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Social Discrimination

How your bank could be discouraging borrowers and job seekers through social media ad targeting

IMAGINE THIS: You are the bank's compliance officer and receive the latest mortgage advertisement from your marketing department for approval. As you review the copy and images, you notice the targeted audience for the ad is "white male home buyers with an income of at least \$100,000 living in only affluent zip codes." Within seconds, you would be on the phone explaining to the marketing team that the ad violates the Fair Housing and Equal Credit Opportunity Acts and likely lead to trouble at the next compliance examination.

"This would never happen at my bank," you may think, after years spent training the marketing team on fair lending and creating policies to prevent discrimination. You personally review each ad's content to prevent discrimination. But what about the online settings in social media profiles that only one person (possibly a summer intern) in the bank knows how to access? Social media ad targeting could be creating hidden fair lending, fair housing and employment discrimination violations. Your bank may be engaged in social discrimination.

Facebook and Fair Housing

In August 2018, the U.S. Department of Housing and Urban Development (HUD) filed a formal complaint against Facebook, the social media giant with over 2.2 billion worldwide users. Of those users, 214 million live in the United States,¹ equating to 65.8 percent of the population. The HUD complaint cites Facebook for "violating the Fair Housing Act by allowing landlords and home sellers to use its advertising platform to engage in housing discrimination." The complaint alleges discrimination against a variety of protected classes including race, color, religion, sex, familial status, national origin, disability and zip code. In HUD's press release issued at the time of the complaint, HUD's Assistant Secretary for Fair Housing and Equal Opportunity, Anna Maria Farias, explained

"when Facebook uses the vast amount of personal data it collects to help advertisers discriminate, it's the same as slamming the door in someone's face."

So how did Facebook facilitate alleged housing discrimination? The HUD complaint outlines how Facebook's advertising platform allows landlords and sellers to use ad targeting to select which people see or are excluded from seeing advertising related to renting or buying a home. The complaint also provides numerous examples of ads that excluded individuals with interests like "deaf culture," "Hinduism," "Latin America," and "Christian Church." Other settings allowed advertisers to prevent women and people with children from seeing ads or to target ads to only zip codes that were not majority-minority.

HUD's action comes after a two-year period of scrutiny and investigation into how Facebook's ad targeting criteria could be used to facilitate discrimination. Starting in October 2016, ProPublica, a nonprofit news outlet, brought to light that many of the criteria that Facebook allows for ad targeting can also create discriminatory impact.² At that time, Facebook included "ethnic affinity" as a demographic category, whereby Facebook would assign an ethnicity affinity factor (e.g. African American, Asian American, Hispanic, etc.) to individual users based on the user's history of page and post likes on its platform. Third-party advertisers could then use

this "ethnic affinity" to target ads for a variety of products and services, including housing, loans and job opportunities. In response to ProPublica's investigation, Facebook committed to build tools to detect discriminatory advertising in relation to housing, credit and employment and offer more education to its third-party advertisers.³

A year went by under the terms of this voluntary pledge by Facebook. ProPublica then re-tested the ad targeting platform in November 2017 and found that potential discriminatory factors were still included and that the promised measures for users to "self-certify" their compliance with Facebook's anti-discrimination policies had not been implemented.⁴ In response to ProPublica's findings, the Attorney General of the State of Washington conducted its own investigation and, in July 2018, entered into a legally binding agreement with Facebook, wherein the company has committed to make significant changes within 90 days to remove the ability of third-party advertisers to exclude "ethnic and religious minorities, immigrants, LGBTQ individuals and other protected groups from seeing their ads." While the agreement is only enforceable in Washington, Facebook plans to make the changes nationwide.⁵ Progress is being made—or so it seems.

Less than a month later, HUD issued its complaint along with a referral to the U.S. Attorney for the Southern District of New York. HUD's complaint was quickly followed by a separate complaint to the Equal Opportunity Employment Commission by the ACLU and others in September 2018, claiming that Facebook's ad platform had been used to target job opportunity advertising to only white males and younger applicants, excluding individuals based on gender and age.⁶



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Why It Matters to Your Bank

Seems like Facebook has had a tough couple of years, at least in relation to discriminatory advertising allegations. So, what does this mean for your bank?

