Fair Lending - Digital Marketing and HMDA 2018

Marquis User's Conference

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Agenda

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- Trending in Digital Marketing
- The Digital Divide
- Consumer Matching Models and Life Stage Marketing
- Digital Marketing Fair Lending Compliance
- 2018 HMDA Data Trends
- New Disparate Impact Proposal
- Scenarios

#Trending in Digital Marketing

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- Institutions are increasingly engaged in digital marketing, using social media and third-party tech firms’ analytics to provide real time consumer data.
  - Includes traditional online ads, as well as content marketing (*e.g.*, videos, websites, infographics)
  - Resulting consumer data allows financial institutions to target potential customers; some lenders, in turn, may use this vendor data for underwriting purposes
- Third party vendor oversight.
  - Risk arises if lenders are unable to monitor and control ad placement.

Applicable Fair Lending Statutes

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- Equal Credit Opportunity Act
  - Prohibits discrimination against "applicants"
  - Issues regarding applicability to marketing and "discouragement"
- Fair Housing Act
  - Applies broadly to marketing
  - Disparate impact theory recognized by the Supreme Court
- Civil Rights Act of 1866
  - Prohibits intentional discrimination on the basis of race and ethnicity

The “Digital Divide” – What Does the Data Tells Us

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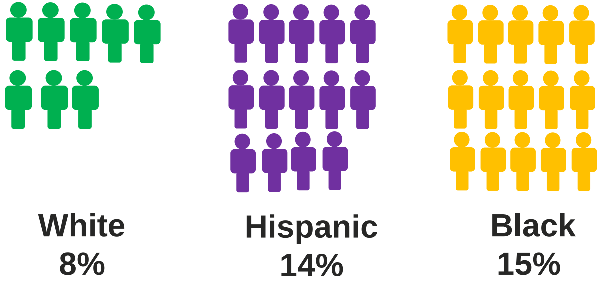
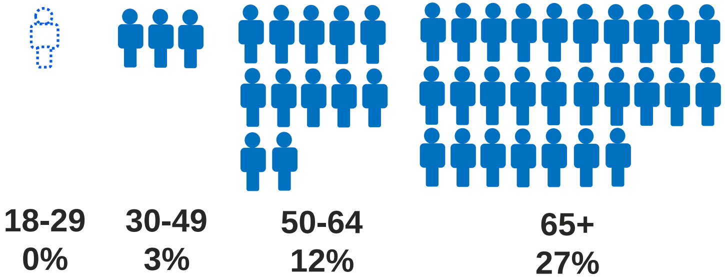
- Key questions:
  – Is there a digital divide for access?
  – Does equal digital *access* translate to equal *use* of digital consumer financial services?
- 10% of American adults do not use the internet.

% of U.S. Adults Who Do Not Use the Internet By Race/Ethnicity



% of U.S. Adults Who Do Not Use the Internet By Age



Source: Monica Anderson et al., *10% of Americans don’t use the internet, Who are they?*, Pew Research Center, Apr. 22, 2019.

