when prudent to do so, including through massive updates to the system as a whole that can affect millions of consumers.[111] In late January, 2020, FICO released the latest version of its credit scoring system, known as FICO 10 T.[112] Previously, FICO scores considered a consumer's debt levels narrowly in the most recent month reported.[113] Under FICO 10 T, a consumer's ability or lack thereof to make credit payments, particularly recent payments, on time is given more weight as a variable in the calculation of the consumer's credit score.[114]

Credit scores are primarily regulated by the CFPB and the FTC to ensure that consumers have access to their designated scores for the purpose of correcting any inaccuracies that could inhibit or prevent the consumer's application for a line of credit.[115] Consumer access to credit scores is essential to maintain public goodwill and to have confidence in a capitalist economy.[116] The purpose of credit scores is to provide an objective tool of measurement for financial institutions to use in their evaluation of whether or not to approve consumers' applications for lines of credit.[117] The use of the scores is meant to prevent discrimination in credit lending practices for an unavoidable financial necessity in the modern American economy.[118] Few Americans have the financial liquidity on hand to purchase a house or car outright in the twenty-first century, let alone cover emergency expenses.[119] Thus, careful regulatory oversight is required to make sure that all Americans have the opportunity to receive credit in a fair manner, giving seemingly equal credence to people regardless of their demographic characteristics.[120] With the recent rise of SSS and its effect on the way that consumers engage with commercial activity, there is a new call to introduce regulations that

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111. Megan Leonhardt, *110 Million Consumers Could See Their Credit Scores Change Under New FICO Scoring*, CNBC (Jan. 24, 2020), https://www.cnbc.com/2020/01/23/fico-10-credit-score-changes.html [https://perma.cc/W6NH-V93R].

112. *Id.*

113. AnnaMaria Andriotis, *FICO Changes Could Lower Your Credit Score*, WALL ST. J. (Jan. 23, 2020), https://www.wsj.com/articles/fico-changes-could-lower-your-credit-score-11579780800 [https://perma.cc/CWG4-R8L7].

114. *Id.*

115. Kagan, *supra* note 36.

116. Kagan, *supra* note 26.

117. Frederic Huynh, *Adapting Credit Scores to Evolving Consumer Behavior and Data*, 46 SUFFOLK U.L. REV. 829 (2013).

118. *Id.*

119. Ann Carrns, *Even in Strong Economy, Most Families Don't Have Enough Emergency Savings*, N.Y. TIMES (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/your-money/emergency-savings.html [https://perma.cc/M44X-2CHK].

120. 15 U.S.C. § 1691.

would monitor and restrict the collection, compilation, and calculation of consumers' digital data.[121]

III. THE PROBLEM WITH SECRET SURVEILLANCE SCORES

Where credit scores are indisputably necessary for Americans to engage with the economy, the use of SSS has become equally necessary when engaging in e-commerce. The issue is not that SSS are used to score and rank consumers akin to a credit scoring system; the issue is that the data points used to calculate SSS are shrouded in mystery and might even include the considerations of demographic characteristic data points.[122]

A. WHO COMPILES THE SCORES AND WHO USES THE SCORES?

There are multiple online data brokerage companies that are compiling, calculating, and assigning SSS to consumers. Five main data brokers that collect this information were identified in a *New York Times* article explaining how consumers can request their scores.[123] The five data brokers engaged in SSS work are Sift, Zeta Global, Retail Equation, Riskified, and Kustomer.[124] Each of these companies has a different process for consumers to request their individual SSS to varying success, but none of them are obligated to provide that score to the consumer.[125] Thus, after submitting a request for scores, some of these data brokers merely promise to provide consumers with the requested information, but ultimately do not provide the score.[126] What's more troubling than the numerous companies that are engaged in this SSS system are the businesses and industries that are using this unregulated information.

More striking is the number of online retailers and service providers that use SSS to classify their consumers. Mainstream retailers and service providers like Best Buy, Sephora, AirBnB, and Yelp use SSS to prevent consumer abuse like fraudulent returns.[127] Some retailers and service providers even use SSS to influence price differentiations, which indicates the very real potential for discriminatory pricing activities based upon consumer SSS.[128] Retailers and service providers like Home Depot, Walmart, Starbucks, ASOS,

121. Letter from Laura Antonini, *supra* note 17, at 1.
122. *Id.*
123. Hill, *supra* note 18.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Letter from Laura Antonini, *supra* note 17, at 1.

