

## Paved with Good Intentions

By Heather Howell Wright and Christopher Knox Friedman

**B**ecause social media often asks individuals to group themselves based on protected characteristics, using social media for advertising exacerbates the risk of inadvertently violating the Fair Housing Act.

# Avoiding Fair Housing Violations in a Hyper-Connected World

Imagine for a moment that you are a newly minted real estate agent fresh out of college. Your contacts are all mostly single, childless, and in their early to mid-twenties. You have few clients and even less experience, but you

probably have something that many of your competitors don't: deep experience in the world of social media. You grew up in a hyper-connected world, and services such as Facebook, Instagram, Snapchat, and Twitter—for better or for worse—were ubiquitous during your formative years. You used these services to facilitate your social life in college and to maintain a connection with your high school friends. Social media has been fully integrated into your life from a relatively young age.

As a new agent, you are resourceful and hardworking, and it doesn't take long for you to get your first listing: a small, single-family cottage in an up-and-coming neighborhood. It's the perfect home for someone in your age cohort: young, single, and with no kids. You want to impress your first client by quickly selling her home, so you turn to Facebook, which has robust, relatively inexpensive advertising tools that allow you to target your audience. The process is simple: you design your ad, draft some

■ Heather Howell Wright is a partner in the banking and financial services group of Bradley in Nashville, Tennessee. She provides regulatory and compliance advice and manages litigation for financial institutions involving the Fair Housing Act, the Real Estate Settlement Procedures Act, and Regulation X, among other federal statutes and regulations. Ms. Wright also advises financial institutions, commercial property developers, and commercial property managers on a variety of insurance-related issues, including flood insurance compliance and resolution of first-party and third-party claims. Christopher Knox Friedman is an associate attorney with Bradley in Nashville, Tennessee. He represents financial services institutions involved in litigation, compliance, and regulatory matters. Mr. Friedman focuses on fair housing and litigation related to title issues, and he also has experience defending broker-dealers facing claims before the Financial Industry Regulatory Authority. Mr. Friedman has also handled class actions and is a co-author of the settlement chapter of *Class Action Strategy and Practice Guide*, published by the American Bar Association.



copy describing the many qualities of the home, and add some flattering, well-lit pictures of the cottage. Last, but not least, you design your target audience using Facebook's advertising tools: between the ages of twenty-five and thirty-five, single, college educated, and no kids. Click a button to finalize, and your advertisement is broadcast to thousands of potential buyers. What you might not realize, though, is that by using Facebook's targeted-advertising functions to focus your advertising on the type of clients who you think are most likely to be interested in your listing, you have potentially violated the Fair Housing Act.

Using social media to advertise is an integral part of business marketing. It is a virtual requirement that companies hoping to make it in the twenty-first century use these social media tools to reach valuable markets. Social media is integral to advertising not only because of its ubiquity, but also because it offers a relatively inexpensive and highly effective way to direct advertising to a target audience. As with any new technology, however, data-driven, targeted marketing has created new and unexpected avenues for liability. This article will review the current legal landscape as it relates to social media and the Fair Housing Act. It will discuss the current and relatively aggressive action that the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice are taking toward Facebook, as well as potential actions against other social media companies. Finally, the article will discuss some ways that practitioners can help their clients avoid the multiple pitfalls, traps-for-the-unwary associated with the use of social media for housing advertisement, and lender liability.

### **Liability Under the Fair Housing Act**

Fifty years ago, Congress passed the Fair Housing Act, which was designed to protect purchasers or renters of real property from discrimination based on an individual's membership in a protected class. Initially, the act prohibited discrimination based on race, color, religion, and national origin. In 1974, Congress amended the statute to prohibit discrimination based on sex, and in 1988, the statute was amended again to prohibit discrimination against individ-

uals based on disability and familial status, such as the presence of children. The Fair Housing Act is codified in 42 U.S.C. §3601, *et seq.*

The Fair Housing Act has several enforcement mechanisms. First, HUD is empowered to enforce the act, which it does through the Office of Fair Housing and Equal Opportunity (FHEO). 42 U.S.C. §3610. Among other things, the FHEO investigates fair housing complaints and conducts reviews for compliance with fair housing laws. In addition, individuals may file complaints alleging discrimination in the provision of housing with HUD, which is then required to seek a conciliatory resolution of the matter. The act also allows the Department of Justice to file federal lawsuits whenever the attorney general "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted [by the act], or that any group of persons has been denied any of the rights granted by [the act] and such denial raises an issue of general public importance...." 42 U.S.C. §3614. Finally, the act provides a private right of action to file civil actions and to intervene in actions filed by the Department of Justice. 42 U.S.C. §3614(e); §3615. Notably, an individual need not file a charge of discrimination with HUD before filing a private action. 42 U.S.C. §3613(a)(2).