The "Digital Divide" – What Does the Data Tells Us

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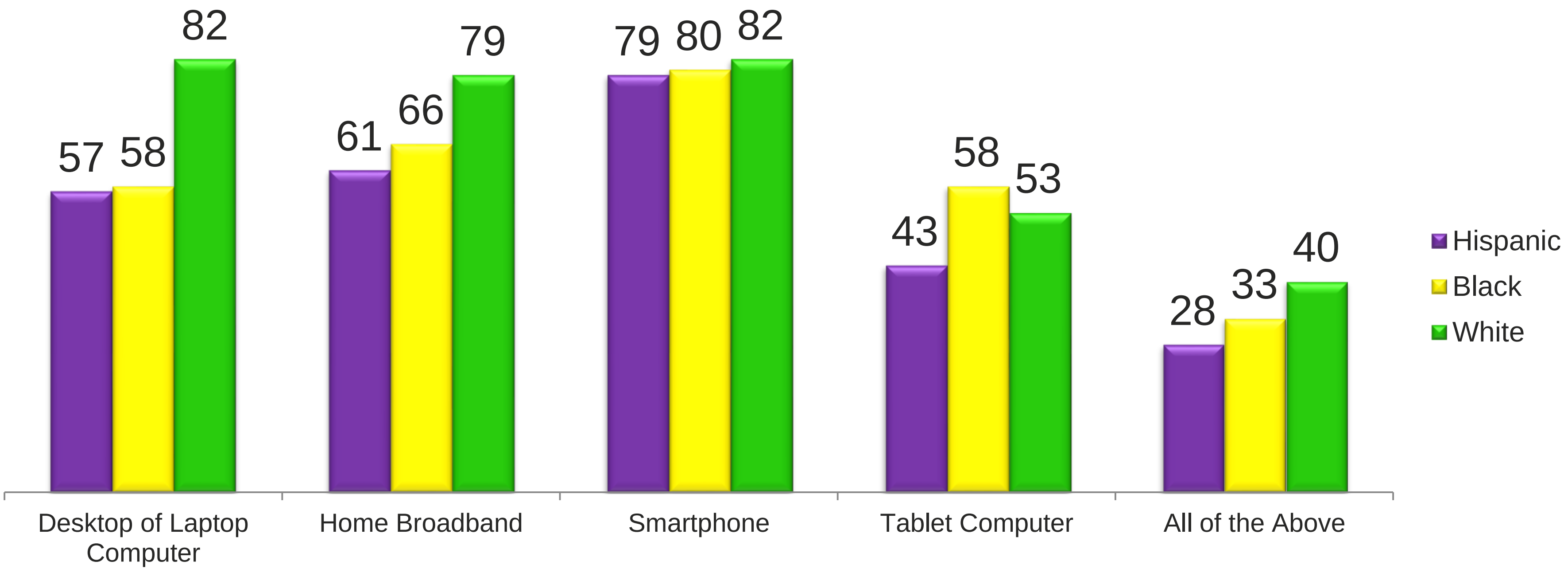
- Minority and White populations own mobile devices at similar rates. Variations are more significant for desktop/laptop and broadband use.

% of U.S. Adults in Each Group Who Say They Have a…



Source: Andrew Perrin, *Smartphones help blacks, Hispanics bridge some – but not all – digital gaps with whites*, Pew Research Center, Aug. 20, 2019.

The “Digital Divide” – What Does the Data Tells Us

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% Use of Different Online Platforms by Demographic Groups

Gender	Men	63	31	24
	Women	75	43	21
Race/Ethnicity	White	70	33	21
	Black	70	40	24
	Hispanic	69	51	25
Age	18-29	79	67	38
	30-49	79	47	26
	50-64	68	23	17
	65+	46	8	7

Source: Aaron Smith and Monica Anderson, *Social Media Use in 2018*, Pew Research Center, Mar. 1, 2018 (Updated Apr. 10, 2019).

Digital Marketing Models – Compliance Issues

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- Digital marketing benefits include:
  - Reflects evolving consumer preferences for online engagement
  - Cost-effective
  - Tools allow matching customers to in-market population
- Compliance risks include:
  - Disparate impact and disparate treatment
  - Vendor models may have limited transparency
  - “Credit invisible” populations
  - “Data deserts”

Consumer Matching Models

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- Some third-party resources, including social media platforms, employ tools designed to identify consumers who resemble the company's preferred customers.
- Fair lending risk can stem from:
  - Demographic imbalance in the seed population
  - Factors used to identify consumers
- Regulators have cautioned that using big data elements to match to existing customers may "risk incorporating previous discrimination in . . . decisions" and "reproduction of existing biases." FTC, *Big Data: A Tool for Inclusion or Exclusion?* (2016).
- Proprietary nature of the model and limited visibility of matching factors can complicate fair lending analysis.

Life Stage Marketing

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- Marketing targeted to consumers in certain life stages can present elevated fair lending risk.
- Examples:
  - Millennials
  - Young professionals
  - Retirees
  - Families with young children
- In some instances, such marketing practices may be viewed as appropriately targeting only those for whom a product is most suitable.
- However, it may also implicate provisions against discrimination on the basis of age, marital status, or familial status.

