Before the

FEDERAL TRADE COMMISSION

Washington, DC 20580

In the Matter of	)	
	)	
Trade Regulation Rule on Commercial Surveillance and Data Security	))	FTC Docket ID: FTC-2022-0053
	)	
Commercial Surveillance ANPR, R111004	)	

COMMENTS OF OPEN MIC

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Introduction

This comment is offered by Open MIC (the Open Media and Information Companies Initiative), a non-profit organization which aims to foster corporate accountability in the tech and media sectors, principally through shareholder engagement. Open MIC works closely with institutional investors—including sustainable investment firms, state and municipal pension funds, faith-based investors, foundations and others—that have fiduciary interests in a broad range of industries engaged in commercial surveillance and data security. These diversified or universal investors, as they are often called, therefore have a strong interest in the current proceeding.

Open MIC urges the Commission to promulgate strong trade regulation rules for the protection of consumer privacy, with the understanding that such action would benefit the economy as a whole and diversified investors generally, even as it may restrict the immediate profitability of a specific set of damaging business models employed by individual companies. Widespread practices of unaccountable consumer data management enact immeasurable harm on consumer welfare, worker productivity, and economic stability, creating massive negative externalities that damage overall economic performance and encourage companies to engage in negligent data practices for which society, rather than the company, bears the actual costs.

Rather than presenting a barrier to economic growth, bold regulatory action to limit commercial surveillance and protect consumer privacy would in fact benefit the broader economy by reining in a value-destroying business model that profits a few select companies at the expense of cross-sector financial health and stability.

I. Consumer privacy invasions create massive negative economic externalities.

Commercial surveillance and lax data security practices enact significant harms on the individuals whose data are collected, shared, exposed, monetized, or used against them. In study after study, consumers demonstrate a growing sense of anxiety about these harms. Pew Research Center recently found that 81 percent of respondents felt that the risks of commercial data collection outweighed the benefits, and that more than half reported avoiding a product or service due to privacy concerns.[1] Survey research from global consulting firm McKinsey revealed abysmal levels of trust in data protection across all industry sectors—the highest scoring sectors were healthcare and financial services (which notably experience greater privacy regulation through other legal and regulatory measures), but even those industries were only rated as trustworthy by 44 percent of respondents.[2] When Apple began requiring iOS application developers to request permission to collect tracking data from users, 94 percent of those who responded in the first three weeks chose not to opt-in to this data collection.[3] Such widespread and deeply rooted anxiety around data protection indicates that consumers have a strong understanding of the potential harms that commercial surveillance exposes them to.

Taken in aggregate, these diffuse individual harms create enormous societal and economic costs, which are overwhelmingly not borne by the companies responsible for incurring those costs. Current data-exploitative business models would not be considered profitable or value-creating if such costs were taken into account rather than externalized. Allowing these practices to continue without meaningful intervention puts the country's broader economic well-being at risk.

A. Data breaches and sharing practices

Data breaches are perhaps the clearest example of how a company's participation in commercial surveillance and subsequent failure to adequately secure such data can result in serious economic costs. According to UNCDF estimates, the global economic cost of data breaches in 2020 was "a staggering USD 4-6 trillion, equivalent to about 4-6% of global GDP."[4] IBM recently estimated that the average cost

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[1] Andrew Perrin, "Half of Americans have decided not to use a product or service because of privacy concerns," *Pew Research Center* (Apr. 14, 2020) https://www.pewresearch.org/fact-tank/2020/04/14/half-of-americans-have-decided-not-to-use-a-product-or-service-because-of-privacy-concerns/.

[2] Venky Anant, Lisa Donchak, James Kaplan, and Henning Soller, "The consumer-data opportunity and the privacy imperative," *McKinsey & Company* (Apr. 27, 2020) https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/the-consumer-data-opportunity-and-the-privacy-imperative.

[3] Estelle Laziuk, "iOS 14.5 Opt-in Rate - Daily Updates Since Launch," Flurry.com (Apr. 29, 2021) https://www.flurry.com/blog/ios-14-5-opt-in-rate-att-restricted-app-tracking-transparency-worldwide-us-daily-latest-update/.