Damages for violating the Fair Housing Act can be severe. The act authorizes both actual and punitive damages against defendants found to have violated it. 42 U.S.C. §3613(c). Importantly, pertaining to the private right of action, a court may award reasonable attorney fees and costs. *Id.* Finally, a court may order injunctive relief, such as a temporary or permanent injunction or a restraining order. *Id.*

### **Publisher and Advertiser Liability**

Although the act prohibits myriad discriminatory practices involving the provision of housing, the most important prohibitions, in terms of social media, are those involving publication and marketing. Specifically, the act makes these activities unlawful:

to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect

to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. 42 U.S.C. §3604(c). These prohibitions extend to financial institutions involved in residential real estate transactions, such as

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providing mortgage loans. 42 U.S.C. §3605.

Of course, traditional advertising forms such as newspaper, magazine, television, and radio advertisements are included in the act's discrimination prohibitions under section 3604(c). The discrimination prohibitions extend to *all* forms of advertising: brochures, flyers, billboards, verbal representations, and social media and internet advertisements. An advertisement may not suggest that a person who is a member of a protected class is prohibited from purchasing or renting real estate or that a person who is not a member of a protected class is preferred.

Obviously, an advertiser must avoid using explicitly discriminatory language, but prohibited advertisement and marketing is not simply limited to overt discrimination. An advertisement may be deemed discriminatory if it uses "words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because" of a prohibited

characteristic. 24 C.F.R. §100.75(c). Similarly, an advertiser that selects “media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of” membership in a protected class may also be deemed discriminatory. *Id.* Put differently, discrimination in marketing and

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publishing housing opportunities is not always obvious and can be quite subtle. Good intentions will never suffice to avoid liability under the act because there are countless ways for a publisher or advertiser to design an advertisement, even inadvertently, so that it only reaches a particular audience or excludes individuals who are part of a protected class.

### Fair Housing Act and Social Media

The risk of housing advertisers and advertising publishers inadvertently violating the Fair Housing Act is exacerbated by social media, partly because social media often asks individuals to group themselves based on protected characteristics. As any Facebook user can attest, membership requires that you disclose, at minimum, your age and sex. In other words, membership in the world’s most trafficked social media website requires members to group themselves based on two protected characteristics. Of course, once an account is created, a user can further segment his or her account based on other protected categories such as race, religion, or familial status. Based on some estimates, there are more than one billion Facebook users, and

according to a survey conducted in 2018, around two thirds of adults in the United States use Facebook. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, Pew Research Center (Mar. 1, 2018), <https://www.pewinternet.org>. Thus, Facebook contains a treasure trove of highly segmented data about who people are and the type of housing they may be interested in purchasing or renting.

The benefits of this data to marketers are obvious. Marketers spend millions of dollars to reach a target audience that they believe will purchase a product or service. Social media services, such as Facebook, allow these marketers to micro-target people based on highly detailed criteria at a reasonable price point. While this may not be a problem for traditional advertisers, housing advertisers are subject to the Fair Housing Act, which, as explained above, governs housing advertising. Combine the ability to segment a marketing audience easily and cheaply based on protected characteristics with civil rights laws that prohibit that practice, and any institution involved in providing housing, including landlords, lenders, property management companies, and real estate brokers, are at risk for substantial monetary liability.

### Facebook and Fair Housing

Although many social media services potentially pose serious risks to housing advertisers, the most recent and high-profile Fair Housing actions involve social media giant Facebook and the use of its targeted advertising services. On March 28, 2019, HUD announced charges against social media company Facebook for violating the Fair Housing Act, specifically 42 U.S.C. §§3601–3619. The charges derive from Facebook enabling housing advertisers to target users based on protected class status such as race, nationality, religion, color, familial status, sex, and disability.

These claims stem from a long-running investigation triggered by a 2016 ProPublica report alleging that housing advertisers could use Facebook’s advertising platforms to exclude users based on protected categories. After ProPublica released this report, the National Fair Housing Alliance (NFHA), a nonprofit dedicated to eliminating housing discrimination, began its own investigation

of Facebook’s advertising platform. Two years later, the NFHA and three other public interest groups filed a complaint in the United States District Court for the Southern District of New York, alleging that Facebook’s advertising platform violated the Fair Housing Act and the New York City Human Rights Law. See *National Fair Housing Alliance, et al. v. Facebook, Inc.*, 118CV02689, 2018 WL 1505634 (S.D.N.Y. Mar. 27, 2018).

