Social Media: A New Fair Len

The growing use of social media by mortgage lenders carries its own set of fair lending risks.

Social media are a huge and growing part of American life. More than two-thirds of adults who go online use social media websites, such as Facebook™ and Twitter®. Not surprisingly, lenders are increasingly making use of social media as a tool for marketing, reputation management and enhancing customer service. ■ Information about a person's Web-surfing habits, online "friends" and other data points can be put to myriad uses, from the identification of individuals to receive solicitations for credit to the pricing and underwriting of loan applications. The potential lender uses of social media are limited only by the imagination and creativity of a lender's marketing professionals, underwriters and third-party vendors. ■ Legitimate uses of social media, however, come with fair lending risks.

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For example:

- Lenders can obtain information from online social media "profiles," photos and affiliations about a borrower's race, ethnicity, marital status, sexual orientation or other status that may be a prohibited basis under federal and/or state fair lending laws.
- Social media contain a wealth of new data elements about individuals that carry fair lending risks, such as an individual's "friends" or other associations.
- Fair lending complaints about lenders can be shared instantly by disgruntled customers among a wide audience.
- Lender outreach to individual customers on social media websites provides new public visibility into the consistency of customer service, which can be a fair lending issue.
- Different levels of access to the Internet and social media—the so-called digital divide—could result in disparate impact in connection with services distributed through those outlets.

The purpose of this article is to raise awareness about the implications of the use of social media so that lenders can more effectively manage the associated fair lending risks.

There are other potential compliance risks associated with social media use, such as information privacy and compliance with the Fair Credit Reporting Act (FCRA) and laws governing consumer disclosures and advertising that are beyond the scope of this article.

This discussion will concentrate on the more common current uses of social media and reported demographics of users, and will delineate the fair lending risks inherent in each type of use.

Social media use and user demographics

Statistics published in New York–based Nielsen's *State of the Media: The Social Media Report–Q3 2011* provide a good snapshot of social media usage in the United States and the demographics of users. Nearly 80 percent of active U.S. Internet users participate in social media networks and blogs.

Social media represents, by far, the single biggest component of time spent on the Internet—nearly triple the time spent on email. Facebook, which is the leading website as measured by time spent by users, had more than 140 million unique users in May 2011 (or 70 percent of active U.S. Internet users) who logged 53.5 billion minutes of use that month—more than four times the hours spent on Google™.

There are significant differences, however, in the manner in which different groups use social media.

Although these users span all ages of the U.S. population, the highest concentration among adults is found in the 18–34 age group, while those aged 65 or older constitute the lowest percentage.

While the level of detail on social media use by race, ethnicity or other demographic characteristics is not as robust as in the field of mortgage lending, studies suggest some salient differences. For example, Asian-Pacific Islanders are more likely to visit social networks and blogs than average Internet users, while African Americans are less likely than average Internet users to visit social networks and blogs.

Moreover, social media use varies with education and income levels—although, interestingly, increased social media use is correlated both with higher levels of education and with lower income.

Moreover, general studies of Internet access and usage have shown significant differences among ethnic and racial groups, ages, geographies and socio-economic groups. An April 2012 study conducted by the Pew Research Center's Internet & American Life Project, Washington, D.C., found that 80 percent of white adults use the Internet, compared with 71 percent of African-American adults and 68 percent of Hispanic adults.

That same study shows that 94 percent of those aged 18–29 years old use the Internet, whereas only 41 percent of those age 65 or older use the Internet. While this

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digital divide has narrowed over time, differences in use and speed of Internet connections still exist.

Fair lending risks tied to social media

Applicability of existing fair lending laws

There is no law or regulation that specifically governs fair lending in the social media context. Rather, as often occurs with emerging technologies, such as the transition from manual to automatic underwriting that occurred many years ago, laws written for a different time (here the Equal Credit Opportunity Act [ECOA] and Fair Housing Act [FHA]) must be applied to the new technology.

This presents numerous challenges, as lawmakers and regulators apply current law in contexts that their authors never could have imagined.

The absence of specific laws or regulations does not mean, however, that regulators and enforcement agencies are not interested in these emerging issues. To the contrary—regulators have indicated in the *Interagency Fair Lending Examination Procedures* that fair lending compliance in this context is a priority.

Bank examiners have been instructed that "in view of the increasing capability to conduct transactions on the Internet, it is extremely important for examiners to review an institution's Internet sites to ensure that all of the information or procedures set forth therein are in compliance with any applicable provisions of the fair lending statutes and regulations."

Using social media data for pre-screened solicitations

Lenders can readily obtain data that has been aggregated from various online sources, including tweets, status updates, a person's online clubs or other relationships, and posts or comments on blogs. This information can identify active social media users, their favorite networks and the types of fan pages they visit.