Travelocity, and Cheaptickets have been caught providing inconsistent pricing for the same products or services.[129] ASOS admitted in 2017 that their "customer value scores" were determined from over "100 data points, including age and location."[130]

Even some landlords have begun using SSS in addition to traditional credit scoring systems to evaluate potential renters.[131] New companies like CoreLogic, described as "tenant-screening companies," use personal information gathered about consumers to rate them, directly affecting consumers' ability to find and secure housing.[132] The implementation of using SSS into housing arena introduces the possibility that SSS could run afoul of regulations set by the Fair Housing Act, which protects consumers from the consideration of race, sex, religion, color, familial status, or national origin in making housing decisions.[133]

Employers have also begun using consumer SSS to screen applicants for professional positions.[134] The use of SSS for job applicants may also violate the protections instituted in Title VII of the Civil Rights Act of 1964.[135] The consideration of sex, race, color, religion, national origin, age, or disability in hiring decisions is in direct violation of this statute.[136] While specific examples of SSS being used against consumers cannot be provided, the sheer potential for consumers' protected status to be used against them in a such vital area of commerce should be motivation enough to prompt preemptive regulation.

Without meaningful regulatory oversight, the use of SSS has become a problematic rating system for companies, service providers, and, in some cases, even landlords and employers to organize consumers into a sort of hierarchy based on sensitive demographic information like age, race, religion, gender, and sex.[137] These demographics are data points that government regulatory oversight traditionally excludes from similar financial scoring systems.[138] Bridging the gap between the protections that the government already offers to the potential for regulatory protections in this emerging secretive consumer scoring industry is imperative to protect consumers from discrimination.

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129. Letter from Laura Antonini, *supra* note 17, at 10-16; Christopher Mims, *The Secret Trust Scores Companies Use to Judge Us All*, WALL ST. J. (Apr. 6, 2019), https://www.wsj.com/articles/the-secret-trust-scores-companies-use-to-judge-us-all-11554523206 [https://perma.cc/3MRD-ETPN].

130. Letter from Laura Antonini, *supra* note 17, at 16.

131. *Id.* at 24-25.

132. *Id.*

133. 42 U.S.C. § 3604.

134. Letter from Laura Antonini, *supra* note 18, at 33.

135. 2 U.S.C. § 1311.

136. *Id.*

137. Letter from Laura Antonini, *supra* note 18, at 36.

138. *Id.*

B. THE LEGISLATIVE GAP

As discussed above, many important laws and regulations exist to protect consumers and consumer data from financial predation in the credit reporting industry. However, the use of SSS is largely unregulated because these scores were truly secret to the public at large until just recently when the FTC Complaint was filed.[139] The data brokers that compile and provide SSS to retailers and other service providers are not held to the same standards as credit reporting agencies.[140] The algorithms used, the specific data points collected to compile SSS, and even the actual use and implementation of SSS are all kept secret from the public.[141]

The FTC Complaint mentions approximately forty-four different types of scoring systems that are collected and calculated about consumers that go beyond the traditional credit reporting system.[142] These scores include a Medication Adherence Score, Health Risk Score, Consumer Profitability Score, Job Security Score, Churn Score (likelihood that a consumer would move his or her business to another company), Discretionary Spending index, Invitation to Apply Score, Charitable Donor Score, and even a Pregnancy Predictor Score.[143] Congress has an interest and obligation to provide regulatory oversight to this system because of the sensitive data points used to calculate such scores. Meaningful regulation for SSS requires implementing three key obligatory provisions for online companies that compile SSS, the same obligatory provisions that credit reporting agencies have been bound by for decades.

1. Duty to Disclose

Requiring a mandatory disclosure of the data points that scores are based upon, the range of scores, the method used to calculate the score, and the subsequent use of the score to consumers in both a reasonable manner and a reasonable time period is the first step to ensuring that consumers are given some control over their SSS.[144] The United States should adopt sweeping legislation to compel the companies that compile these scores to create a reasonable and easy method for consumers to request and receive their scores in a timely manner, because these scores can affect a consumer's ability to

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139. *Id.*
140. *Id.*
141. *Id.*
142. Letter from Laura Antonini, *supra* note 18, at 7.
143. *Id.* at 7-8.
144. *Id.*

engage in commercial activities, including finding housing or employment.[145] Adapting the FCRA to include SSS, not just credit reporting agencies, would provide consumers with the power of knowledge over their scores.[146] Mandatory disclosure of SSS allows consumers to (1) know their score in relation to others, (2) correct any inaccuracies, and (3) prevent discriminatory practices by requiring accountability.[147]