The *National Fair Housing Alliance* lawsuit targeted housing advertisers’ ability to “exclude” or “include” certain categories of users while using Facebook’s advertising tools. For instance, the plaintiffs alleged that the NFHA created an advertisement for a fictitious apartment using Facebook’s “Ad Manager” platform in 2016. The NFHA then purportedly used Facebook’s “exclude” function to exclude “African Americans” and “Hispanics” from the advertisement’s audience. The NFHA also allegedly used Facebook’s “boost” capability to amplify its posts advertising the fake apartment by sending the post to some users while excluding others who fell within certain protected categories. In 2018, NFHA alleged that another plaintiff conducted a second investigation, after Facebook announced that it would no longer allow housing, credit, and employment advertisers to exclude users based on racial categories. During this second investigation, the plaintiffs alleged, it was still possible to create ads and “boost” posts that excluded individuals based on race, sex, family status, and disability status. The plaintiffs sought a declaration that Facebook’s advertising policies violate the Fair Housing Act and the New York City Human Rights Act, an injunction, compensatory and punitive damages, and attorney fees.

### The Federal Government Gets Involved

Shortly after the *National Fair Housing Alliance* plaintiffs filed their lawsuit, in August 2018, HUD filed a “me-too” administrative complaint, alleging similar conduct against Facebook. Press Release, U.S. Dep’t Hous. & Urban Devel., HUD Files Housing Discrimination Complaint Against Facebook: Secretary-Initiated Complaint Alleges Platform Allows Advertisers to Discriminate (Aug. 17, 2018). According to HUD, Facebook allows housing adver-

tisers to discriminate by, among other things, “showing ads only to men or only to women” and “showing ads only to users whom Facebook categorizes as interested in the ‘Christian Church,’ ‘Jesus,’ ‘Christ’ or the ‘Bible.’” Additionally, the HUD complaint alleges, “Facebook enables advertisers to discriminate based on race and color by drawing a red line around majority-minority zip codes and not showing ads to users who live in these zip codes.” According to the HUD complaint, “[t]he alleged policies and practices of Facebook violate the Fair Housing Act based on race, color, religion, sex, familial status, national origin and disability.”

Finally, on August 17, 2018, the Justice Department, through U.S. Attorney for the Southern District of New York Geoffrey F. Berman, filed a statement of interest in support of the *National Fair Housing Alliance* plaintiffs in their lawsuit. *National Fair Housing Alliance, et al. v. Facebook, Inc.*, No. 118CV02689, Dkt. No. 48 (S.D.N.Y. Aug. 18, 2018). The Justice Department filed its statement of interest in response to Facebook’s motion to dismiss, which argued, in part, that Facebook was “merely an interactive computer service” and therefore was immunized from Fair Housing Act liability by the Communications Decency Act. In the statement of interest, the Justice Department rejected Facebook’s characterization, asserting that “[b]y allegedly collecting user data, collating user data, and classifying its users based in part upon protected characteristics, Facebook participates in the ‘mak[ing],’ of an ‘advertisement’ ‘that indicates any preference, limitation, or discrimination.’”

### Facebook Settles with the NFHA

Ultimately, the *National Fair Housing Alliance* lawsuit resulted in an amicable settlement. Under the terms of the settlement, Facebook agreed to revise its targeted advertising systems to prevent housing discrimination, among other things. Specifically, Facebook announced that it would no longer allow housing advertisers to target individuals based on protected characteristics. Additionally, Facebook agreed to pay approximately \$5 million in legal fees and costs.

In the settlement, Facebook agreed to create a separate portal for housing,

employment, and credit advertisers called the “HEC Portal.” When using the HEC Portal, advertisers are not allowed to target individuals based on race, ethnicity, national origin, gender, family status, religion, age, disability, or sexual orientation. In addition, advertisers may no longer target by zip code. Rather, advertisers are now permitted to advertise based on a 15-mile radius from either a city center or address. In addition, Facebook has made changes to some of its algorithms, including its “Lookalike Audience” algorithm. Previously, this function allowed advertisers to market to users that were similar to the marketers’ existing customers. Facebook has agreed to alter this function so that it no longer considers the user’s age, relationship status, religious or political views, zip code, membership in specific “Facebook groups,” or interests. Finally, Facebook agreed to several changes designed to increase the scope of housing advertisement in general, including creating a page where consumers can view all housing advertisements placed on the platform.

### HUD’s 2019 Charges of Discrimination

Despite the sweeping changes that Facebook agreed to undertake due to the NFHA litigation, in March 2019, HUD announced formal charges against Facebook for violating the act. Similar to the *National Fair Housing Alliance* plaintiffs, HUD is alleging that Facebook’s advertising platform is designed in a way that “ads for housing and housing-related services are shown to large audiences that are severely biased based on characteristics protected by the Act....” HUD also alleges that Facebook’s advertising platform provides tools to advertisers to exclude members falling into certain categories from receiving housing-based ads. According to HUD Secretary Ben Carson, “Facebook is discriminating against people based on who they are and where they live.... Using a computer to limit a person’s housing choices can be just as discriminatory as slamming the door in someone’s face.”

