

## HUD v. Facebook: Battling Discrimination on the Internet

By John Dolgetta, Esq.

The filing of the Charge of Discrimination (“Charge”) on March 28, 2019 ([see https://bit.ly/2OxXTCC](https://bit.ly/2OxXTCC)) against Facebook, Inc. by the Secretary for Fair Housing and Equal Opportunity with the Department of Housing and Urban Development (“HUD”) comes at a time of the year when the real estate industry’s focus is on Fair Housing, particularly because it commemorates the enactment of the Fair Housing Act (“FHA”) ([see https://bit.ly/2OXTbOK](https://bit.ly/2OXTbOK)) in April, 1968 and the assassination of Martin Luther, King Jr. which occurred on April 4th, the same day the Senate voted on the legislation. According to HUD it is “...a time when we celebrate the Fair Housing Act and recommit ourselves to ensuring every American has access to housing that is free from discrimination.”

### The Fair Housing Act and Advertising

According to the FHA ([see https://bit.ly/2OXTbOK](https://bit.ly/2OXTbOK)), it is unlawful “[t]o make, print, or publish, or cause [emphasis added] 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 disability, or that indicates an intention to make any such preference, limitation, or discrimination.” (See 42 U.S.C. § 3604(c)). It is clear from the language above that not only those who create the advertisements are subject to liability, but those who “cause” the ads “to be made, printed, or published”, such as Facebook and others, are liable as well. The FHA provides that:

*“Discriminatory notices, statements and advertisements include, but are not limited to: (1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons...[,] (2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter...[,] (3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities...[, and] (4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin of such persons.”* (See 24 C.F.R. Section 100.75 at <https://bit.ly/2IfYK9E>).

The law is clear that the “publisher” is prohibited from “publishing” content that is unlawful, and that “...these prohibitions apply to both the person who drafted or placed the ad as well as the publisher of the ad because the negative effect of discriminatory advertising would be magnified if widely circulated by newspapers and other mass media. (See *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972).” Therefore, not only are the real estate broker and agent liable for placing an ad that violates the FHA, but Facebook or any other entity, as a “publisher”, may be subject to such liability as well.

**Settlement of Lawsuit filed against Facebook in 2018**

On March 27, 2018, the National Fair Housing Alliance (NFHA), the American Civil Liberties Union (“ACLU”), and other groups (collectively, the “Plaintiffs”) filed a lawsuit ([see https://bit.ly/2HprYkb](https://bit.ly/2HprYkb)) against Facebook in the Southern District of New York alleging that Facebook allowed third-party advertisers to discriminate by permitting them to create housing advertisements based on certain descriptive criteria which were “excluded” or “included” from the target audience, specifically based on protected classes. Once the advertisement is posted, Facebook utilizes algorithms to target specific Facebook users who align with the chosen parameters.

The lawsuit alleged that Facebook, through its algorithms, uses private information garnered from an individual’s Facebook account, including the user’s “likes”, friends, photographs, postings, “shared” content, etc., in order to restrict certain Facebook users from having access to a particular housing advertisement. This targeted form of advertising is by its very nature discriminatory, if legally protected classes are being blocked or restricted.

Many individual Facebook users would not even be aware of the discrimination because they would never see the advertisement or the descriptive parameters of those “targeted” to receive it. In essence, a user’s own private data is being used against him or her and for purposes which may violate the law.

On March 18, 2019, the Plaintiffs and Facebook entered into a “Settlement Agreement” ([see https://bit.ly/2HUrHbW](https://bit.ly/2HUrHbW)) which requires that Facebook comply with certain “Programmatic Relief” ([see https://bit.ly/2UCXBQ3](https://bit.ly/2UCXBQ3)) provisions, and to “develop and administer” a training program on civil rights laws relating to specific Facebook employee groups and work with NFHA to develop “an interactive process,” and “training materials and program.” The Settlement Agreement also requires Facebook to pay \$1,950,000.00 to the Plaintiffs for various damages and expenses.

As part of the Settlement Agreement, Facebook is also required to provide the Plaintiffs with a credit of \$500,000 “...for advertising on Facebook to promote (1) educational programs, such as information on consumer fair housing rights and housing industry fair housing responsibilities, fair housing/fair lending workshops, trainings and conferences; publication of reports on fair housing/fair lending issues; and other educational activities; and (2) services, such as first-time homebuyer clinics, foreclosure prevention counseling, housing discrimination complaint intake, and landlord/tenant hotlines.”

Sheryl Sandberg, Chief Operating Officer at Facebook ([see https://bit.ly/2TpLuBo](https://bit.ly/2TpLuBo)), in connection with the settlement explained “...that the changes...will better protect people on Facebook:

- Anyone who wants to run housing, employment or credit ads will no longer be allowed to target by age, gender or zip code.
- Advertisers offering housing, employment and credit opportunities will have a much smaller set of targeting categories to use in their campaigns overall. Multicultural affinity targeting will continue to be unavailable for

these ads. Additionally, any detailed targeting option describing or appearing to relate to protected classes will also be unavailable.”