2. Duty to Correct Inaccuracies

Without the duty to disclose SSS, consumers are at the mercy of the companies that compile their data and assign each consumer a score.[148] There are numerous opportunities for inaccuracies via fraud with the frequent exposure of consumers' usernames and passwords on the internet.[149] Similar to the ways that identity theft can adversely affect a consumer's ability to secure a line of credit for a purchase from a creditor, unchecked identity theft in relation to SSS can severely adversely affect a consumer's ability to engage with a retailer or online service provider.[150] If a consumer's login information was compromised and their SSS was negatively affected by fraudulent activity, they might be prevented from engaging further with a major retailer.[151] Companies that compile SSS should not only have to report a consumer's SSS, but also explain the data points that affect the compiled score, providing the consumer with the ability to correct any inaccuracies as they may find.[152]

3. Preventing Discriminatory Practices

Perhaps the most jarring potential misdeed that could occur if these SSS are left unregulated is the consideration of sensitive demographic information in the calculation of the score. Recorded digital consumer data points include personal information such as:

race, religion, age, gender, social security number, driver's license number, household income and finances, zip code, marital status, height, weight, eye color, hair color, facial structure, fingerprint, the sound of our voice, whether we are parents or expectant parents, if we own pets, our location

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145. *Id.*

146. Pam Dixon & Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future*, WORLD PRIV. F. (Apr. 2, 2014), https://www.ftc.gov/system/files/documents/public_comments/2014/08/00014-92369.pdf [https://perma.cc/W88D-9ETP].

147. Letter from Laura Antonini, *supra* note 18, at 8.

148. *Id.*

149. Dixon & Gellman, *supra* note 147.

150. *Id.*

151. *Id.*

152. Letter from Laura Antonini, *supra* note 18, at 36; Dixon & Gellman, *supra* note 147.

(which can include up to 14,000 location data points per day), what we are buying and where we are buying it, where and what we eat, where we vacation, our sexual interests, dietary restrictions, medical conditions, genetic information, political views, what we search for on the Internet, what websites we visit, when we open an email, what apps we use and how long we use them, the names and contact information of people we text, call, and visit, when and how we exercise.[153]

Legislative protections that prevent credit reporting agencies from discriminating against consumers based upon their sensitive demographic characteristics like race, sex, and socioeconomic class do not currently apply to SSS because there is no formal or meaningful regulatory oversight.[154] The potential for nefarious and discriminatory considerations used against consumers compounds when the data points used to compile these scores are kept secret by the data brokerage companies that collect and sell the scores to retailers and service providers. We simply do not know if these companies are compiling and calculating SSS based upon race, religion, sex, sexual orientation, gender expression, or marital status of consumers. As evidenced in the price differentiating of Walmart and Home Depot,[155] companies very well may be pricing the same items differently based upon a customer's race, sex, or socioeconomic status. By the adaptation of the ECOA to include regulation of SSS, these companies would be forbidden from considering these sensitive demographics about consumers as a factor in scoring them and rating them against one another.[156] In addition to the possibility of strengthening current legislation to cover SSS, there are two existing primary model regulations that can serve as the foundation to build new and stronger regulations for consumer digital privacy in an increasingly digitized economy.

IV. FILLING THE GAP

To fill the regulatory gap between existing regulation for credit scoring systems and the area where SSS exist, the new regulations for consumer data protection in the state of California and the European Union can serve as a loose framework to build upon. These regulations coupled with potential FCRA and ECOA adaptations can provide the best protection for consumers.

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153. Letter from Laura Antonini, *supra* note 18, at 3-4.
154. *Id.* at 1.
155. *Id.* at 10-15.
156. 15 U.S.C. § 1691.

A. EXISTING ALTERNATIVE MODEL REGULATIONS

The federal government can look to two main regulations to bridge the gap between existing protections for consumers and the companies that compile SSS.[157] California's Consumer Privacy Act and the European Union's General Data Protection Regulation provide similar frameworks of regulation to model future consumer protections in relation to SSS.[158]

1. General Data Protection Regulation in the European Union

In 2018, all European Union (EU) members were under a new digital privacy regulation called the General Data Protection Regulation (GDPR).[159] This regulation gives consumers in the EU absolute control over their digital data footprint.[160] Consumers have the right to know the data that is collected and recorded about them, the right to remedy and delete their data at any time, and the right to not have any decision levied against them based on an automated process.[161] Consumers who consent to have their data collected also retain the right to withdraw that consent at any time.[162] GDPR holds the businesses that deal with consumer digital data to a high standard of accountability by requiring them to also protect and encrypt the data that they collect.[163] Further, in the event of a data breach, which is always a risk for companies that compile sensitive personal information, companies must notify potentially affected consumers within seventy-two hours of the breach.[164]

American companies that do business in the EU are subject to the regulations instituted by the GDPR.[165] Companies in breach of the GDPR can face hefty fines up to 20 million euros or 4% of their global annual turnover, whichever number is larger.[166] In fact, the EU has taken separate legal actions

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157. CAL. CIV. CODE § 1798.100 (2020); Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119) 1.

