

LESSONS FROM FAIR LENDING LAW FOR FAIR MARKETING AND BIG DATA

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Executive Summary

This White Paper is submitted in connection with Peter Swire's participation at the Federal Trade Commission's September 15, 2014 event on "Big Data: A Tool for Inclusion or Exclusion?"

Issues of potential discrimination in online marketing have recently attracted increasing attention, notably in the April 2014 White House Report on Big Data and Privacy. To date, however, the public debate has not included a systematic analysis of the closest legal precedents – fair lending law under the Equal Credit Opportunity Act (ECOA) and other statutes. This White Paper, drawing on my previous scholarship in the fair lending area,¹ explains lessons from fair lending law for what I call "fair marketing" – the application of anti-discrimination and fair lending principles to online advertising and the Big Data analytics that support much of online advertising.

This White Paper applies fair lending law in two principle ways:

1. **Sectoral legislation applies to some online marketing, much as sectoral legislation for privacy exists in areas such as HIPAA, the Gramm-Leach-Bliley Act, and the Children's Online Privacy Protection Act.** Anti-discrimination law applies to marketing for lending, housing, and employment, under the ECOA, the Fair Housing Act, and Title VII of the Civil Rights Act of 1964. An important legal topic going forward will be whether and in what ways these sectoral anti-discrimination laws apply to entities in the online advertising ecosystem who play a role in advertising for lending, housing, and employment as well as other sectors.

*The opinion expressed herein are those of the author alone, and do not necessarily reflect the view of participants in the Future of Privacy Forum. Research assistance provided by Joseph Jerome, Policy Counsel, Future of Privacy Forum.

2. **Over two decades of fair lending enforcement and regulatory guidance provide numerous useful insights for advertising in sectors other than lending, housing, and employment, where sectoral statutes do not currently exist.** Financial institutions have extensive and long-developed programs for fair lending compliance. Instead of fair marketing issues being entirely novel, these compliance programs provide well-established mechanisms for addressing possible discrimination in marketing.

Part I addresses the law and history of fair lending enforcement. Fair lending laws (which historically have included fair housing) have broad scope and application. The ECOA, for example, prohibits discrimination with respect “to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age” It defines “creditor” broadly to include “any person who regularly extends, renews, or continues credit,” as well as brokers and “any person who regularly arranges for the extension, renewal, or continuation of credit.” The Fair Housing Act and Title VII have similarly broad language with respect to housing and employment discrimination.

The disparate impact theory has long played a central role for enforcement of fair lending laws. A 1994 bank regulator policy statement defined disparate impact as “when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.” Fair lending enforcement became active during the 1990’s, and received renewed attention in response to subprime loans and the financial crisis.

Part II examines important possible distinctions between fair lending and fair marketing, to determine whether and what ways online marketing should be treated differently from fair lending. Specifically, I assess: (1) financial services are heavily regulated and supervised, in contrast to online marketing; (2) financial services are dominated by large companies, in contrast to the start-ups and small businesses engaged in online marketing; (3) whether congressional action in fair lending suggests other areas should be less regulated; (4) whether a history of government action perpetuating discrimination would be relevant to fair marketing; and (5) whether anti-discrimination principles should apply only to a limited set of transactions of highest importance to consumers. Upon examination, I do not discern any categorical reason why online marketing should be exempt from the anti-discrimination principles embodied in the ECOA, Fair Housing Act, Title VII and numerous other laws.

Part III offers four lessons from fair lending for fair marketing:

1. **Fair lending law affirmatively encourages targeted marketing to protected classes.** In contrast to the skepticism of targeted marketing voiced by some in the privacy debates, fair lending consent decrees and regulatory guidance have often encouraged or required such marketing to members of historically underserved communities.
2. **Fair lending law applies disparate impact analysis to targeted marketing. Financial regulators also see risks in targeted marketing, as exemplified by subprime mortgage loans.** As applied to fair marketing, the experience with fair lending shows an apparent paradox – targeted advertising to reach minority groups and protected classes is often expected, yet it is illegal to use targeted

marketing to steer products to those groups. In my view, this topic needs considerably more research and discussion.

3. **Sectoral statutes prohibit discrimination in online marketing for lending, housing, and employment.** A crucial legal fact about fair marketing is that the ECOA, Fair Housing Act, and Title VII apply to both online and offline marketing. This White Paper identifies a number of issues under these statutes that require additional attention, to determine the impact of existing law on online marketing practices.
4. **Data relevant to a disparate impact analysis may often be more available for online marketing than for traditional fair lending cases.** The history of fair lending enforcement has been intertwined with the limited availability of data to detect and prove possible violations in anti-discrimination laws. These data limitations may be easier to address in many online advertising situations, which are characterized by precisely the Big Data that is the subject of this FTC Workshop.[†]

[†] I also add a disclaimer to the analysis in this White Paper. I am presenting this document while in the midst of research for what I expect to be a longer research effort on fair lending and fair marketing. This White Paper was completed under the time constraints of preparing for the FTC workshop, and I have not yet had the benefit of comments on this written product. The application of anti-discrimination law to online marketing presents complex issues, and so I present here my best current thinking but with an awareness that my views may shift as the research project continues.