Based on this information, data aggregators create "social graphs" to identify people who have relationships with account holders at a particular lender, which can be used for marketing purposes.

This data can be used by lenders to identify segments of consumers to whom they wish to send pre-screened solicitations for credit, or to choose the particular products they will market to a given individual.

For example, a lender might market a credit card that is branded with a celebrity's likeness for people who follow that celebrity on Twitter. Or a lender might send an email or direct-mail advertisement for a consumer loan to people whose social media profiles indicate that their relationship status has recently changed to "engaged" or "married," saying, "Let us help you take that great honeymoon you've always wanted."

Similarly, a lender might send solicitations for a rewards credit card to users who have friends who already have similar credit cards with that lender.

With these innovative (and nearly innumerable) marketing strategies comes the potential risk for disparate treatment, particularly if lenders are perceived as using pre-screening criteria that are defined by, or could be seen as a proxy for, protected-class status. Moreover, even if the pre-screening criteria are facially neutral, they may result in the sort of statistical imbalances that create a risk of disparate impact.

The extent to which the fair lending laws apply to pre-screened solicitations is unsettled and could depend on the type of solicitation.

Regulators have interpreted the Fair Housing Act as prohibiting discrimination in connection with pre-screened solicitations for mortgage loans. However, ECOA's anti-discrimination provisions apply only to applicants, and for this reason, federal regulators have taken the position—as reflected in the *Interagency Fair Lending Examination Procedures*— that "pre-screened solicitation of potential applicants on a prohibited basis does not violate ECOA."

Nonetheless, Regulation B does require preservation of pre-screened solicitations and the pre-screening criteria.

In addition, the Consumer Financial Protection Bureau's (CFPB's) examination guidance suggests that the CFPB views use of pre-screened solicitation criteria associated with a protected class as potentially constituting impermissible "discouragement" in violation of Regulation B. Although such a view appears to conflict not only with prior regulatory guidance but also with at least one court decision, there is considerable risk in utilizing pre-screened solicitation criteria that are associated with protected-class status.

Use of social media data for lending decisions

Fair lending risk also exists where lenders use social media data for underwriting or pricing purposes. While there is little evidence to suggest that this information is commonly used in underwriting, it is conceivable that an underwriter might log on to Facebook or Twitter to obtain information about an applicant.

In addition, data aggregators are currently developing products that classify and group individuals based on social media sources, providing metrics not dissimilar to credit-report metrics for use in credit underwriting.

The way that a **lender responds** to online complaints is also important.

Similarly, a June 2012 enforcement action by the Federal Trade Commission (FTC) against Pasadena, California–based Spokeo Inc. under the FCRA alleged that the company had gathered information from sources including social media that identified the marital status, ethnicity and religion of individuals, and that it had sold this data to employers for potential use in employment decisions.

The temptation to use such information may be strong, as the information could be inherently valuable in assessing the risk of a given loan. For example, if an applicant's Facebook profile indicates that he is employed somewhere other than at the employer he has listed on his application, this information would be an indicator of potential fraud.

Likewise, a loan officer might conduct online research to determine what types of stores, companies or organizations the applicant "likes," which might shed light on the applicant's sophistication or negotiating abilities, and thus influence the pricing of his or her loan. A lender may also obtain information from a data vendor about the type of email account or computer a person uses and make a judgment about the person based on whether he or she has a .edu or .gov email domain or accesses accounts from a mobile device as opposed to a computer.

In addition, a lender might review its experience with an applicant's online friends and use that information to assess the applicant's own creditworthiness.

Use of this information could significantly elevate an institution's fair lending risk. Indeed, discrimination allegations have been raised in the employment context based on employers' use of social media data in the employee vetting process. Given that employment discrimination litigation has long provided precedents for fair lending discrimination cases, lenders are well advised to follow closely how the courts treat employer use of social media information.

Ad hoc use of social media information—for example, reviewing and relying on Facebook page information for some but not all applicants on a case-by-case basis—presents a disparate treatment risk because inconsistent treatment can be considered evidence of discrimination.

For instance, if an underwriter views an applicant's online profile to obtain information about the applicant, the underwriter may learn information or form an opinion about the applicant's protected-class status from a profile photo or other information on a social media website—such as race, ethnicity or marital status—that the lender might not otherwise have known.

And this risk is not just abstract. As reported in a *Consumer Reports* article in June 2012, in the last year, 7.7 million Facebook users "liked" a Facebook page pertaining to a religious affiliation and 1.6 million users "liked" a page pertaining to a racial or ethnic affiliation. If an underwriter were to factor this information into his or her decision in a way not authorized by law, this could present significantly elevated fair lending risk.