158. *See* Stuart L. Pardau, *The California Consumer Privacy Act: Towards A European-Style Privacy Regime in the United States?*, 23 J. TECH. L. & POL'Y 68 (2018).

159. *See* Céline Castets-Renard, *Accountability of Algorithms in the GDPR and Beyond: A European Legal Framework on Automated Decision-Making*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 91, 94 (2019); *see also* Pardau, *supra* note 158, at 79.

160. *See* Castets-Renard, *supra* note 159, at 94; *see also* Pardau, *supra* note 158, at 79.

161. *See* Castets-Renard, *supra* note 159, at 94.

162. *Id.*

163. *See* Pardau, *supra* note 158.

164. Arjun Kharpal, *Everything You Need to Know About a New EU Data Law that Could Shake Up Big US Tech*, CNBC, (May 25, 2018), https://www.cnbc.com/2018/03/30/gdpr-everything-you-need-to-know.html [https://perma.cc/ZLY9-QYNE].

165. *Id.*

166. Mary Hanbury, *Facebook is Looking Down the Barrel of a $2.2 Billion Fine for Storing Millions of Passwords Insecurely*, BUS. INSIDER (Apr. 25, 2019), https://www.businessinsider.com/facebook-faces-2-2-billion-fine-email-contacts-harvesting-ireland-data-protection-2019-4 [https://perma.cc/JE3F-WEHC].

for noncompliance against the notoriously data-rich American companies, Facebook and Google.[167] France sued Google for making its confidentiality rules too long and convoluted (at over 1000 lines of text) for consumers to understand, as required under the GDPR.[168] Facebook, meanwhile, currently faces up to $2.2 billion for storing users' Facebook passwords in plaintext on its servers, in direct violation to the GDPR-instilled duty to protect consumers' personal and private digital information.[169]

While the GDPR seems like the symbolic white knight to the digital privacy world, some language used in the legislation is vague and will need to be worked out in the courts.[170] For example, some of the companies that compile SSS like Sift and SecureAuth both technically comply with the standards set by GDPR.[171] Further, major corporations have largely benefitted from the GDPR.[172] Large corporations like Facebook and Google are given more advertising revenue as opposed to smaller companies out of fear that the large conglomerates are the only companies sizeable enough to institute policies that fully comply with the standards set forth by the GDPR or to financially weather any violations that may occur.[173] Such stringent regulation can in fact have unintended adverse effects on the free market in a digital economy. In the United States, the California Consumer Privacy Act of 2018 attempted to bring digital data protections in U.S. soil while balancing the strict restrictions set forth by the GDPR.

2. *California Consumer Privacy Act of 2018*

Becoming effective on January 1, 2020, California's Consumer Privacy Act (CCPA) is currently the most comprehensive legislation in the United States that accounts for digital privacy protections for consumers.[174] CCPA provides consumers with the right to request their digital data from online

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167. Kharpal, *supra* note 164.

168. *French Lawsuit Accuses Google of Violating EU Privacy Rules*, ASSOCIATED PRESS (June 26, 2019), https://apnews.com/dd72d3e691094bada612fa5ec09a8a8c [https://perma.cc/78PA-MRQZ].

169. Hanbury, *supra* note 166.

170. Christopher Mims, *The Secret Trust Scores Companies Use to Judge Us All*, WALL ST. J. (Apr. 6, 2019), https://www.wsj.com/articles/the-secret-trust-scores-companies-use-to-judge-us-all-11554523206 [https://perma.cc/3MRD-ETPN].

171. *Id.*

172. Nick Kostov & Sam Schechner, *GDPR Has Been a Boon for Google and Facebook*, WALL ST. J. (June 17, 2019), https://www.wsj.com/articles/gdpr-has-been-a-boon-for-google-and-facebook-11560789219 [https://perma.cc/QAA4-3E8R].