LESSONS FROM FAIR LENDING LAW FOR FAIR MARKETING AND BIG DATA

I. The Law and History of Fair Lending Enforcement

This part of the White Paper first explains the provisions of the Equal Credit Opportunity Act that are most relevant to fair marketing. It briefly examines other statutes that have been important to the development of fair lending law and anti-discrimination law generally, including the Community Reinvestment Act of 1977, the Fair Housing Act of 1968, and Title VII of the Civil Rights Act of 1964. I then examine the relevant history of fair lending enforcement.

A. *The Equal Credit Opportunity Act*

The Equal Credit Opportunity Act was enacted in 1974. An important original purpose was to ensure that married and divorced women could establish credit in their own names. The statute applies far more broadly than that, however. It makes it “unlawful for any creditor to discriminate against any application, with respect to any aspect of a credit transaction – (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract.”²

Exceptions provide that creditors can take marital status or age into account for limited non-discriminatory reasons, such as to ascertain a creditor’s remedies or to “use any empirically derived credit system which considers age if such system is demonstrably and statistically sound” in compliance with the ECOA regulations.³ The Consumer Financial Protection Bureau (CFPB) now issues these regulations, known as Regulation B.⁴

The definition of “creditor” is broad, including “any person who regularly extends, renews, or continues credit,” as well as brokers and “any person who regularly arranges for the extension, renewal, or continuation of credit.”⁵

Enforcement of the ECOA occurs through the CFPB and the federal banking agencies, such as the FDIC and the Federal Reserve. In addition to specific ECOA actions, each of these agencies can use its existing supervisory and enforcement powers to ensure compliance with the ECOA.⁶

The statute specifically provides that the Federal Trade Commission is authorized to enforce the requirements of the ECOA.⁷ A violation of the ECOA is deemed a violation of the Federal Trade Commission Act, and the FTC can use all of its functions and powers under that Act to enforce compliance by any person who violates the ECOA’s requirements. In contrast to general limitations on the FTC’s jurisdiction to persons engaged in commerce, the statute provides that the FTC can enforce compliance with the ECOA “irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.”⁸ The FTC can enforce any rule prescribed by the CFPB “in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.”⁹ The FTC cannot enforce against entities supervised by the FDIC, the Federal Reserve, and other listed federal agencies.¹⁰ It can, however, enforce the ECOA for entities that are also subject to enforcement by the CFPB.

The statute also provides for civil liability. The Department of Justice may bring a civil suit when there is a “pattern or practice” of discrimination, including for actual and punitive damages and injunctive relief.¹¹ Aggrieved individuals can bring individual actions, with actual damages plus

punitive damages up to \$10,000. Class actions are also available, with punitive damages up to the lesser of \$500,000 or one per cent of the creditor's net worth.¹²

B. *Other Relevant Fair Lending and Anti-Discrimination Statutes*

I briefly describe three other statutes that have been important to the development of fair lending law and anti-discrimination law generally.

First, the *Community Reinvestment Act of 1977*¹³ is a prominent fair lending law that "is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate."¹⁴ The CRA was enacted to correct the problem of "redlining," which "refers to the illegal practice of refusing to make residential loans or imposing more onerous terms on any loans made because of the predominant race, national origin etc., of the residents of the neighborhood in which the property is located."¹⁵ The CRA today is notably applied during bank examinations conducted by the bank regulatory agencies.¹⁶

Second, the *Fair Housing Act of 1968* has provisions that are roughly parallel with the ECOA, as applied to housing rather than the extension of credit.¹⁷ The FHA prohibits discrimination in housing "because of race, color, religion, sex, familial status, or national origin."¹⁸ The FHA explicitly governs discrimination in advertising, making it unlawful "[t]o 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, familiar status, or national origin."¹⁹

Third, *Title VII of the Civil Rights Act of 1964* is the well-known law that prohibits discrimination in employment.²⁰ It is an unlawful employment practice for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²¹ Title VII makes it unlawful "to print or publish or cause to be printed or published any notice or advertisement relating to employment" where there is an indication of "any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin."²² The relevance of Title VII to fair lending and fair marketing goes beyond advertising for employment, because Title VII cases have developed much of the jurisprudence for anti-discrimination law generally, including in the area of disparate impact discussed below.²³

C. *The Central Role of Disparate Impact for Enforcement of the ECOA*

Fair Lending in the 1990's. Although the ECOA was enacted in 1974, enforcement of the broad anti-discrimination provisions in the ECOA began in earnest during the 1990's. In 1992, the Federal Reserve of Boston released a detailed study on mortgage loan denial rates in the Boston area, examining whether racial and ethnic disparities in mortgage loan denial rates reflected evenhanded use of legitimate credit standards. The Boston Fed study, as it became widely known, used Home Mortgage Disclosure Act (HMDA) data that showed "patterns of relatively low mortgage lending in minority areas and indicated that black and Hispanic applicants were denied loans two to three times as often as whites."²⁴

In 1994, the federal banking agencies issued the Interagency Policy Statement on Discrimination in Lending.²⁵ The agencies used strong, clear language in stating: "Discrimination in lending on the basis of race or other prohibited factors is destructive, morally

repugnant, and against the law.”²⁶ The agencies discussed three methods of proof of lending discrimination that courts had found under the ECOA and the Fair Housing Act:

- “Overt evidence of discrimination,” when a lender blatantly discriminates on a prohibited basis;
- Evidence of “disparate treatment,” when a lender treats applicants differently based on one of the prohibited factors; and
- Evidence of “disparate impact,” when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.”