It’s not just Facebook that should be concerned. There have been recent reports that HUD is investigating Twitter and Google’s advertising practices, as well. See Tracy Jan & Elizabeth Dwoskin, *HUD is Reviewing Twitter’s and Google’s Ad Practices as Part*

*of Housing Discrimination Probe*, Wash. Post, Mar. 28, 2019. According to the *Washington Post*, a source with knowledge of HUD outreach noted that HUD “want[s] to make sure that other companies aren’t getting away with something that one company is investigated for[.]” *Id.*

These charges, and continued investigation of other internet giants, should be

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especially concerning not just to social media companies, but to any company that uses those social media companies for housing-related advertising. The fact that the HUD charges against Facebook came just weeks after Facebook entered a sweeping settlement in which it agreed to substantial changes to its advertising platform indicates that HUD is poised to take aggressive action to enforce the Fair Housing Act as it applies to emerging technologies and the social media companies that host such technologies.

### Avoiding Fair Housing Act Violations in a Hyper-Connected World

While the recent actions against Facebook and investigations against Google and Twitter involve publisher liability, rather than advertiser liability, all housing advertisers, such as landlords, lenders, property management companies, and real estate brokers (as well as their lawyers), should pay close attention to these investigations. Social media advertising has become an integral part of businesses marketing to consumers, and as illustrated by this litigation, data-driven, targeted marketing likely

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will create new and unexpected avenues for liability. Moreover, HUD and the Justice Department's apparent interest in how the Fair Housing Act applies to social media marketing suggests that agencies and regulators will be scrutinizing how housing advertisers use big data and targeted advertising to market and sell housing and housing-related services.

Although large social media companies are currently receiving the lion's share of the attention as nonprofits, federal agencies, and the courts grapple with the complexities of applying fifty-year-old civil rights laws to emerging technologies, it is nearly certain that these entities, along with private plaintiffs, will soon begin scrutinizing the way that housing advertisers use social media to market their products and services. Thus, it is critical that housing advertisers and their counsel develop strategies to avoid the risk of violating Fair Housing laws through use of social media. Some starting points are discussed below.

#### Avoid Targeted Advertising

Although micro-targeted advertising is currently all the rage, it presents a severe risk of Fair Housing Act violations because advertisers may inadvertently exclude indi-

viduals based on a protected class. Where housing is concerned, it is critical that advertisers cast as wide a net as possible. In other words, avoid targeted advertising.

#### If Available, Use a Platform's Housing Advertisement Tool

As noted above, Facebook's settlement included a commitment to developing a portal specifically for housing, employment, and credit advertising. If a social media platform maintains a service designed specifically for advertising housing, use it. If the platform does not maintain such a service, request that it be created or reconsider placing advertisements on the service.

#### Be Careful Where You Post

Some social media users create or join "groups" that serve as "bulletin boards" for different communities or suburbs. Often, housing advertisers will "post" advertisements for housing in such a group based on a target audience. Although this can be a cheap (and sometimes free) and effective advertising tool, advertisers should be very careful about posting housing advertisements to some community "groups" but not others. The best practice is to post advertisements to groups covering all communities within a city or town.

#### Remember that Your Post Is a Housing Advertisement

Where social media is involved, advertisers strive to be genuine and personal, but housing marketers cannot forget that their "posts" are housing advertisements subject to fair housing laws. Thus, housing advertisers marketing on social media should observe best practices that are applicable to *all* housing advertisements. For instance, social media housing advertisers should include images with individuals from a broad racial and ethnic backgrounds, of multiple genders, and of various religious backgrounds.

Advertisers should also include the fair housing logo and the "Equal Housing Opportunity" slogan in their social media marketing. Focus on the amenities of the product, and do not focus on the ideal renter or purchaser. In short: follow all the rules that you would follow in your traditional advertising.

#### Train Well, Create Policies, and Have a Point Person

Organizations involved in social media advertising for housing should create policies and procedures designed to ensure compliance with the Fair Housing Act and other fair housing laws, and they should train all employees involved in the provision of housing in these policies. Although it is contrary to the fast-paced ethos of the internet age, organizations should designate a "point person" to review all social media advertisements (including individual "posts") before publication.

#### Some Final Thoughts

It is easier than ever to design cheap and highly effective advertising through social media. The downside, at least when it comes to housing, is that it is easier than ever to violate fair housing laws. Because the legal standards governing this area are still forming, attorneys representing housing providers should counsel their clients to take a conservative approach to using this technology. Taking a measured, conscientious approach to social media marketing is a small price to pay for the benefits of avoiding the high cost of litigation, and the potential for enormous compensatory and punitive damages under the Fair Housing Act.



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