[4] UNCDF Policy Accelerator, "Brief: The role of cybersecurity and data security in the digital economy" (last reviewed: June 2022) https://policyaccelerator.uncdf.org/policy-tools/brief-cybersecurity-digital-economy.

of a data breach in the United States has risen to just under $10 million—more than twice the global average.[5]

Even these metrics fall short of assessing the true cost of data breaches. Typical calculation methodologies include the costs to businesses of notifying consumers of a breach, offering financial redress to consumers, and stock value fluctuations—but it is exceptionally hard to quantify the indirect costs of consumer harm. Identity theft is a prime example. Victims of identity theft "can suffer a ruined credit score, inability to access credit or employment, or even criminal charges - in addition to financial damage, psychological costs, and time losses."[6] In 2019, 28 percent of Pew Research respondents reported suffering from a major identity theft problem within the past year, with Black adults even more likely to be targeted than their Hispanic or white counterparts.[7]

Consumers overwhelmingly bear these costs without reimbursement or recovery from the company that failed to adequately protect their personal information. Although these costs appear diffuse and individualized, they also represent a tremendous reduction in customer trust and purchasing power, as well as worker health and productivity, for the entire economy. Recent research in the Harvard Business Review describes how even direct business harms such as stock market losses can effectively spill over to close rival companies—a risk that can be mitigated by offering consumers stronger data transparency and control.[8]

Beyond security failures, consumers' data regularly falls into malicious hands due to unregulated sharing and selling of data. As the Commission is well aware, data brokers and other companies routinely sell consumers' geolocation and other data that, when sold to private actors, may enable digital

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[5] "The Cost of a Data Breach Report," IBM (2022) https://www.ibm.com/reports/data-breach.

[6] Alessandro Acquisti, "The Economics of Personal Data and the Economics of Privacy," presented at Joint WPISP-WPIE Roundtable for *The Economics of Personal Data and Privacy: 30 Years after the OECD Privacy Guidelines* (Dec. 1, 2010) https://www.oecd.org/sti/ieconomy/46968784.pdf.

[7] Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar, and Erica Turner, "Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information," *Pew Research Center* (Nov. 15, 2019) https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.

[8] Kelly D. Martin, Abhishek Borah, and Robert W. Palmatier, "Research: A Strong Privacy Policy Can Save Your Company Millions," *Harvard Business Review* (Feb. 15, 2018) https://hbr.org/2018/02/research-a-strong-privacy-policy-can-save-your-company-millions.

harassment, stalking, and physical violence.[9] Many companies also share data collected via consumer surveillance regimes with law enforcement agencies. Whether this data is shared in compliance with a valid warrant or subpoena, as in the case of Nebraska police soliciting private Facebook messages to be used in a criminal proceeding against a mother for helping her teenage daughter abort her pregnancy[10], or whether it is shared out of an "extreme willingness to help", as in the case of AT&T allowing the National Security Agency unfettered access to its network[11], the end results subject consumers to a range of harms including governmental surveillance, arrests, and deportation.

Many of these harms represent violations of internationally-recognized civil and human rights.[12] By sharing consumer data with law enforcement agencies, voluntarily or otherwise, companies become complicit in such abuses.

In 2010, OECD presenters described privacy costs using a "blank check" metaphor.[13] Consumers have no way of knowing what they will be "charged" when their data is collected—if they will be subject to irritating spam, financial instability, or violent personal injury. Harms vary in terms of immediacy and tangibility, and in many cases the sophistication of the commercial surveillance system is such that it's impossible for consumers to discover the company or companies responsible for their injury, let alone seek remediation.[14] From an economic perspective, by saddling individual consumers with the true costs of commercial surveillance and lax data security regimes, companies engaging in this practice are

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[9] "FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations," Office of Public Affairs at the Federal Trade Commission (Aug. 29, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other; Adi Robertson, "Senators ask FTC to fight stalkers exploiting people search sites," The Verge (Mar. 4, 2021) https://www.theverge.com/2021/3/4/22313613/ftc-senator-letter-stalking-abuse-data-broker-people-search-sites.

[10] Martin Kaste, "Nebraska cops used Facebook messages to investigate an alleged illegal abortion," NPR (Aug. 12, 2022) https://www.npr.org/2022/08/12/1117092169/nebraska-cops-used-facebook-messages-to-investigate-an-alleged- illegal-abortion.

[11] Ryan Gallagher and Henrik Moltke, "The Wiretap Rooms: The NSA's Hidden Spy Hubs in Eight U.S. Cities," *The Intercept* (June 25, 2018) https://theintercept.com/2018/06/25/att-internet-nsa-spy-hubs/.