As discussed further below, the most relevant among these theories for fair marketing is likely to be the disparate impact theory, where facially neutral practices have a discriminatory effect on a protected class.

Along with this policy statement, the Department of Justice and federal banking agencies stepped up their fair lending enforcement during the 1990’s, with multiple lawsuits and resulting consent decrees based on a “pattern or practice” of lending discrimination.²⁷ The agencies in 1995 issued significant changes to the CRA regulations, which gave more detailed requirements about the lending, investment, and services that a financial institution provided to communities in its service area.²⁸ Fair lending also became a more prominent part of bank examinations, with banking agencies offering guidance on how to comply with fair lending laws,²⁹ and emphasizing that fair lending compliance programs would be scrutinized during bank examinations.³⁰

The Subprime Crisis, Renewed Attention to Fair Lending, and Re-affirmation of the Disparate Impact Test. From the end of the 1990’s until the mortgage defaults that began in 2006 and 2007, there was relatively little new policy development in the fair lending area. Fair lending issues have become much more prominent since the financial crisis hit, triggered by concerns about disproportionate subprime lending to minorities as well as actions by the new Consumer Financial Protection Bureau (CFPB).

Encouraging homeownership was a domestic policy priority during the 1990’s and early 2000’s,³¹ and subprime loans were viewed by many as a way to increase homeownership.³² To compensate for increased credit risk, subprime loans carry higher interest rates and were generally excluded from being pooled into mortgage-based securities by Fannie Mae and Freddie Mac.³³

Minority communities have been disproportionately affected by subprime lending. A 2000 report by the Department of Housing and Urban Development looked at subprime lending between 1993 and 1998 and found that subprime loans were five times more likely in black neighborhoods than in white neighborhoods.³⁴ While much of this disparity may track with differences in income levels among those neighborhoods, the study also found that homeowners in high-income black areas were twice as likely as homeowners in low-income white areas to have subprime loans.³⁵ A May 2002 study by the Center for Community Change concluded that significant racial disparities existed in subprime lending, and that these disparities actually increased as borrower income increased.³⁶ In 2009, HUD evaluated HMDA data in nine major metropolitan areas, finding strong associations between African-American borrowers and the probability of obtaining higher-priced loans, even when accounting for credit

score information.³⁷ HUD cautioned that mortgage market discrimination was "coming home to roost" by undermining the stability and vitality of minority neighborhoods during the height of the subprime crisis.³⁸

The CFPB was created by the Dodd-Frank Act of 2010, as part of the response to the financial crisis. It has broad jurisdiction over consumer financial issues including fair lending. The CFPB took over from the Federal Reserve the lead role in issuing Regulation B to implement the ECOA,³⁹ and has issued detailed guidance on its fair lending efforts.

In 2012, the CFPB issued a Bulletin that reviewed applicable legal sources and concluded that the disparate impact test "would be one method of proving lending discrimination under the ECOA and Regulation B."⁴⁰ The CFPB specifically concurred with the 1994 Interagency Policy Statement, which recognized three methods for proving lending discrimination under the ECOA: overt discrimination, disparate treatment, and disparate impact. As explained in Regulation B, the legislative history indicated that Congress intended the ECOA to use the disparate impact test as outlined in the employment field in cases such as *Griggs v. Duke Power Co.*⁴¹ The CFPB reiterated this language from Regulation B:

The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.⁴²

II. Comparing Fair Lending and Fair Marketing

I believe this background on fair lending and other anti-discrimination statutes aids in assessing discrimination issues for online marketing. This Part of the White Paper examines reasons why fair lending approaches may or may not be analogous to fair marketing. It concludes there is no categorical reason why online marketing should be exempt from anti-discrimination principles, although there may be significant factual differences to understand in applying such differences. Among possible distinctions, I examine five:

1. Financial services are heavily regulated and supervised, in contrast to online marketing.
2. The financial services industry is dominated by large companies, in contrast to the many start-ups and small businesses engaged in online marketing.
3. The decision by the Congress to enact the ECOA and other specific statutes means that other areas should not be regulated as heavily.
4. One justification for existing anti-discrimination statutes is to address a history of government action in lending and housing that perpetuated discrimination for many years. No similar history of government action exists for online marketing.
5. Existing statutes target especially important aspects of consumer participation in the market, in contrast to the lower stakes for much of online marketing.

Although each of these distinctions is potentially important, there are of course important counter-arguments to each of them. First, it is true that financial services firms have a long

history of government regulation and supervision, notably for banks insured by the FDIC, where taxpayer funds have historically been at risk in case of bank failures. With that said, the ECOA applies far outside the scope of companies historically subject to regular supervision. It applies to all creditors, including “any person who regularly extends, renews, or continues credit.” Similarly, the Fair Housing Act and Title VII apply broadly, and not only to regulated financial firms.

Second, the existence of large firms does not effectively distinguish fair lending from fair marketing. Large firms are prominent and have high market shares in commercial banking, investment banking, insurance, and other financial markets. These large firms generally have a greater ability than small firms to develop sophisticated fair lending compliance programs. Large firms also exist in online advertising, however, including some of the firms with the largest market capitalization in the world. Small firms also exist in lending, and notable fair lending enforcement actions have applied to small community banks. Because both large and small firms exist in both financial services and online marketing, a key policy goal would seem in both settings to be how to make compliance scalable – appropriate to the size and complexity of the company.