Moreover, even if such information is not purposefully factored into the underwriter's decision-making process, the mere fact that the lender gains access to such information could enhance practical fair lending risk.

A more systematic use of social media information—identifying desirable or undesirable borrowers based on some of the aforementioned social media factors—presents a disparate impact risk because of the likelihood that various groups would be affected differently by the consideration of social media metrics.

For example, if an underwriter considered applicants who "like" certain high-end retailers to be more creditworthy than other applicants (or utilized a vendor-generated score based in part upon such information), it might be alleged that the practice has an impact based on a prohibited basis if it were shown that minorities were underrepresented among those retailers' customers.

Lender social media accounts and communications

Many lenders maintain Facebook profiles or Twitter accounts and other social media presence. While these activities can enhance customer service and no doubt increase competitiveness, lenders should be cognizant of potential fair lending issues in maintaining such accounts.

Finding customer complaints against a lender on social media sites is not difficult. For example, on Facebook, the complaint may be included in comments on the lender's own site. And on Twitter, one can very easily search for recent tweets that contain the lender's name.

The mere fact that stating a written "complaint" against a lender is significantly facilitated by the rise of social media increases fair lending risk. Moreover, even if a lender does not actively monitor such complaints, it may well be charged with knowledge of the complaints.

The way that a lender responds to online complaints is also important. Some lenders have dedicated social media customer service teams responsible for monitoring and responding to complaints about the lender on social media.

For example, a tweet from the customer service team in response to a complaint might say, "@[customer account

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name], Is there anything I can do to help?" For privacy reasons, lenders generally do not engage in substantive communication about specific accounts over social media in a way that allows others to see the communication. But the initial reaching out to a customer by the customer service team is often done in a way that all can see.

Many fair lending issues could arise in connection with lender social media accounts. Lenders are well advised to ensure that their posts and direct messages on Facebook and Twitter do not indicate a discriminatory preference or give the appearance of endorsing any discriminatory posts made by others.

This concern could also extend to personal social media posts maintained by an employee of a lender, and lenders may wish to consider providing guidance to employees regarding references to the lender in their personal social media usage.

When lenders use social media for customer service outreach, additional fair lending considerations come into play, because providing customers a different "level of assistance," "amount of assistance" or "quality of assistance" based on a prohibited factor may constitute a fair lending violation, according to bank regulatory guidance.

These risks are heightened with respect to social media customer teams because the people to whom a team chooses to respond and how it responds are very visible to the online world. Regulators or litigants may seek to assess how a lender's social media customer service teams respond to complaints from people of different apparent race, ethnicity, sex or age as indicated by their name or profile photo.

Regulatory "testers" may even engage in high-tech "mystery shopping" by using different profile names and photos and asking questions or making complaints against the lender in social media to test how the lender's social media customer service team responds.

Finally, social media complaints could present additional compliance issues for large bank lenders subject to CFPB examination specifically.

Section 1034 of the Dodd-Frank Wall Street Reform and Consumer Protection Act imposes obligations on large banks to provide certain information to both the CFPB and to a customer in response to complaints and inquiries from that customer. Whether a complaint in response to a lender's Facebook post or in a tweet falls within the scope of the statute is unclear.

When does a "chat" between a lender and its customer transform itself into a "complaint"?

The difficulty in knowing how to categorize such communications—as well as the difficulty in monitoring such communications—has ramifications not only with respect to the lender's complaint-handling process, but also with regard to the lender's document-preservation policies and procedures and its response to civil litigation discovery requests. Lenders should consider clarifying applicable policies and procedures to address how to treat social media complaints.

Blogs

Some lenders host their own blogs. Posts on these blogs provide information about special events, products, the industry, consumer protection and other topics. Just as in the traditional advertising context, lenders should ensure that the messages and images posted by them on their blogs do not indicate a discriminatory preference or suggest endorsement of such statements made by third parties on their blogs.

This might occur, for example, if a lender approves and posts a comment made by a third party on a moderated blog that expresses a discriminatory preference, or if the lender fails to remove a post that indicates such a preference.

Here to stay

Social media have become a major presence in American society. Banks and lenders, like other businesses, are responding to this trend by using social media to increase their competitiveness. Some uses of social media, such as for marketing and customer service, are already commonplace among major banks. Other potential uses, such as considering information from an applicant's social media profile or social networks in the decision-making process, may become more commonplace.

As with any other emerging technology used in commerce, lenders should ensure that their use of that technology is consistent with fair lending laws. To do so, lenders should consider conducting a comprehensive review of their use of social media with a view toward developing formal policies for fair lending compliance in this area. **MB**

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