[12] "Access to safe and legal abortion: Urgent call for United States to adhere to women's rights convention, UN committee," UN Human Rights Office Media Section (July 1, 2022) https://www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights; Human Rights Watch, "Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse" (Feb. 5, 2020) https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and.

[13] Acquisti, op.cit.

[14] *Id*.

redistributing tremendous business costs to every industry sector that depends on financially-stable customers and a healthy, productive workforce—namely, all of them.

B. Targeted advertising and consumer profiling

Using data gleaned from commercial surveillance practices for targeted advertising and consumer profiling exacerbate economic and societal inequality. Some well-documented examples include: risky payday loan vendors targeting predatory advertisements to low-income consumers and people of color[15]; Facebook allowing racial discrimination in violation of the Fair Housing Act[16]; major platforms promoting COVID-19 misinformation to vulnerable populations[17]; extremist political movements fomenting polarization and election disinformation.[18]

While there are conceivably neutral applications for microtargeting and consumer profiling, the fact remains that discriminatory and unfair applications are widespread and largely unregulated. On aggregate, these practices work to replicate existing inequalities and to exploit vulnerable consumers. While malicious or short-sighted company actors may see this exploitation as beneficial for immediate profits, research repeatedly shows a simple truth: Inequality is bad for business.[19] A 2020 study by

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[15] David Lazarus, "Column: There's a racial gap in marketing by banks and payday lenders," *Los Angeles Times* (Apr. 9, 2021) https://www.latimes.com/business/story/2021-04-09/racist-marketing-banks-payday-lenders.

[16] Chandler Nicholle Spinks, "Contemporary Housing Discrimination: Facebook, Targeted Advertising, and the Fair Housing Act," Houston Law Review Vol. 57 Issue 4 (May 6, 2020) https://houstonlawreview.org/article/12762-contemporary-housing-discrimination-facebook-targeted-advertising-and-the-fair-housing-act.

[17] Open Technology Institute: Ranking Digital Rights, "Targeted Advertising and COVID-19 Misinformation: A Toxic Combination," in *Getting to the Source of Infodemics: It's the Business Model* (May 27, 2020) https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/targeted-advertising-and-covid-19-misinformation-a-toxic-combination/.

[18] Scott Rosenberg, "How online ad targeting weaponizes political misinformation," Axios.com (Nov. 17, 2019) https://www.axios.com/2019/11/17/online-ad-targeting-political-misinformation.

[19] World Economic Forum, The Swedish Trade Union Confederation, "Inequality is bad for business - a progressive agenda for equality" (2017) https://www.lo.se/home/lo/res.nsf/vRes/lo_in_english_1366027847830_inequality_is_bad_for_business_los_rapport_till_davos_2017_pdf/$File/Inequality%20is%20bad%20for%20business%20-%20LOs%20rapport%20till%20Davos%202017.pdf; Mark Anderson, "Economic inequality is greatest threat facing many nations, report says," *The Guardian* (June 23, 2015) https://www.theguardian.com/global-development/datablog/2015/jun/23/economic-inequality-greatest-threat-facing-many-nations-report-says; United Nations Department of Economic and Social Affairs, "Inequality Matters: Report on the World Social Situation" (2013) https://www.un.org/esa/socdev/documents/reports/InequalityMatters.pdf; Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*, W.W. Norton & Company (2012).

Citigroup estimated that racial discrimination cost the U.S. economy $16 trillion.[20] Economies characterized by extreme inequality suffer from reduced aggregate demand, credit bubbles, economic instability, shorter growth cycles, monopolistic inefficiencies, reduced development, flagging infrastructure, and a less educated workforce.[21] A growing body of research also suggests that economic and social inequality is positively correlated with political unrest and instability.[22] Overall economic growth benefits from stable governments and predictable market conditions.

Inequality in the United States surpasses most other developed nations, and trends suggest it will continue to rise barring major policy intervention.[23] Unregulated targeted advertising contributes to and exacerbates the economic consequences of inequality, collecting individual profits at the expense of broader market sustainability.

