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In Depth

Fair Lending and Marketing in the Digital Age

by Margaret Dolinger

There's an old saying, "You don't know what you don't know" and that is certainly true when it comes to marketing initiatives meshing with the world of fair lending. The clash of both worlds and the often-divergent priorities have caused regulators to put this intersection under a microscope. A key fact today is that marketing has been elevated in prominence in the Interagency Fair Lending Exam Procedures as a high-risk form of fair lending risk.

Marketing generally meant running print and radio ads and using mailers or door stuffers. The traditional oversight process would be for compliance to review marketing's advertising material before the ads go out to the public. Compliance would ensure there is no impression of unfair treatment of not including minorities when depicting people.

Social media revolutionized marketing and today reaching much broader markets. Facebook has 242 million active users in the United States and Canada, opening the door to unbounded creativeness by marketers as ads are broadcast at the speed of light. Partnering with third parties to maximize digital marketing opportunities also is more common. Yet banks still own the regulatory risk when outsourcing tasks to vendors. A very real example is that HUD has alleged Facebook facilitates lending discrimination by providing advertising tools to formulate targeted marketing ads to bypass prohibited basis groups. In short, Facebook allegedly allowed advertisers to exclude consumers from viewing or receiving certain rental or housing advertisements.

Another great marketing tool is to allow home seekers to draw circles around an area for realtors to look for homes. However, there definitely could be severe fair lending implications of such a tool. How well do you know your marketing vendor? How would you answer these key questions?

- Did the bank perform its due diligence when vetting the vendor?
- Are they compliant with advertising materials?
- Are the final advertising products fair, truthful and reach the targeted audience without any potential evidence of disparity?
- By what means and method is the vendor capturing the targeted audience data for the Bank's marketing campaign?
- Will they adhere to the Bank's request for compliance with the fair lending laws?
- What does the marketing agreement say regarding discrimination?
- Do they understand the unintended fair lending risk in social media?

Depending upon your answers and comfort level with these answers, it might be time for some additional due diligence.

There are lessons to be learned from this Facebook pending legal case:

Department of Housing & Urban Development has a complaint against Facebook for violating the Fair Housing Act through its advertising platforms used by real estate agents, landlords and property management companies. So how did this legal case against Facebook come about? It started by a non-profit news organization known as ProPublica, a special interest group, investigating whether target marketing had a disparate impact.

Facebook did not have controls in place to ensure no form of discrimination could take place with all the data available for Facebook advertisers. Facebook user settings, profiles or other information such as the Facebook users' history of likes or postings allows for categorizing individuals by ethnicity, race, religion, sex and all the other prohibited basis or zip code locations. Facebook was able to sell "ethnic infinity" data to geofence marketing ads which allowed third-party advertisers to select groups to be targeted from profile information on its ad platform. This resulted in the exclusion of prohibited basis groups from these marketing campaigns.

ProPublica's alleged disparity by Facebook surfaced 2016. Facebook made promises to make changes, but that did not happen. HUD issued a statement of interest in August 2018 also alleging the disparity wanting Facebook to make changes and remove the ability of third-party advertisers to exclude certain individuals, locations and more from seeing ads for buying or renting homes. In addition, the ACLU made claims to the Equal Opportunity Employment Commission that Facebook's ad platform allowed firms to seek or target applications from non-minority persons, males and a younger audience resulting in the exclusion by gender, age and race.

Facebook is an example of where digitally collected data and other forms of information on individuals is being passed on to others for marketing purposes. This data can be known as alternative data and includes shopping patterns with the use of loyalty cards, browser history of internet use, behavioral data and use of other social media platforms. All of these can be sold for marketing purposes. So, whether you use platforms like Facebook or your outsourced third party offers access to "lookalike" targets, beware!

Facebook has now settled five separate legal actions from civil right groups, including the American Civil Liberties Union, Communications Workers of America, and National Fair Housing Alliances. Under the settlement, Facebook agrees to pay $5,000,000 and will remove the opportunity for marketers to use age, gender, and ZIP code targeting for housing, employment and credit-related ads. Such tactics allowed advertisers use "ethnic affinity" criteria when seeking consumer loans.