Third is the issue of what weight to put on the legal difference between sectors where Congress has enacted specific anti-discrimination laws, such as lending, housing, and employment, and other areas where no such laws exist. As a matter of democratic principle, decisions by the elected representatives about where to regulate deserve an important degree of deference. With that said, the anti-discrimination principles embodied in those statutes are held in our society far more generally than just for a few limited sectors. If there is proof of overt or intentional discrimination in how a company conducts its marketing, then I have little doubt that there would be a swift and strong public reaction against that company. There is no reason to believe that the Congress or the general public believes online marketing to be an area where discrimination is permitted.

Fourth, a lack of historical government action encouraging online discrimination does not negate the importance of applying anti-discrimination statutes to protected classes. In the housing market, there is a well-documented history of government actions that fostered redlining and lending discrimination for many years. For instance, Federal Housing Administration manuals in the 1930’s and afterwards down-rated loans when there was “infiltration of inharmonious racial or nationality groups,” and they explicitly encouraged segregation by calling racially restrictive covenants “a favorable condition” for a loan.⁴³ In light of this history, one rationale for the ECOA and the Fair Housing Act was to remedy the earlier government actions that promoted discrimination. I am not aware of any similar government actions that encouraged discrimination in online marketing, and so one rationale for existing statutes does not apply to such marketing. With that said, however, the scope of anti-discrimination statutes sweeps far beyond specific remedies for specific past government actions. The anti-discrimination statutes today apply to a range of protected classes that, as a societal and legislative judgment, should not be treated worse than others.

Fifth, one might argue that existing anti-discrimination laws apply to a limited set of the transactions of highest importance to individuals – housing, employment, and mortgages and other major loans such as for automobiles. On this theory, online marketing may consist of generally less important transactions that do not merit enforcement of anti-discrimination principles. In response, I note that existing statutes apply to small transactions as well – small loans, short-term rentals, and transient employment. As a matter of enforcement discretion, the CFPB and other agencies may not target such smaller transactions, but there is no

jurisprudence suggesting that the existing statutes apply only to large transactions. In addition, the overall volume of online advertising and purchases is large and growing, both in dollar value and in importance in the overall purchases of many consumers. If patterns of unfair marketing do exist, then the effects of any such discrimination would apply to this large volume of online advertising and purchases.

Considering these five possible distinctions, I have not discerned any categorical reason why online marketing should be exempt from the anti-discrimination principles embodied in the ECOA, Fair Housing Act, Title VII and numerous other laws. I now turn to some specific topics where the history of fair lending may inform how to treat fair marketing.

III. Four Lessons for Fair Marketing from Fair Lending Law

I highlight four lessons from fair lending law for fair marketing. First, I show that fair lending law has often affirmatively encouraged targeted marketing, especially to reach out to minority or other communities that otherwise would lack equal access to credit. Second, this positive view toward targeted marketing operates within important constraints – the marketing should not have a negative and disparate impact on protected classes. There is thus a paradox in the fair lending approach to targeted marketing – it may be either encouraged or discouraged but the law is not clear in what contexts. Third, in light of the fair lending jurisprudence related to marketing, I highlight how existing statutes already make online marketing illegal where there is discrimination in lending, housing, or employment. Fourth, I discuss the different sources of data that may be relevant to a disparate impact claim, including ways in which such claims may actually be easier to establish for fair marketing than for fair lending. A key issue going forward will be clarifying when a company would be expected to gather and analyze such data.

1. Fair Lending Law Affirmatively Encourages Targeted Marketing to Protected Classes

In privacy policy involving the FTC, there have been intense debates about the role of targeted marketing. For instance, the FTC has played a leading role in supporting the Do Not Track process of the World Wide Web Consortium, and I chaired the W3C Do Not Track process in 2012-13. At the W3C, online advertisers and others strongly supported online behavioral advertising (OBA), stressing its economic importance and ways in which OBA enables consumers to find the goods and services they prefer. By contrast, consumer groups and others questioned the consumer benefits of targeted marketing, and argued that, at a minimum, consumers should have usable and effective controls to limit such marketing. Similar disagreements about the value of targeted marketing compared with the value of privacy protection have occurred in numerous other privacy policy debates.

While there remains considerable disagreement about the value of OBA,⁴⁴ micro-targeting has become an increasingly important practice in the online ecosystem. Analytics and Big Data use vast pools of data in order to develop mechanisms to categorize and organize. Advertisers and business have used these tools to hone their abilities to target a wide range of different consumer segments and demographics. Despite skepticism, the result has been a major shift in the online economy. For example, the theory of the “Long Tail” argues that the online economy is shifting way from mainstream products and markets at the head of the demand curve towards a larger number of niche products and interests.⁴⁵ Niche products can be matched to niche interests because micro-targeting can reveal those preferences and connect buyers and sellers in those markets.