It's also worth noting that while increasingly granular data targeting does result in increased risks and consumer harms, it does not follow that the advertising or profiling is more effective.[24] Targeted advertising is routinely maligned as irritatingly intrusive, and consumer data profiles often include grossly inaccurate information stripped entirely of its context. Commercial data items and collection methods demonstrate "very high variability in quality," and yet commercial surveillance norms subscribe to an empirically inaccurate belief that more data is always better—or as one researcher put it nearly two decades ago, "garbage in—gospel out."[25] Research suggests that some of the commercial data sets most in

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[20] Adedayo Akala, "Cost of Racism: U.S. Economy Lost $16 Trillion Because of Discrimination, Bank Says," NPR (Sep. 23, 2020) https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says.

[21] Michael W. Doyle and Joseph E. Stiglitz, "Eliminating Extreme Inequality: A Sustainable Development Goal, 2015-2030," *Ethics & International Affairs*, Issue 28.1 (Mar. 20, 2014) https://www.ethicsandinternationalaffairs.org/2014/eliminating-extreme-inequality-a-sustainable-development-goal-2015-2030/.

[22] Ahliddin Malikov and Behzod Alimov, "Income Inequality and Political Instability," prepared for 37th IARIW General Conference (Aug. 24, 2022) https://iariw.org/wp-content/uploads/2022/08/Malikov-Alimov-IARIW-2022.pdf.

[23] Anshu Siripurapu, "The U.S. Inequality Debate," Council on Foreign Relations (Apr. 20, 2022) https://www.cfr.org/backgrounder/us-inequality-debate; Juliana Menasce Horowitz, Ruth Igielnik and Rakesh Kochhar, "Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority: Trends in income and wealth inequality," *Pew Research Center* (Jan. 9, 2020) https://www.pewresearch.org/ social-trends/2020/01/09/trends-in-income-and-wealth-inequality/.

[24] Alexander Bleier and Maik Eisenbeiss, "Personalized Online Advertising Effectiveness: The Interplay of What, When, and Where," *Marketing Science* Vol. 34 Issue 5 (Sep. - Oct. 2015) https://pubsonline.informs.org/doi/epdf/10.1287/mksc.2015.0930.

[25] Roger Clarke, "Risks inherent in the digital surveillance economy: A research agenda," *Journal of Information Technology* Vol. 34 Issue 1 (2019). https://journals.sagepub.com/doi/pdf/10.1177/0268396218815559.

demand are rife with inaccuracies, particularly for low-income communities.[26] The black box nature of most commercial surveillance regimes mean that it is virtually impossible for consumers to review, let alone correct inaccurate data—but they nonetheless experience the consequences of whatever data errors are included in their profiles.

Basing business decisions on inaccurate consumer profiles not only threatens the health of that particular company or industry, but subjects consumers and businesses across sectors to deleterious harms. Untold numbers of consumers are being denied services, loans, housing, and more based on unaccountable data profiles which may not even be accurate. This is hardly an efficient economic outcome.

C. Algorithmic decision making and artificial intelligence

Black box algorithms and artificial intelligence systems also routinely perpetuate economic inequality. Widely-adopted healthcare algorithms discriminate against people of color both through explicit racial factors and through the use of racial proxies, leading to predictably worse health outcomes.[27] Law enforcement agencies use biased algorithms and facial recognition technologies that disproportionately target communities of color for harassment and arrest.[28] Artificial intelligence systems used by remote exam proctors discriminate against disabled, neurodiverse, queer, and Muslim communities, presenting barriers to equal education.[29]

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[26] Nico Neumann, Catherine E. Tucker and Timothy Whitfield, "How Effective Is Third-Party Consumer Profiling and Audience Delivery?: Evidence from Field Studies," forthcoming in *Marketing Science - Frontiers* (May 16, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3203131.

[27] "OPTN Board approves elimination of race-based calculation for transplant candidate listing," Organ Procurement & Transplantation Network, U.S. Department of Health and Human Services (July 27, 2022), https://optn.transplant.hrsa.gov/news/optn-board-approves-elimination-of-race-based-calculation-for-transplant-candidate-listing/; "Attorney General Bonta Launches Inquiry into Racial and Ethnic Bias in Healthcare Algorithms," Office of the Attorney General of California (Aug. 31, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-launches-inquiry-racial-and-ethnic-bias-healthcare.