Notably, on March 29th, HUD surprised Facebook and did not settle with Facebook as others did; it is pursuing separate legal action. In addition, HUD said it alerted Twitter and Google in 2018 that it is scrutinizing their platform practices as well.

At a recent House Financial Services Committee meeting regarding Fair Lending and Facebook, Debbie Goldberg, vice president for housing policy and special projects at the National Fair Housing Alliance, stated: "Some have concluded wrongly that systems built on big data and sophisticated algorithms are objective and make it harder to discriminate. If you can't see what is going on and you don't know what the algorithms do, you don't know that discrimination is happening."

As a bank reviews its lending patterns to peers and the performance is not at the level of peer percentages, a bank is encouraged to seek additional opportunities through marketing and outreach efforts in the areas with lower performance. This is where a strong marketing policy with effective fair lending controls is needed to direct the Bank through the intersection of the two often conflicting initiatives.

So how does a bank build safeguards when it comes to advertising, marketing efforts and fair lending risk? A resource that can be used is the interagency fair lending exam procedures, often called FLEXPRO. This guidance covers many factors; specifically, The Marketing Risk Factor identifies the areas of risk in marketing programs. A bank can assess its level of marketing risk as High, Moderate or Low based on the rating for the individual risk components after existing mitigating controls have been identified. If existing controls are not in place, efforts should be undertaken by the bank to implement necessary controls to bring the risk to an acceptable level. The table below provides the factors of potential disparate treatment in Marketing of Residential Products outlined in the interagency fair lending exam procedures:

Indicators of Potential Disparate Treatment in Marketing of Residential Products*

Factor	Description	Risk Rating High/Mod/Low
M1	Advertising patterns or practices that a reasonable person would believe indicate prohibited basis customers are less desirable.	
M2	Advertising only in media serving non-minority areas of the market.	
M3	Marketing through brokers or other agents that the lender knows (or has reason to know) would serve only one racial or ethnic group in the market.	
M4	Use of marketing programs or procedures for residential loan products that exclude one or more regions or geographies within the lenders assessment or marketing area that have significantly higher percentages of minority group residents than does the remainder of the assessment or marketing area.	
M5	Using mailing or other distribution lists or other marketing techniques for pre-screened or other offerings of residential loan products that: • Explicitly exclude groups of prospective borrowers on a prohibited basis; or • Exclude geographies (e.g., census tracts, ZIP codes, etc.) within the institution's marketing area that have significantly higher percentages of minority group residents than does the remainder of the marketing area.	
M6	Proportions of monitored prohibited basis applicants are significantly lower than that group's representation in the total population of the market area.	
M7	Consumer complaints alleging discrimination in advertising or marketing loans.	

* FFIEC's Fair Lending Examination Procedures

A bank can implement control processes for each applicable risk and develop a monitoring report noting any identified potential fair lending risk with corrective actions, if necessary. In addition, a bank should be as informed as possible when utilizing marketing vendors. It is a critical part of your vendor due diligence to ask the tough questions such as:

- Where is the data to be used for marketing purposes?
- Is there a potential of protected groups or zip codes being excluded?
- What controls does the vendor have in place to ensure no form of discrimination?
- Is there an impact to the bank if the data is utilized by the vendor? and
- What is the reason for targeted marketing and what is the process to ensure no disparate impact exist?

Be sure to update your fair lending risk assessment annually and grade the level of risk for marketing.

TCA recognizes sees that the regulatory agencies are looking more closely at a bank's monitoring processes and the management reporting of fair lending including marketing to ensure no form of disparity is embedded in marketing practices.

If your bank requires assistance to review its marketing plan for forms of disparity, assistance with development of a monitoring process of marketing materials or an overall risk assessment of the bank's fair lending program, contact our office to schedule a call with our TCA Fair Lending Team. We can help.

TCA – A Better Way!