The role of targeted marketing in fair lending, however, has been noticeably different from the skepticism of such marketing expressed by some in the privacy debates. In fair lending, many settlements have included requirements for lenders to do *more* targeted marketing. For instance, in 1993, the Department of Justice settled an \$11 million case with Chevy Chase Federal Savings Bank for refusing to market its services in minority neighborhoods.⁴⁶ Chevy Chase agreed to open new mortgage offices in black neighborhoods and take steps to equalize its market share of mortgage loans with minorities. It also agreed to extensively advertise its services, target sales calls to real estate professionals in black neighborhoods, and provide training in affirmative marketing programs. Affirmative marketing requirements continue to have an important role in fair housing settlements. In 2009, HUD entered into a consent decree with Westchester County that required the county to allocate \$51.6 million to construct and affirmatively market affordable housing in overwhelmingly white county municipalities to combat residential segregation.⁴⁷

Regulators' fair lending guides similarly emphasize the importance of targeted advertising to meet fair lending goals. For instance, the Federal Reserve Bank of Chicago, in implementing Interagency Fair Lending Examination Procedures, stated that examiners should "determine if a lower level of marketing effort was made toward prohibited basis groups or geographies."⁴⁸ Similarly, the Office of the Comptroller of the Currency, in writing about successful fair lending efforts, said: "These banks generally engage in targeted radio and newspaper advertising, for examples when they introduce a new product or at a time of year when their customer base returns from extended trips to a home country. Banks have also found that advertising in local establishments, like small grocery stores (*bodegas*) and barbershops, adds to a perception of credibility."⁴⁹

A major recent enforcement action underscores the importance of targeted marketing by lenders. In June 2014 the CFPB ordered GE Capital to provide \$169 million to about 108,000 borrowers excluded from debt relief offers because of their national origin. GE Capital had two promotions that allowed credit card customers with delinquent accounts to settle their balances by paying off a specific portion of their debt. For instance, GE Capital offered a credit of between \$25 and \$100 for customers who paid their minimum amount due, for a defined set of customers: those with balances greater than \$700, a credit score below 670, and with minimum payment due of over \$150. The legal violation was that GE Capital did not extend these offers to any customer who indicated they preferred to communicate in Spanish or had a mailing address in Puerto Rico. The CFPB found a violation of the ECOA because "Hispanic populations were unfairly denied the opportunity to benefit from these promotions."⁵⁰

In summary, fair lending law expects lenders to use targeted marketing, especially to ensure that members of protected classes have equal access to credit and housing.

2. Fair Lending Law Applies Disparate Impact Analysis to Targeted Marketing

Although regulators clearly support enhanced marketing to protected classes, they also see risks in such marketing. As discussed above, much of the concern arose from subprime mortgage lending, where aggressive marketing efforts to minority communities appears to have resulted in disproportionately higher-interest loans and more home foreclosures.⁵¹

My research thus far has not revealed a comprehensive explanation within fair lending about when targeted marketing should be favored or disfavored. Based on my research to date, one answer may lie in the concept of "steering." Under the Fair Housing Act, racial steering is defined as "deliberately guiding loan applicants or potential purchasers toward or away from

certain types of loans or geographic areas because of race.”⁵² For instance, targeting subprime loans to African-Americans because of race would violate fair lending laws. As the CFPB explains: “A creditor may not advertise its credit services and practices in ways that would tend to encourage some types of borrowers and discourage others on a prohibited basis. In addition, a creditor may not use prescreening tactics likely to discourage potential applicants on a prohibited basis.”⁵³

As applied to fair marketing, the experience with fair lending shows an apparent paradox – targeted advertising to reach minority groups and protected classes is often expected, yet it is illegal to use targeted marketing to steer products to those groups. In my view, this topic needs considerably more research and discussion. A prominent feature of online advertising is to use micro-targeting to reach specific groups that are difficult or impossible to reach offline. Some of those groups use languages other than English, but offers in some but not other languages can trigger liability under the GE Capital case.

Given the doctrine of fair lending law, the applicable legal approach is generally to apply the three steps of the disparate impact test. First, does the practice have a disproportionately negative impact on a prohibited basis? Second, if so, does the practice meet a legitimate business need? Third, could that need be achieved as well by means that are less disparate in their impact?

Application of this test would first focus on what constitutes a “negative impact.” Presumably advertising about legitimate opportunities for credit relief, such as in the GE Capital case, would have a positive impact. Marketing of a high-risk loan product would have a negative effect, although the difference between “positive” and “negative” products is far from self-evident. Next, concerning a “legitimate business need,” online marketing would likely include a wide range of goods and services that are tailored for particular protected classes, including race, national origin, sex, and age. Those sorts of differentiated services are less likely to be commercially prominent in credit card and other loans, so the legitimacy of differentiated products may be more justifiable in some online advertising instances. Third, for specialized goods and services, the company would examine whether that need can be achieved by less discriminatory means.

In conclusion on developing a fair marketing approach to targeted marketing, considerable research and policy discussion will be needed to address the paradox about targeted marketing that exists in fair lending.

3. Sectoral Statutes Prohibit Discrimination in Online Marketing for Lending, Housing, and Employment

As shown by fair lending regulatory guides and enforcement actions, the ECOA clearly governs targeted marketing in lending. Although enforcement actions to date have not focused on Internet advertising, it is clear that the statute applies to Internet advertising. There is nothing to suggest an ECOA exception for online advertising, and it would contradict the anti-discrimination purpose of the statute to have any such exception.