[28] Mike Dumke and Frank Main, "A look inside the watch list Chicago police fought to keep secret," *Chicago Sun-Times* (May 18, 2017), https://chicago.suntimes.com/2017/5/18/18386116/a-look-inside-the-watch-list-chicago-police-fought-to-keep-secret; Alex Najibi, "Racial Discrimination in Face Recognition Technology," Harvard University SITN (Oct. 24, 2020) https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/.

[29] Monica Chin, "ExamSoft's proctoring software has a face-detection problem," The Verge (Jan. 5, 2021), https://www.theverge.com/2021/1/5/22215727/examsoft-online-exams-testing-facial-recognition-report; Shea Swauger, "Remote testing monitored by AI is failing the students forced to undergo it," NBC News (Nov. 7, 2020),

As discussed above, these systemic inequalities extend beyond the sphere of ethics- and rights-based philosophies to have an additional negative material impact on broader economic growth, to the detriment of all businesses and individuals.

Lack of governance around the development, testing, and marketing of artificial intelligence systems also means that many artificial intelligence tools presently on the market are not actually functional. Most well-known examples of AI tools being misapplied and causing harm are in fact the result of these technologies failing to function properly, as opposed to functioning at dangerously sophisticated levels.[30] Job recruiting software fails to reduce bias in candidate screening and misses huge quantities of qualified candidates for arbitrary reasons;[31] weapons-scanning systems deployed in schools fail to detect handguns but falsely flag laptops;[32] water quality prediction tools incorrectly predict that beaches will be safe for swimming when health risks are present.[33]

Meanwhile, businesses and public agencies are investing huge amounts of money adopting these artificial intelligence tools, often to replace human workers in whole or in part, only to discover that the tools cannot deliver on overly grandiose marketing promises. Not only does this perpetuate inequality, it damages businesses by reducing business efficiencies, exposing companies to lawsuits, limiting the pool of qualified workforce candidates, and other direct harms.

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https://www.nbcnews.com/think/opinion/remote-testing-monitored-ai-failing-students-forced-undergo-it-ncna1246769.

[30] Inioluwa Deborah Raji, I. Elizabeth Kumar, Aaron Horowitz and Andrew D. Selbst, "The Fallacy of AI Functionality," ACM Conference on Fairness, Accountability and Transparency (June 2022) https://dl.acm.org/doi/abs/10.1145/3531146.3533158.

[31] Chris Vallance, "AI tools fail to reduce recruitment bias," BBC News (Oct. 13, 2022) https://www.bbc.com/news/technology-63228466; Stephen Jones, "AI tools that companies use to scan resumes are stopping 27 million people finding new jobs, a Harvard report says," Business Insider (Sep. 8, 2021) https://www.businessinsider.com/ai-recruitment-tools-cv-scanners-automated-hiring-overlook-hidden-workers-2021-9.

[32] Aaron Gordon, "'The Least Safe Day': Rollout of Gun-Detecting AI Scanners in Schools Has Been a 'Cluster,' Emails Show," *Vice* (Aug. 25, 2022), https://www.vice.com/en/article/5d3dw5/the-least-safe-day-rollout-of-gun-detecting-ai-scanners-in-schools-has-been-a-cluster-emails-show.

[33] Ben Cohen, "Safe for swimming? Toronto's new tool for measuring water quality at its beaches is misleading, advocates say," *Toronto Star* (Aug. 10, 2022), https://www.thestar.com/news/gta/2022/08/10/safe-for-swimming-torontos-new-tool-for-measuring-water-quality-at-its-beaches-is-misleading-say-advocates.html?rf.

II. Diversified investors benefit from limiting externalities and protecting privacy.

For diversified investors, the economic health of the broader economy matters much more than the profitability of any individual company or sector. For this reason, they have a vested interest in transforming business models that depend on offloading costs and consumer harms onto the broader economy, including models that depend on commercial surveillance and lax data security practices. Diversified investors and the ordinary savers who invest in companies that misuse data are harmed as their capital is misapplied to generate illusory profits at individual companies, while relying on data practices that harm consumers and investors alike.