173. *Id.*

174. CAL. CIV. CODE § 1798.100 (2020); *see also* Pardau, *supra* note 158, at 79.; Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N. Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html?module=inline [https://perma.cc/U6HX-6VWB].

companies and control the storage and sharing of that data.[175] Consumers can request that their data is deleted at any time, for any reason, and the companies are legally obligated to delete that data.[176] Consumers can also request that the companies do not sell their consumer data to third parties through an opt out clause.[177]

The CCPA does not apply to every e-commerce retailer or service provider that collects data on consumers, however.[178] The CCPA only applies to companies that (1) have a gross annual income over $25 million; (2) buy, receive, or sell personal data of more than 50,000 California citizens for commercial purpose; and (3) receive more than 50% of its annual revenue from the sale of this personal data on California citizens.[179] These companies are required to disclose to consumers a description of their consumer rights and a clear method for submitting requests.[180] In addition to providing consumers the rights to control how their data is used, the CCPA also requires that companies that fall under this regulation provide consumers with information including the specific information that was collected, and the actual purpose of the collection of that information.[181] Many companies that compile SSS on consumers fall under the regulation of CCPA, and must abide by the law as it is set up in California, but only in the state of California.[182]

3. *Commercial Involvement in the Creation and Implementation of Regulation*

Government regulation does not have to be a burden on commercial business, but it is important to keep commercial interests separate from consumer interests. Regulation is an inevitability of commerce and data collection, which is why many tech companies have become involved in the development of the regulation that they will have to adhere to.[183] Facing anti-trust investigations, major tech companies like Google's parent company Alphabet, Facebook, Apple, and Microsoft are now calling for regulation of their

175. *See* Pardau, *supra* note 158.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *See* Pardau, *supra* note 158.
181. *Id.* at 72.
182. *Id.* at 102.
183. Sebastian Herrera, *Tech Giants' New Appeal to Governments: Please Regulate Us*, WALL ST. J. (Jan. 27, 2020), https://www.wsj.com/articles/tech-giants-new-appeal-to-governments-please-regulate-us-11580126502 [https://perma.cc/4K9P-CSNS].

industry.[184] Allowing the parties who are bound by the regulation to help develop the regulation is problematic and a grossly unethical conflict of interest.[185]

The lobby group Internet Association, which represents major tech companies like Google and Facebook, spent hundreds of thousands of dollars to lobby legislators during the drafting of the California Consumer Privacy Act (CCPA).[186] The Internet Association was able to successfully water down key aspects of the CCPA.[187] Some of these attenuated critical pieces of CCPA include the removal of the ability for consumers to sue companies in breach of the new law, the removal of an automatic opt-out clause for the sale of consumer data information to third parties, and the CCPA, in its current iteration, places the burden on the consumer to communicate what they want or do not want done with their personal consumer information.[188] The CCPA could improve protections and regulations in key areas by including whistleblower protections for insiders who expose their companies or industries for violations of regulations; clarifying terms of regulations more explicitly and clearly; expanding exceptions to data collection regulation for research, including academic, non-profit, and for-profit; and streamlining disclosure requirements.[189] Additionally, when a violation has occurred, the CCPA can be improved by lengthening the cure period for companies to fix violations that might be more complicated and, most importantly, by increasing the amount of financial damages that consumers can collect in a private right of action against e-commerce retailers and service providers in the event of a violation.[190]

B. BLENDING AND ADAPTING EXISTING REGULATION

Currently, for digital data privacy, we are limited to the imperfect models set forth by the CCPA and GDPR to follow for federal regulation. One solution is that we incorporate and build upon the European Union's GDPR

184. *Id.*
185. Sebastian Herrera, *Activist Behind California's New Privacy Law Already Wants to Improve It*, WALL ST. J. (Dec. 29, 2019), https://www.wsj.com/articles/activist-behind-californias-new-privacy-law-already-wants-to-improve-it-11577615401?mod=article_inline [https://perma.cc/WY3T-3X2X].
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* Pardau, *supra* note 158.
190. *Id.* at 105-106.

model with the CCPA.[191] The CCPA is the most comprehensive existing legislation in the U.S. that has the potential to regulate SSS.[192] By blending GDPR and CCPA, there is ample opportunity for the Congress to pass federal regulations to allow consumers easy and fair access to their own scores.[193] This is a step in the right direction, from a regulatory standpoint, but data privacy protection legislations are broad and vast. The difficulty with such broad legislation is that it is difficult to anticipate and account for specific instances of violations until they have already occurred. Additionally, as discussed above, the businesses subject to regulation have been heavily involved in the drafting of such legislation, which is an inherent conflict of interest.