More broadly, a key legal fact about fair marketing is that the ECOA, Fair Housing Act, and Title VII apply to both online and offline marketing. I thus recap the relevant statutory language:

ECOA: It is “unlawful for any creditor to discriminate against any application, with respect to any aspect of a credit transaction – (1) on the basis of race, color, religion,

national origin, sex or marital status, or age (provided the applicant has the capacity to contract).”⁵⁴

Fair Housing Act: It is unlawful “[t]o 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.”⁵⁵

Title VII: It is unlawful “to print or publish or cause to be printed or published any notice or advertisement relating to employment” where there is an indication of “any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin.”⁵⁶

The online advertising eco-system is famously complex, and I do not attempt here to apply the three statutes to all of the possibly relevant factual settings. Instead, I make five observations based on the plain language of the statutes and interpretation to date.

First, the quoted language in ECOA applies specifically to “creditors” with respect to “any aspect of a credit transaction.” This language appears to apply in a straightforward way to lenders when they place online advertisements. Privacy experts are familiar with sectoral regulation, such as for HIPAA, Gramm-Leach-Bliley, and the Children’s Online Privacy Protection Act. One implication of this White Paper is that sectoral regulation exists concerning online advertising as well.

Second, the ECOA applies to brokers as well as “any person who regularly arranges for the extension, renewal, or continuation of credit.” The language about “regularly arranges” likely will be important to defining the effect of the ECOA on non-lenders involved in advertisement on behalf of lenders. Enforcement actions to date have shown an expansive interpretation of who “regularly arranges” for credit. For instance, car dealerships and car salespersons are covered, when they help a purchaser get an automobile loan, even when the lender is a non-affiliated corporation.⁵⁷

The statutory question, as applied to fair marketing, will be to determine which parts, if any, of the eco-system are “regularly arranging” for the extension of credit. One chart of the “display advertising technology landscape” contains numerous niches, such as: advertising agencies; media-buying platforms; demand-side platforms; ad exchanges; advertising networks; and publisher tools.⁵⁸ As a hypothetical, suppose that there were disparate treatment or disparate effect at one or more of those advertising-related entities. While it is clear that advertising and marketing in general are covered by the ECOA, what facts would be needed to establish the “regular arrangement” of credit by the various actors? Where such facts exist, then the ECOA would apply.

Third, similar to the ECOA, the Fair Housing Act applies to those who purchase advertisements, such as a landlord renting an apartment. Online advertisements for apartments are covered the same as offline advertisements. One important statutory issue, which is a subject for future research, is what would meet the statutory requirement that the advertisement “indicates any preference, limitation, or discrimination” concerning a protected class. For online advertising, this issue will be important for housing advertisement campaigns that narrowly target a specific population. For instance, it will be important to clarify whether and when the Act covers advertisement purchasing decisions that will reach members of a protected class far more or less often than other demographic groups.

Fourth, similar to the ECOA, it is important to determine what actors beyond the landlord or other advertising purchaser are covered by the Fair Housing Act. The statute applies to those who “make, print, or publish” the advertisements. This language would seem to apply, for instance, to online publishers as well as those who “make” the advertisement.⁵⁹ Even more vaguely, the Act applies to those who “cause to be published” a prohibited advertisement. Once again, it is far from clear who in the display advertising technology landscape plays this causal role.

Fifth, the advertising language in Title VII is quite similar to the Fair Housing Act, and additional research is needed to clarify the scope of coverage for online employment advertisements.

In summary, it is surprising how little of the Big Data and privacy debates to date have focused on the existing statutes that apply to online marketing. Sectoral regulation exists for discrimination in online marketing similar to how sectoral regulation exists in the U.S. for many privacy issues.

4. Data Relevant to a Disparate Impact Analysis May Often Be More Available for Online Marketing Than For Traditional Fair Lending Cases

The history of fair lending enforcement is intertwined with the availability of data to detect and prove possible violations of anti-discrimination laws. Much of the fair lending enforcement in the 1990’s relied on data generated under the requirements of the Home Mortgage Disclosure Act (HMDA). That law requires financial institutions to report certain data about applications and approval for home loans, including the ethnicity, race, sex, and income of any applicant. Borrowers provide demographic information in the course of applying for a mortgage.

In fair lending enforcement, a first step has often been to examine an institution more carefully if there is an apparent discrepancy based on race in mortgage loans. Where such a discrepancy exists, the next step is to do more careful regression analysis, to determine whether factors other than membership in a protected class explain the discrepancy.⁶⁰ If a significant discrepancy still exists, then that can be evidence of discrimination in violation of the ECOA.

One recurring issue in fair lending enforcement is that the lenders, outside of the mortgage context, often have no good demographic data about which potential borrowers belong to a protected class. It is not a standard part of a credit card application, for instance, for lenders to ask about race and national origin, and any lender who asked customers for that information could face a negative customer reaction and bad press. For this reason, the General Accountability Office reported in 2009 that fair lending oversight activities on areas such as automobile, credit card, and business lending have been considerably more limited.⁶¹ In recent years, the CFPB has made a higher priority of automobile and credit card loans, but data issues persist. The CFPB is currently engaged in a procedure to clarify what data should be considered, in what way, for identifying situations that merit further investigation under the disparate impact approach.⁶²

These data limitations may be easier to address in many online advertising situations, which are characterized by precisely the Big Data that is the subject of this FTC Workshop. The online advertising ecosystem generates many data points about an individual or device, and far more data points than are typically available in the traditional lending relationship. Micro-targeting routinely estimates the age and gender of those receiving the advertisements. Where micro-targeting uses dozens or hundreds of market segments, the relative abundance of data may

provide useful insights into likely membership into demographic groups such as race or national origin.