Cluster Examples Used in Industry

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"Metro Minority Families"

"Urban Blues"

"African-American Neighborhoods"

"Lap of Luxury"

"Remaining Diverse"

"Young Influentials"

"Belong to Mediterranean, Jewish, or Hispanic"

"Multi-Ethnic, Purpose-Built Estates"

"Age of Head of Household is 70+"

"Soccer Moms"

"Younger Than 40 Years Old"

"Aspiring Hispania"

"Gray Perspectives"

"Country Living"

"Stay at Home Moms"

"Larger Family Homes, Multi-Ethnic Areas"

"High-Occupancy Terraces, Many Asian Families"

Case Study – Social Media Advertising Lawsuit (2019)

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- On March 28, 2019, HUD charged Facebook with violating the Fair Housing Act "by encouraging, enabling, and causing housing discrimination through the company's advertising platform."
- Allegations include:
  - Facebook "enables advertisers to exclude men or women from seeing an ad," has a "search-box to exclude people who do not speak a specific language from seeing an ad," and has a "map tool to exclude people who live in a specified area from seeing an ad by drawing a red line around that area."
  - "Respondent also provides drop-down menus and search boxes to exclude or include (i.e., limit the audience of an ad exclusively to) people who share specified attributes."
  - "To generate a Lookalike Audience, Respondent considers sex and close proxies for the other protected classes. Such proxies can include which pages a user visits, which apps a user has, where a user goes during the day, and the purchases a user makes on and offline. Respondent alone, not the advertiser, determines which users will be included in a Lookalike Audience."
  - In the "ad delivery phase, . . . to decide which users will see an ad, Respondent considers sex and close proxies for the other protected classes."

Case Study – Social Media Advertising Lawsuit (2018)

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- On March 27, 2018, the National Fair Housing Alliance (NFHA) and other groups filed a lawsuit against Facebook regarding the ability of advertisers to "include" or "exclude" recipients of real estate advertisements based on a pre-populated list of demographics, behaviors, and interests.
  - NFHA allegedly created a fictitious real estate company to access these functions
- Alleged examples include:
  - "Parent with grade school kids"
  - "Interest" in
    - "English as a second language,"
    - "Telemundo"
    - "Disabled American Veteran"
    - "No kids"

Case Study – Social Media Advertising Lawsuit (2018)

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- Advertisers could allegedly select certain markets to include or exclude including "corporate moms," "stay-at-home moms," "big-city moms," "fit moms," "soccer moms," and "moms of grade school kids."
  - "Men" could be allegedly be excluded as a demographic
- NFHA alleged that the advertising practices constitute illegal discrimination based on familial status, sex, disability, race, and national origin in violation of the Fair Housing Act and New York state law.
- Pursuant to March 2019 settlement, Facebook will pay $1,950,000 to plaintiffs and create a separate advertising portal for housing, employment, and credit ads with more limited targeting options.

Digital Marketing Clusters

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All Parents

Add demographics, interests or behaviors

- New parents (0-12 months)
  Parents
- Parents (All)
  Parents
- Parents with adult children (18-26 years)
  Parents
- Parents with early school-age children (06-08 years)
  Parents
- Parents with preschoolers (03-05 years)
  Parents
- Parents with preteens (08-12 years)
  Parents
- Parents with teenagers (13-18 years)
  Parents
- Parents with toddlers (01-02 years)
  Parents

Multicultural Affinity

Add demographics, interests or behaviors

- African American (US)
  Behaviors
- Asian American (US)
  Behaviors
- Hispanic (US - All)
  Behaviors
- Hispanic (US - Bilingual)
  Behaviors
- Hispanic (US - English dominant)
  Behaviors
- Hispanic (US - Spanish dominant)
  Behaviors

Additional Litigation

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- *Vargas v. Facebook, Inc.*, No. 3:19-cv-5081 (N.D. Cal. filed Aug. 16, 2019)
  - Putative class action lawsuit alleging that Facebook allowed housing providers to shield their ads from people based on their national origin, family status, disability and other factors, thereby limiting those groups' ability to find housing and violating the Fair Housing Act

CMS Takeaways

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- Digital marketing models, campaigns, and materials should be reviewed by Legal and/or Compliance for fair lending risk.
- Digital marketing models—like other models—should be subject to model risk governance processes. This may include documentation and review of variables, model risk assessments, risk rating, model inventories, and periodic review.
- Exercise caution in using marketing inclusion or exclusion criteria or pre-defined groups or clusters based on demographic factors that are tied to (or that may closely correlate with) a prohibited basis.
- Third-party data sets and marketing models should be carefully reviewed for fair lending risk. Risk mitigation strategies may vary depending on visibility of model factors, and may include certifications, testing, third-party review, and prohibited variable lists.
- Consider whether marketing practices in the aggregate are designed to reach a balanced, broad audience.