There is also the opportunity to create brand new regulations that will protect consumers from a more nefarious, discriminatory use of the SSS going forward.[194] The FTC and CFPB, as the regulating bodies for the consumer financial credit scoring systems, have the potential to provide the same regulatory oversight to the data brokers as they provide to credit rating companies. New regulatory legislation can be modeled after the long and storied evolution of the FCRA and ECOA.[195] The regulations for the credit scoring system have had many iterations over the years, mostly reactionary to correct discriminatory practices, and serve as a solid example of how to proceed with developing the regulations for SSS proactively before discrimination occurs.

Based upon the fact that the credit scoring system has taken decades to evolve in its regulation,[196] creating regulation to oversee SSS is not an overnight process, but one that requires careful consideration about the ways that data is collected and used against consumers. The process to develop a regulatory system to encompass SSS should not be painted with the broad strokes of a brush meant to encompass digital data privacy at large. Instead, the conception of such regulation should be an intentional and methodical process of drafting meaningful regulation that will effectively protect consumers from discriminatory commercial practices. Legislation for regulating SSS can and should be drafted the same way that the regulation for the credit scoring system has been developed.

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191. *Id.*

192. CAL. CIV. CODE § 1798.100 (2020); *see also* Aaron Holmes, *Yelp, AirBnB, Twitter, and Other Apps Are Secretly Rating You as a Consumer. Here's How to Check Your Score.*, BUS. INSIDER (Nov. 4, 2019), https://www.businessinsider.com/how-to-check-consumer-rating-file-score-apps-yelp-airbnb-twitter-2019-11 [https://perma.cc/5Q72-BNM7].

193. Council Regulation 2016/679, 2016 O.J. (L 119) 1; Kharpal, *supra* note 164.

194. Letter from Laura Antonini, *supra* note 17, at 5.

195. 15 U.S.C. § 1681.

196. *Id.*

V. CONCLUSION

Regardless of the path taken, government oversight is undoubtedly necessary to regulate data brokers and protect consumers from discrimination.[197] Regulation of the companies that compile and rank consumers based upon SSS is vital to ensure that e-commerce retailers and service providers are treating consumers fairly and equally in the digital economy.[198] In the modern economy, where it is increasingly impossible to avoid engaging with digital commercial activity, consumers should be provided the same legal and regulatory protections to their digital identity as they are afforded for their financial identity in the credit industry.[199] Certainly, it is a violation of consumer privacy protections that the consideration of sensitive demographic characteristics is used to calculate a score that could affect where consumers live, where they work, and where they can shop.[200]

The FTC and the CFPB should use their broad investigative powers to inspect and expose the process used by data brokers and allow consumers full access to their SSS.[201] If in fact, the activities of these data brokers violate existing laws, the FTC and CFPB should immediately enforce action against the violators. Where no laws have been violated, but data brokers are still collecting and using sensitive demographics to compile and calculate SSS, Congress should immediately act to protect consumers from potential discriminatory and predatory activities. Even the potential consideration of sensitive demographics in the compilation and calculation of the scores is highly suspect.[202] Where SSS are used in housing applications, protections guaranteed by the Fair Housing Act should apply; and where SSS are used in job applications, protections guaranteed by Title VII of the Civil Rights Act of 1964 should apply.[203] With the power to regulate commerce, Congress has a direct interest and a constitutional responsibility to address this emerging area of commerce and will hopefully act soon.[204]

197. Letter from Laura Antonini, *supra* note 17, at 2.
198. *Id.*
199. *Id.* at 8.
200. *Id.* at 9.
201. *Id.* at 2.
202. Letter from Laura Antonini, *supra* note 17, at 5.
203. 42 U.S.C. § 3604; 2 U.S.C. § 1311.
204. Letter from Laura Antonini, *supra* note 17, at 36.

Appendix A

Table of Acronyms
CCPA – California Consumer Privacy Act of 2018
CCCRRA – Comprehensive Consumer Credit Reporting Reform Act
CFPB – Consumer Financial Protection Bureau
ECOA – Equal Credit Opportunity Act
EU – European Union
FACTA – Fair and Accurate Credit Transactions Act
FCRA – Fair Credit Reporting Act
FTC – Federal Trade Commission
GDPR – General Data Protection Regulation
GLBA – Gramm-Leach Bliley Act
SSS – Secret Surveillance Scores