It is beyond the scope of this White Paper to set forth how this relatively abundant demographic data might be used to assess online lending advertisements or fair marketing generally. In light of this often-abundant data, an important issue may become whether there are circumstances in which a company may be legally or ethically expected to analyze such data to detect possible violations of anti-discrimination law or principles.

The point here is a limited one – data limitations have been an important constraint on fair lending enforcement to date, but the Big Data available through online advertising quite possibly means such data limitations will be less important for fair marketing.

Conclusion

Determining the precise scope and contours of fair marketing is an ambitious project. To alleviate concerns in fair lending, lenders have developed significant compliance programs including extensive training in fair lending for their personnel. Fair lending law provides decades of lessons from jurisprudence, regulatory guidance, and industry initiatives that could help guide next steps for both industry and the FTC to evaluate marketing data and ensure advertising is done in ways that benefit consumers.

Big Data is changing online marketing, but precedents and lessons exist on how to conduct marketing in ways that are lawful, fair, and consistent with society's commitment to anti-discrimination principles. I look forward to working with stakeholders to develop the idea of fair marketing, and appreciate the Federal Trade Commission's interest in ensuring that Big Data is used as a tool for inclusion.

¹ Peter P. Swire, *Equality of Opportunity and Investment in Creditworthiness*, 143 U. PA. L. REV. 1533 (1995); Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787 (1995); Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349 (1993).

² 15 U.S.C. § 1691(a).

³ 15 U.S.C. § 1691(b).

⁴ 12 CFR Part 1002 *et seq.* Current CFPB guidance for the ECOA is available at *CFPB Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA)*, http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf (June 2013).

⁵ 15 U.S.C. § 1691a.

⁶ 15 U.S.C. § 1691c.

⁷ 15 U.S.C. § 1691c(c).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 15 U.S.C. § 1691e(h).

¹² 15 U.S.C. § 1691e(a) & (b).

¹³ 12 U.S.C. § 2901 *et seq.*

¹⁴ Federal Financial Institutions Examination Council, "Community Reinvestment Act," <http://www.ffiec.gov/cra>.

¹⁵ Interagency Policy Statement on Discrimination in Lending, Fed. Reg. Apr. 15, 1994. <http://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf>. The term "redlining" derives from lenders drawing a red line around minority neighborhoods

and not lending into those neighborhoods. The history of empirical evidence related to redlining is discussed in Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 806-14 (1995).

¹⁶ Federal Financial Institutions Examination Council, CRA Examinations, <http://www.ffiec.gov/cra/examinations.htm>.

¹⁷ 42 U.S.C. § 3601-3631.

¹⁸ 42 U.S.C. § 3604.

¹⁹ 42 U.S.C. § 3604(c).

²⁰ 42 U.S.C. § 2000e.

²¹ 42 U.S.C. § 2000e-2(a).

²² 42 U.S.C. § 2000e-3. There is an exception providing that “such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.” *Id.*

²³ For a discussion of implications of Title VII for big data and privacy, see Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, www.ssrn.com/2474789.

²⁴ Interagency Policy Statement on Fair Mortgage Lending Practices, Oct. 9, 1992, <http://www.federalreserve.gov/bankinfo/interagencystatement.htm>.

²⁵ Interagency Policy Statement on Discrimination in Lending, Fed. Reg. Apr. 15, 1994. <http://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf>.

²⁶ *Id.*

²⁷ UNITED STATES GENERAL ACCOUNTING OFFICE, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN (1996), <http://www.gao.gov/products/GGD-96-145>.

²⁸ Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,157 (May 4, 1995) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e). See Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617 (2009).

²⁹ FEDERAL DEPOSIT INSURANCE CORPORATION, SIDE BY SIDE: A GUIDE TO FAIR LENDING (1996), <https://www.fdic.gov/regulations/resources/side/>.

³⁰ FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES (Jan. 22, 1999), <https://www.fdic.gov/news/news/inactivefinancial/1999/FIL9914b.html>.

³¹ UNITED STATES DEP’T OF HOUSING & URBAN DEVELOPMENT, THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM (1995), available at <http://confoundedinterest.files.wordpress.com/2013/01/nhsdream2.pdf>; Press Release, Fact Sheet: America’s Ownership Society: Expanding Opportunities, The White House (Aug. 9, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040809-9.html>.

³² See KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURES, AND NEXT STEPS 21 (2011) (citing Julie Williams, Chief Counsel of the Office of the Comptroller of Currency, lauding “the rise of the subprime segment . . . in advancing homeownership, especially for minority Americans.”).

³³ CONGRESSIONAL BUDGET OFFICE, FANNIE MAE, FREDDIE MAC, AND THE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET 6 (2010), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12032/12-23-fanniefreddie.pdf>.

³⁴ UNITED STATES DEP’T OF HOUSING & URBAN DEVELOPMENT, UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), <http://www.huduser.org/portal/publications/fairhsg/unequal.html>.

³⁵ *Id.*

³⁶ CALVIN BRADFORD, RISK OR RACE? RACIAL DISPARITIES AND THE SUBPRIME MARKET, CTR. FOR COMMUNITY CHANGE (2002), available at <http://www.knowledgeplex.org/showdoc.html?id=1032>.