First, if your bank uses social media advertising, a policy stating that you don't discriminate is not sufficient. Reviewing the content of individual ads may also not adequately manage fair housing and fair lending risk. To ensure that your bank is not creating social discrimination, your compliance reviews must include a detailed analysis of the settings within your social media ad targeting platforms, likely for each ad. You must also document these settings to prove that you didn't use them in a discriminatory way when sending out social media marketing.

During a recent conversation with a bank compliance officer, she shared that during her compliance examination, the examiners had not only asked to see her social media policy, but also wanted a screenshot of the ad targeting parameters for each ad run on a social media platform. While she shared that her social media policy and procedures prohibited the bank from using ad targeting, when she chatted with her marketing department, she was surprised to find they had been using ad targeting features for months. Luckily, no protected class factors had been used—but what if they had?

Second, in most cases, compliance officers are not reviewing every single social media post to ensure compliance with non-discriminatory requirements. Often, a bank may establish guidelines and parameters to prevent compliance violations. Do those guidelines include ad

targeting settings? How often are they being reviewed? Seems like it's a good time to take a closer look and make any adjustments to tighten up these guidelines.

Third, you may need to re-train your staff, specifically anyone managing social media or human resources, on how certain ad targets can create a disparate impact or discriminate against potential borrowers or job seekers. While overt demographics like race, gender and age tend to be easy to spot, some factors are more subtle. The HUD complaint also lists targeted criteria like "child care," "parenting" and "accessibility" as terms that could be inferred as part of a protected class that may not be as obviously discriminatory upon first glance to your staff.

Lastly, if your bank uses an ad agency, out-sources social media management or allows third parties to market your products and services, the risk only grows. While most banks have expansive due diligence programs in place to evaluate risks related to third parties, those policies and procedures may or may not include tracking of advertising and, more specifically, social media ad targeting.

More than Facebook

While the recent investigations have focused on Facebook ad targeting, it is important to remember that Facebook is not the only social media platform. Many social media and online advertising services have similar ad targeting features. Just investigating Facebook settings during your marketing review may not be enough. Does your bank use Twitter to advertise? How about Snapchat, Instagram, YouTube,

Google Ads? The list goes on.

Also, it's important to remember that along with housing and lending discrimination, employment discrimination is a key concern as well. Many banks utilize LinkedIn and similar platforms to promote job opportunities in local communities. It bears investigation by your legal or compliance team to ensure that posts on these platforms are shared without any prohibited or discriminatory factors included in their targeting.

As with any emerging compliance issue, it may take a while before official guidance is provided on how best to manage social discrimination risk in advertising and other areas. However, that does not shield your bank from ensuring that you've established sufficient and comprehensive practices and procedures to identify risks related to social media advertising. Take a few minutes to discuss with your marketing department and see if they are using ad targeting features and then institute controls to keep your bank from ending up with a fair lending, fair housing or employment discrimination violation. For more information, see the article on Digital Compliant Marketing by Renee W. Huffaker, CPA, CRCM on page 18 of this issue of *ABA Bank Compliance* magazine. ■

ABOUT THE AUTHOR

BRIAN WATERS, CRCM, is the President and Co-Founder of findCRA, which develops and deploys groundbreaking tools to streamline research and empower partnerships between banks and nonprofits nationally to optimize CRA outcomes. He has nearly 20 years experience in banking compliance and community development and is a resident of Louisville, KY. Contact him at brian@findCRA.com.

Endnotes

¹ <https://www.statista.com/statistics/398136/us-facebook-user-age-groups/>

² <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>

³ <https://newsroom.fb.com/news/2016/11/updates-to-ethnic-affinity-marketing/>

⁴ <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>

⁵ <https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit>

⁶ <https://www.aclu.org/cases/facebook-eeoc-complaint-0?redirect=node/70165>