A. Defining diversified investors

Diversified investors are actors that seek to minimize their financial risk by building a diverse portfolio, investing across economic sectors so that market fluctuations for individual companies or industries have minimal harmful impact on overall portfolio value. This strategy is rooted in modern portfolio theory (MPT), which "encourages those institutions to own diversified common stock portfolios in order to earn the greater returns available from equity without an undue increase in risk."[34] MPT has so influenced equity markets over the past half-century as to amount to "nothing less than an equity ownership revolution," meaning that capital markets are now overwhelmingly dominated by large institutional investors with diversified long-term portfolios.[35] Federally regulated retirement plans are in fact legally required to diversify their investments.[36] This is also the method by which most individuals invest in the market, through pensions and retirement funds managed by large institutional investors.[37]

Diversified investors benefit from improvement in overall economic growth, which leads to improved average overall market returns, known as "beta", and suffer when individual companies and

[34] Written Testimony of Frederick Alexander before Hearing of the U.S. Joint Economic Committee, "Examining the Impact of Shareholder Primacy: What It Means to Put Stock Prices First" (Mar. 16, 2022) https://theshareholdercommons.com/wp-content/uploads/2022/03/FHA-written-testimony-for-JEC-3.16.22.pdf.

[35] Jim Hawley and Jon Lukomnik, "The Long and Short of It: Are We Asking the Right Questions? Modern Portfolio Theory and Time Horizons," *Seattle University Law Review* Vol. 41:449 (2018) https://digitalcommons.law. seattleu.edu/cgi/viewcontent.cgi?article=2507&context=sulr.

[36] 29 U.S.C. § 404(a) (1) (C).

[37] Ellen Quigley, "Universal Ownership in the Anthropocene" (May 13, 2019) https://ssrn.com/abstract=3457205.

sectors pursue high individual returns, known as "alpha", at the expense of the economy overall—thereby harming overall portfolio returns.

This theory, sometimes called universal ownership theory, has its roots in environmental concerns. As a 2011 report from the UNEP Finance Initiative and Principles for Responsible Investment noted, diversified institutional investors "are inevitably exposed to growing and widespread costs from environmental damage caused by companies."[38] Companies that externalized the costs of pollution would appear immensely profitable to investors focused exclusively on seeking alpha, all the while the true costs of their actions were distributed across the broader economy, or over the long term. These harms are not negligible—the same report estimated that in 2008, global externalities equated to 11 percent of the entire global economy, with indications that costs would continue to rise in the absence of intervention.[39]

Environmental externalities are far from the only widely-accepted example of companies foisting costs on the broader economy to falsely effect high individual financial performance. Using its award-winning SustainEx tool, investment manager Schroders estimated in 2018 that accounting for the social costs of externalities from publicly-traded companies would reduce U.S. company earnings by 55 percent.[40] By this calculation, *one-third* of U.S. publicly-traded companies would be value destroyers—that is, the net social costs of their business exceeds their reported profits.[41] Importantly, this assessment does not provide separate accounting for privacy costs, the inclusion of which would likely exacerbate these already damning results.[42]

This is the exact opposite of an efficient market. MPT provides investors a powerful tool with which to minimize idiosyncratic risk from individual companies and sectors, but does nothing to protect

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[38] UNEP Finance Initiative and Principles for Responsible Investment, "Universal Ownership: Why environmental externalities matter to institutional investors" (2011) https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf.

[39] *Id*.

[40] Schroders, "SustainEx: measuring social and environmental impact," in *Sustainable Investment Report: Annual Report 2018* https://prod.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/schroders-annual-sustainable-investment-report-2018-cs1179.pdf.

[41] Alexander written testimony, op.cit.

[42] Vicki Owen, "How we can measure companies' impacts on society: our award-winning SustainEx tool explained," Schroders (Oct. 15, 2020) https://www.schroders.com/en/insights/economics/how-we-can-measure-companies-impacts-on-society-our-award-winning-sustainex-tool-explained/.

diversified investors from systemic and non-diversifiable costs such as climate change, income inequality, and political instability.[43] Universal ownership theory posits that diversified investors can and must reduce systemic risks by considering not simply the impact a company's decisions have on individual financial performance, but the impact such decisions have on the sustainability and growth of the entire economy.

B. Privacy as a priority for diversified investors

Privacy costs bear some similarities to environmental costs in that they are often broadly distributed, difficult to quantify, and easy for companies to externalize under current lax legislative and regulatory regimes. In both cases, it is also typically more expensive to remedy harm after it has occurred than to take preventative measures.[44]

Diversified investors have increasingly recognized the costs of consumer privacy invasions as major economic risks in need of intervention. Over the past several years, investors have filed shareholder proposals at major technology and telecommunications companies calling on their boards of directors to improve data practice disclosures, to audit the racial and civil rights impacts of commercial surveillance practices, to prohibit sales of facial recognition technology, and to report on measures for improving data security. These reports have won significant votes and pressured companies to make key changes.