³⁷ UNITED STATES DEP’T OF HOUSING AND URBAN DEVELOPMENT, RISK OR RACE: AN ASSESSMENT OF SUBPRIME LENDING PATTERNS IN NINE METROPOLITAN AREAS (2009), http://www.huduser.org/portal/publications/pdf/risk_race_2011.pdf.

³⁸ *Id.* at 47-48.

³⁹ Regulation B is codified at 12 CFR Part 1002, <http://www.ecfr.gov/cgi-bin/text-idx?SID=17116fb3f1e1fb0685459a237478ca396&node=pt12.8.1002&rgn=div5>.

⁴⁰ CFPB Bulletin 2012-044 (Fair Lending) (Apr. 2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

⁴¹ 401 U.S. 424 (1971).

⁴² 12 CFR part 1002, Supp. I, § 1002.6, ¶ 6(a)-2.

⁴³ Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 794 (1995).

⁴⁴ See Jason Kint, *Behavioral Advertising Might Not Be As Crucial As You Think*, ADAGE (Feb. 25, 2014), <http://adage.com/article/datadriven-marketing/behavioral-advertising-crucial/291858/>.

⁴⁵ Chris Anderson, *Long Tail 101*, THE LONG TAIL: CHRIS ANDERSON'S BLOG (Sep. 08, 2005), http://www.longtail.com/the_long_tail/2005/09/long_tail_101.html.

⁴⁶ Complaint, United States v. Chevy Chase Fed. Sav. Bank, Civ. Action No. CV94-1824JG (D.D.C. 1994); see also National Fair Housing Advocate Online, *Justice Department: D.C. Bank Pays \$11 Million For Failing to Service Predominantly Black Areas*, http://www.fairhousing.com/index.cfm/index.cfm?method=page.display&pagename=September-October_1994_Page3 (last visited Sep. 6, 2014).

⁴⁷ Stipulation and Order of Settlement and Dismissal, U.S. ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County, No. 1:06-cv-2860-DLC (S.D.N.Y. Aug. 10, 2009), <http://www.hud.gov/content/releases/settlement-westchester.pdf>.

⁴⁸ FEDERAL RESERVE BANK OF CHICAGO, BANKER'S GUIDE TO RISK-BASED FAIR LENDING EXAMINATIONS 3, https://www.chicagofed.org/digital_assets/others/utilities/about_us/cca/bankers_guide_to_risk_based_fair_lending_examinations.pdf.

⁴⁹ OFFICE OF COMPTROLLER OF THE CURRENCY, REACHING MINORITY MARKETS: COMMUNITY BANK STRATEGIES 10 (2006), <http://www.occ.gov/topics/community-affairs/publications/insights/insights-reaching-minority-markets.pdf>.

⁵⁰ Press Release, CFPB Orders GE Capital to Pay \$225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices, Consumer Protection Financial Bureau (June 19, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/>.

⁵¹ See, e.g., UNITED STATES DEP'T OF HOUSING & URBAN DEVELOPMENT, UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), <http://www.huduser.org/portal/publications/fairhsg/unequal.html>; CALVIN BRADFORD, RISK OR RACE? RACIAL DISPARITIES AND THE SUBPRIME MARKET, CTR. FOR COMMUNITY CHANGE (2002), available at <http://www.knowledgeplex.org/showdoc.html?id=1032>; Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUSING POLICY DEBATE 328 (2013) (evaluating 2006 HMDA data to conclude that wealthier black and Latino applicants were 2.4 times more likely to receive subprime loans than whites.).

⁵² Federal Fair Lending Regulations and Statutes, "Fair Housing Act," http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf.

⁵³ Consumer Financial Protection Bureau, *CFPB Consumer Laws and Regulations (ECOA)* 3 (June 2013), http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf.

⁵⁴ 15 U.S.C. § 1691(a).

⁵⁵ 42 U.S.C. § 3604(c).

⁵⁶ 42 U.S.C. § 2000e-3. There is an exception providing that "such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment." *Id.*

⁵⁷ See, e.g., CFPB Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (Mar. 21, 2013), http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

⁵⁸ Luma Partners, Display Advertising Technology Landscape (2010), <http://www.adexchanger.com/wp-content/uploads/2010/09/LUMA-Display-Ad-Tech-Landscape-for-AdExchanger.jpg>.

⁵⁹ I note that there is some interplay between anti-discrimination laws and the Communications Decency Act. See, e.g., Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008), as amended (May 2, 2008) (finding Craigslist not liable for discriminatory postings and user classified ads).

⁶⁰ Stuart Rossman, *Analyzing Disparate Impact Credit Discrimination in the Subprime Lending Market*, 1533 PLI/CORP 601, 608-10 (2006).

⁶¹ GENERAL ACCOUNTING OFFICE, FAIR LENDING: DATA LIMITATIONS AND THE FRAGMENTED U.S. FINANCIAL REGULATORY STRUCTURE CHALLENGE FEDERAL OVERSIGHT AND ENFORCEMENT EFFORTS (2009), <http://www.gao.gov/products/GAO-09-704>.

⁶² For discussion, see NATIONAL COMMUNITY REINVESTMENT COALITION, WHITE PAPER: SMALL BUSINESS LOAN DATA: RECOMMENDATIONS TO THE CONSUMER FINANCIAL PROTECTION BUREAU IMPLEMENTING SECTION 1071 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010 (Aug. 7, 2014), available at <http://www.ncrc.org/images/PDFs/recommendations-to-cfpb-on-small-business-loan-data.pdf>.