According to the Wall Street Journal, the settlement also “...add[s] further restrictions on targeting such ads to U.S. consumers. Geographic targets, for example, will have a minimum 15-mile radius from any specific address or city center, according to Facebook. And the “Lookalike Audience” tool, which lets advertisers try to find Facebook users who resemble the customers they already know, won’t incorporate factors such as age, religious views or Facebook Group membership when targeting these ads.” The “Lookalike Audience” tool, by its nature, is one feature of concern and should be removed entirely from any advertising platform.

### **HUD Files Formal Charges of Discrimination Against Facebook**

While it seemed that Facebook was making progress, one week after Facebook entered into the settlement with the Plaintiffs, HUD filed the Charge (*see* <https://bit.ly/2OxXTCC>) alleging violations of the FHA arising from the ongoing investigations relating to the complaint filed by HUD in August, 2018. The Charge points out that Facebook also operates Instagram, Facebook Messenger (a standalone messaging tool), and “‘Audience Network’, which is comprised of thousands of websites and mobile applications that are operated by third parties but on which Respondent displays targeted ads.” In a statement issued by HUD Secretary Ben Carson, “Facebook is discriminating against people based upon who they are and where they live...” and “[u]sing a computer to limit a person’s housing choices can be just as discriminatory as slamming a door in someone’s face.” (*See The Hill* at <https://bit.ly/2FZShwN>).

*The Verge* (*see* <https://bit.ly/2JWBO1A>) reported that “[a]ccording to Facebook, discussions with HUD seem to have broken down over the question of the agency’s level of access to Facebook user data. ‘While we were eager to find a solution, HUD insisted on access to sensitive information — like user data — without adequate safeguards,’ the statement continues. ‘We’re disappointed by today’s developments, but we’ll continue working with civil rights experts on these issues.’” Regardless of what led to the filing of the Charge, it is clear that more information must be provided by Facebook to determine how to stop the discriminatory behavior.

In a press release issued by HUD (*see* <https://bit.ly/2HL3uVq>), it explains that “Facebook enabled advertisers to exclude people whom Facebook classified as parents; non-American-born; non-Christian; interested in accessibility; interested in Hispanic culture; or a wide variety of other interests that closely align with the Fair Housing Act’s protected classes.” HUD also claims that Facebook allowed “...advertisers to exclude people based upon their neighborhood by drawing a red line around those neighborhoods on a map. Facebook also allegedly gave advertisers the option of showing ads only to men or only to women.”

If the above practices are being engaged in, including “redlining”, then they must be regulated and stopped. “Redlining” refers to an illegal practice of discrimination which lenders have used in the past to deny loans to homeowners and potential homeowners who lived in certain neighborhoods. Redlining resulted in economic decline because lenders simply would not provide loans to those living in specific areas, and, if they did provide loans, they would do so at a much higher cost. “Redlining” would specifically exclude certain protected classes from

receiving advertising related to housing, lending and credit availability, and Facebook’s alleged actions would amount to a new form of “redlining.”

HUD further explains that “...Facebook also uses the protected characteristics of people to determine who will view ads regardless of whether an advertiser wants to reach a broad or narrow audience. HUD claims Facebook combines data it collects about user attributes and behavior with data it obtains about user behavior on other websites and in the non-digital world.” HUD also claims that Facebook uses artificial intelligence and “...uses machine learning and other prediction techniques to classify and group users to project each user’s likely response to a given ad, and in doing so, may recreate groupings defined by their protected class.” Basically, HUD claims that if Facebook can determine which users act a certain way, share a certain attribute or trait, then its “...mechanisms function just like an advertiser who intentionally targets or excludes users based on their protected class.” Therefore, it is crucial to understand what these underlying mechanisms are in order for them to be curtailed.

### **Facebook May Only Be the Beginning**

It has been reported that the “HUD charges were seen as a possible prelude to a wider regulatory crackdown on the digital advertising industry, which is dominated by Facebook and Google.” (See <https://fxn.ws/2VxzL5C>). According to *Fox Business*, the “HUD spokesman Brian Sullivan said the agency has reached out to Google and Twitter to ‘better understand their advertising practices.’ But he said neither is currently under investigation. Twitter says it doesn't allow discriminatory advertising, while Google says its policies prohibit targeting ads based on sensitive categories such as race, ethnicity and religious beliefs.” Facebook has annual revenue of approximately \$56 billion and it is reported that “Facebook gathers enormous amounts of data on what users read and like and who their friends are, and it uses that information to help advertisers and others direct their messages to exactly the crowd they want to reach.” Unfortunately, if it or other companies use data which includes protected classes or utilizes other algorithmic and artificial intelligence technology that targets any protected class, they would, by their very nature, be violating the Fair Housing and Anti-Discrimination laws.

It is important for the real estate industry to keep up with the ever-changing legal landscape as it pertains to the Fair Housing Act and other Anti-Discrimination laws. Real estate professionals will remain liable for any discrimination they engage in and are ultimately responsible to ensure that any advertising platform they utilize does not allow targeting or excluding any protected class. Simply because Facebook or any online advertising company allows an advertiser to do certain things does not mean it is permitted by law. Real estate professionals, therefore, must be careful when utilizing these companies for advertising.

\* \* \* \*

Legal Column author John Dolgetta, Esq. is the principal of the law firm of Dolgetta Law, PLLC. For information about Dolgetta Law, PLLC and John Dolgetta, Esq., please visit <http://www.dolgettalaw.com>. The foregoing article is for informational purposes only and does not confer an attorney-client relationship.