In some cases, investors have pursued legal action. Shareholders at Amazon filed suit this year against company management alleging that their "astronomical" misuse of customer data represented such an existential risk that it breached Amazon's fiduciary obligations.[45] Shareholders at Meta allege that the company's decision-making processes generally (and in particular related to consumer data, targeted advertising, and other commercial surveillance practices) have prioritized individual company returns

[43] Hawley and Lukomnik, op.cit.
[44] UNEP Finance Initiative and Principles for Responsible Investment, op.cit.
[45] Lauren Rosenblatt, "Shareholder: Amazon's 'astronomical' misuse of customer data could ruin company," *Seattle Times* (May 12, 2022) https://www.seattletimes.com/business/shareholder-amazons-astronomical-misuse-of-customer-data-could-ruin-company/.

over all competing interests, thus discriminating against the company's diversified investors who stand to benefit most from overall economic growth rather than a Meta-only perspective.[46]

These actions are meaningful and powerful, but they are also limited. Many major tech companies are not responsive to shareholder action, thanks to structures that give insider management outsized voting rights in comparison to independent shareholders.[47] Many data brokers and start-ups are not publicly-traded companies, and are only accountable to venture capitalists or private equity firms with no formal structure for shareholder action. These firms are often charged with investing pension funds and other capital for the benefit of ordinary savers, but structured to reward managers for producing alpha returns, even if those returns come at significant cost to the overall economy and beta.

Perhaps most significantly, harmful data practices are also no longer the exclusive province of tech companies. Nearly every economic sector is involved in the collection, retention, or sharing of consumer data. Nearly every economic sector is investing in artificial intelligence and targeted advertising. The scope of the problem is too vast and too broad for targeted shareholder actions alone.

In the words of David Russell, head of Responsible Investment at USS Investment Management, "Engaging on a company or sector level is often less efficient than trying to get policies changed. Sometimes engaging with the market or the framework within which all the companies operate can be a more efficient way for Universal Owners to address externalities."[48] Moreover, research shows that policy shifts can have a significant positive impact, with studies reporting that having strong regulatory privacy protections in place reduces consumers' worry and sense of data vulnerability, encouraging more productive relationships with companies.[49]

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[46] "Shareholder Lawsuit Charges Meta Platforms with Prioritizing Profits over Shareholders," Shareholder Commons via Business Wire (Oct. 4, 2022) https://www.businesswire.com/news/home/20221004005383/en/Shareholder-Lawsuit-Charges-Meta-Platforms-with-Prioritizing-Profits-over-Shareholders.

[47] Jan Rydzak, "It's time to bring down the barriers blocking shareholders on human rights," Ranking Digital Rights (last reviewed Oct. 31, 2022) https://rankingdigitalrights.org/mini-report/its-time-to-bring-down-the-barriers-blocking-shareholders-on-human-rights/.

[48] UNEP Finance Initiative and Principles for Responsible Investment, op.cit.

[49] Kelly D. Martin, Jisu J. Kim, Robert W. Palmatier, Lena Steinhoff, David W. Steward, Beth A. Walker, Yonggui WAng, Scott K. Weaven, "Data Privacy in Retail," Journal of Retailing Vol. 96 Issue 4 (Dec. 2020) https://www.sciencedirect.com/science/article/pii/S0022435920300531#bib0020.

For that reason in particular, diversified investors have an interest in promoting strong privacy regulation to limit commercial surveillance and set a substantial baseline for protecting the economy.

Conclusion

The Commission must not allow the self-interested comments of specific companies and industry sectors that are heavily invested in an economically-damaging business model to equate strong privacy protections with economic harms. In fact, the broader economy stands to benefit greatly from meaningful regulation to restrict the rampant negative externalities of these companies' unaccountable data management practices. Commercial surveillance practices are grossly inefficient, leading to short-term profitable returns for individual companies while doing severe damage to worker health, customer financial stability, social equality, and political stability—foundational pillars of sustainable economic success that the overwhelming majority of investors rely upon.

We urge the Commission to act decisively to protect consumers, diversified investors, and overall economic well-being from the devastating externalized costs of rampant data malpractice.

Respectfully submitted,

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