Specific Risk Mitigation Tools

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- Risk mitigation tools may include:
  - Reviewing matching factors (or categories of factors)
  - Certification regarding matching factors
  - Testing demographic balance in seed population
  - Testing demographic balance in matched population
  - Back-end testing of applications resulting from campaign

Third-Party Oversight

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- Oversight of third parties is essential
  - Ensure thorough initial vetting of a vendor
  - Retain documentation of the relationship and establish clear expectations
  - Develop policies and procedures for data sharing between the company and the third party
  - Obtain fair lending certifications as necessary or appropriate

HMDA 2018

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- A strong potential benefit of digital marketing is expanded access to credit.
- According to the CFPB, the 2018 HMDA data released on Aug. 30, 2019 shows improvement in lending to minority borrowers.
  - Increase in share of home-purchase loans by Black borrowers (6.7% of one to four family homes, up from 6.4% in 2017)
  - Hispanic borrowers also showed a fractionally larger increase in share of loans
- The average home purchase loan amounts for Asian, Black, and non-Hispanic White borrowers in 2018 were above the previous pre-Recession peaks.
- Shares of borrowers who took out nonconventional home purchase loans continue to fall across all ethnic and racial groups.

HMDA 2018

- Among the 12.9 million applications reported, 1.3 million included at least one disaggregated racial or ethnic category.
  - The two most commonly reported disaggregate groups were Mexican and Other Hispanic, which were reported by 3.0 percent and 1.5 percent of applicants, respectively

HUD Proposal to Modify Disparate Impact Rules

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- On August 16, 2019, HUD proposed to revise its rules regarding the disparate impact standard under the Fair Housing Act.
  - Would modify the disparate impact rule to conform with the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*
  - Comment period ends October 18, 2019
- Five-step prima facie burden for plaintiffs.
  - The policy is "arbitrary, artificial and unnecessary" to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law
  - "Robust causal link" showing that the "specific practice is the direct cause"
  - Alleged disparity had an adverse effect on members of a protected class
  - Disparity is "significant"
  - "Direct link" between the disparate impact and the injury
- New defenses
  - Certain uses of models/algorithms
  - Discretion limited by a third party

Scenarios

Marketing

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- Company A is seeking to grow its purchase mortgage business. Most applications are generated through digital channels, and the company markets throughout the region.
- Techville is an affluent city with a strong university approximately 50 miles from a much larger, less affluent city (Othertown). Techville has been expanding over the last 15 years based largely on its growing technology-based businesses as well as its medical industry.
- Several affluent single-family developments have sprung up in Techville. Most of the new residents already live near Techville and are looking to upsize. Very few new residents are from Othertown.
- Based on cookies and other technology and data tools, Company A can estimate the approximate physical location of visitors to its website and social media sites, as well as the website that they had visited immediately prior to and after visiting the company’s website.
- Company A is developing marketing for purchase mortgage loans with favorable pricing, using imagery designed to cater to prospective residents of the new Techville developments and purchasers of larger homes. The marketing would be shown to consumers who (1) are located in or around Techville; or (2) have visited websites associated with Techville or high-tech and medical industries.
- The marketing for this offer would be suppressed or modified for consumers estimated to be located in Othertown.

Marketing – Third Parties

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- Company B is advertising a new credit card with an aggressive cash back program for customers with strong credit profiles.
- The Company uses a variety of tools, including television marketing intended to reach a broad audience, print media, and some marketing intended to reach underserved customers.
- The Company also seeks to use a very cost-effective product offered by a third party that will target ads to consumers that share certain similarities to a group of customers selected by the company.
- The vendor has stipulated that the model does not use prohibited basis under federal and state law, user preferences that on their face are closely associated with the prohibited bases, or zip codes.
- The vendor has expressed a willingness, if requested, to take steps to help the Company assess and mitigate fair lending risk, including facilitating fair lending testing of the targeted population and other reasonable measures that may be requested. But the vendor will not share a list of every attribute (of which there are thousands) that may influence the model.

For More Information

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